

Argentina – Measures Relating to Trade in Goods and Services

(DS453)

Responses of the United States to the Panel's
Advance Questions Before the Third Party Session

September 24, 2014

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<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
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3. GENERAL EXCEPTIONS UNDER ARTICLE XIV OF THE GATS AND THE PRUDENTIAL CARVE-OUT OF PARAGRAPH 2(A) OF THE ANNEX ON FINANCIAL SERVICES

Question 7. The last sentence of paragraph 2(a) of the Annex on Financial Services provides that “where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement”.

- a. What are the steps that should be followed by the Panel in its analysis under this paragraph?**
- b. In paragraphs 136 and 140 of its third party written submission, the European Union affirms that the rationale of the second phrase of paragraph 2(a) is comparable to that of the chapeau to the general exceptions in Articles XX of the GATT 1994 and Article XIV of the GATS, and therefore proposes that an assessment is made of whether the measure at issue, as it is effectively applied, genuinely pursues a prudential objective or, to the contrary, if it is used as a means to avoid the commitments and obligations of the respondent. What are your views in this respect?**

1. The Panel poses two questions concerning paragraph 2(a) of the GATS Annex on Financial Services (the “prudential exception”). The Panel first asks for views on the “steps” that “should be followed by the Panel in its analysis” of the prudential exception.¹ The Panel also asks for views on the EU’s suggestion that the second sentence of the prudential exception requires an assessment as to “whether the measure at issue, as it is effectively applied, genuinely pursues a prudential objective or, to the contrary, if it is used as a means to avoid the commitments and obligations of the respondent.”² In that regard, the Panel seeks input on the EU’s suggestion that the rationale of the sentence is “comparable” to that of the chapeau to the general exceptions in Article XX of GATT 1994 and Article XIV of GATS.³

2. To frame its responses to these questions, the United States offers two overarching observations:

3. *First*, as in any dispute, the panel’s approach should be informed by and tailored to the particular context of the circumstances at issue. This dispute raises an issue of first impression, the resolution of which will have important systemic implications. WTO Members consider this to be a critical exception with respect to commitments undertaken in the GATS.

¹ Panel’s Advance Questions Before the Third-Party Session.

² Panel’s Advance Questions Before the Third-Party Session.

³ Panel’s Advance Questions Before the Third-Party Session.

4. In the more than 15 years since the GATS financial services commitments entered into force,⁴ no Member until now has ever invoked the exception in any GATS dispute, and no panel has interpreted the exception. Moreover, in discussions on financial services in meetings of the Council for Trade in Services, Members have recognized the prudential exception's broad scope and have chosen not to limit expressly the measures that Members may take under the exception.⁵

5. At a more basic level, Members' broad conception of the prudential exception informed the scope of the commitments and country-specific limitations that they negotiated and inscribed in their schedules of specific commitments and MFN exemptions because, as the Council for Trade in Services has stated, "any measure taken in accordance with paragraph 2(a) of the Annex on Financial Services constitutes an exception to the agreement and should not be scheduled."⁶ Members have also incorporated and relied on the exception or similar exceptions in numerous bilateral and plurilateral trade and investment agreements.

6. The United States therefore considers that the context of this dispute warrants a cautious approach and that the panel should consider whether it can resolve Panama's claims without issuing findings on the prudential exception. This would be appropriate if, for example, the Panel were to find that the two measures for which Argentina has invoked the prudential exception are consistent with the GATS.

7. *Second*, a panel's interpretation of the prudential exception must be based on the text of the particular provision.⁷ It is the understanding of the United States that the different drafting used in other provisions, such as the general exceptions in the GATT and GATS, reflects the Members' views that these exceptions operate differently, and should not be construed to operate in the same manner. In particular, the prudential exception applies to all measures taken for prudential reasons, and does not require an evaluation as to whether such measures are "necessary" or least restrictive.

8. Against the background of these observations, in the U.S. view, the Panel's questions require analysis of the following issues:

- Whether paragraph 2(a) of the Annex on Financial Services requires a particular sequence in the Panel's evaluation of whether Argentina's measures are inconsistent with the GATS and the conclusion as to whether the prudential exception applies;

⁴ See Fifth Protocol to the General Agreement on Trade in Services (adopted 27 February 1998, in force 30 January 2009) (S/L/45, 3 December 1997).

⁵ See Council for Trade in Services, Special Session, "Report of the Meeting Held on 3-6 December 2001" (S/CSS/M/13, 26 February 2002), paras. 267, 268, 271, 272, and 275; see also United States' First Written Submission, at para. 21 n.12.

⁶ See Council on Trade in Services, "Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)" (S/L/92, 28 March 2001), para. 21.

⁷ See further discussion, *infra*.

- If the Panel were to address the exception, whether the Panel should import standards from differently worded provisions; and
- What role the prudential exception's anti-abuse provision serves in the Panel's analysis, especially as compared to provisions in other, differently worded exceptions that Members may have also adopted to prevent abuse.

A. Sequence of Analysis

9. Regarding the sequence of the Panel's analysis, Argentina has invoked the prudential exception with respect to only two of the six challenged measures⁸ and states that it would pursue a prudential argument only if the Panel determined that one or both of these measures is inconsistent with the provisions of the GATS.⁹ While a future dispute may call for deciding these issues in a different order, the United States sees no reason to disagree with this sequence in the context of this dispute, nor to suggest that this sequence would be appropriate in a future dispute.

10. The Panel therefore should first determine whether there is a *prima facie* inconsistency and, if it were to find such an inconsistency, then decide whether the measure would fall within the prudential exception. Where the Panel finds no inconsistency, it should not address the prudential exception, as the Appellate Body has recognized that “nothing anywhere in the DSU . . . requires panels” to “consider[] and decid[e] issues that [a]re not absolutely necessary to dispose of the particular dispute.”¹⁰ This is especially relevant in a dispute such as here where the alleged inconsistencies may have already been addressed and there would be no existing measure that would require interpretation of the exception.

B. Interpretation of the Text of the Exception

11. In the event that the Panel must analyze the prudential exception in this case, it should interpret the actual text of the exception, rather than importing standards derived from the differently worded texts of other GATT and GATS provisions. As the Appellate Body has made clear, interpretation of a WTO provision “must be based above all upon the text of the treaty.”¹¹ The Appellate Body has further stated that “[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purposes of the states parties to the treaty

⁸ These measures are: “Measure 5,” which, according to the parties’ briefing, may prohibit suppliers from certain jurisdictions from supplying reinsurance in the Argentine market, either cross-border or through a commercial presence; and “Measure 6,” which, according to the parties’ briefing, may prohibit intermediaries authorized to operate in the Argentine capital markets from transacting with entities in certain jurisdictions.

⁹ Argentina’s First Written Submission, para. 551.

¹⁰ See *US – Wool Shirts and Blouses (AB)*, p. 19.

¹¹ See *Japan – Alcoholic Beverages II (AB)*, p. 11.

must first be sought.”¹² In that way, it is “the task of the treaty interpreter to give meaning to *all* the terms of the treaty.”¹³

12. Paragraph 2(a) of the Annex on Financial Services provides that “a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.” Thus, according to the text, for a Member’s measure to fall within the exception, the Member must, as an initial matter, identify a “prudential reason” “for” which the measure was “tak[en].” These reasons are not exclusive; the exception makes clear that its scope is broad and encompasses other prudential reasons or considerations beyond those expressly listed in the provision.¹⁴

13. This is a critical point in the view of the United States. As the financial crisis of 2008 and its aftermath have amply demonstrated, the risks in the financial sector can evolve over time, based on changing circumstances in that sector, and have consequences that can threaten entire economies and the well-being of nations. After the crisis, the G-20 requested that the Financial Stability Board, as well as the Financial Action Task Force and other international standard setting bodies reform and enhance prudential standards within the scope of their mandates to strengthen international financial stability.

14. By its terms and unlike the general exceptions, the prudential exception provides that a measure must be taken “*for* prudential reasons.” That text neither requires nor permits an assessment of “the extent to which the measure contributes to the realization of the end pursued,”¹⁵ whether under a test related to “necessity,” or whether the measure is “relating to” a particular end (e.g., “rational relationship” or “reasonableness” test). Some of the general exceptions in GATT and GATS, for example, expressly require a measure to be “necessary” to achieve a purpose, such as: “necessary” to protect public morals or to maintain public order; “necessary” to protect human, animal or plant life or health; or “necessary” to ensure compliance with laws or regulations that are not inconsistent with the agreement.¹⁶

15. Other GATT general exceptions limit their scope to measures “relating to” the achievement of a purpose, including the exception for measures “relating to the conservation of exhaustible natural resources.”¹⁷ What is required by the term “relating to” has been articulated in various ways, including: a measure that is “primarily aimed at” achieving a purpose,¹⁸ or a

¹² See *US – Shrimp (AB)*, para. 114.

¹³ See, e.g., *EC – Chicken Cuts (AB)*, para. 214 (emphasis added).

¹⁴ See, e.g., WTO Secretariat, Financial Services – Background Note by the Secretariat (S/C/W/312, 3 February 2010), para. 29.

¹⁵ See e.g., *Korea – Beef (AB)*, paras. 162-63 (applying the “necessity” test of GATT Article XX(d)).

¹⁶ See, e.g., GATT arts. XX(a), (b), & (d); GATS arts. XIV(a), (b) & (c).

¹⁷ See, e.g., GATT art. XX(g).

¹⁸ See, e.g., *US – Gasoline (AB)*, p. 18.

“means” that is “reasonably related” to the “ends.”¹⁹ With respect to the prudential exception, Members considered preliminary suggestions to include a reasonableness requirement but ultimately rejected the limitation and omitted it from the exception.²⁰

C. Anti-Avoidance Provision

16. Where the Member identifies a prudential reason for which the challenged measure was taken, the panel must then, in accordance with the second sentence of the exception, consider whether the measure is “used as a means of avoiding the Member’s commitments or obligations under the Agreement.”

17. The submissions of Argentina, Brazil, the European Union, and the United States all agree that this sentence represents an anti-abuse and anti-avoidance provision.²¹ The question posed by the Panel is how the Panel ought to interpret the text of this particular anti-abuse provision, especially as compared to the chapeau to the general exceptions.

18. In the U.S. view, there is no basis to apply a test developed from the language of the chapeau in the general exceptions in GATT and GATS – which enumerates multiple circumstances under which those exceptions would not apply – to the much more narrowly focused anti-abuse language in the prudential exception. Indeed, with respect to the chapeau to the general exceptions, the Appellate Body has explained that, although the chapeau represents “one expression of the principle of good faith,” it is the actual text of the provision that matters because the “task” at hand “is to interpret the language of the chapeau.”²² Accordingly, the Appellate Body has consistently and expressly relied on the “precise language of the chapeau,”²³ when assessing whether a measure is “applied in a manner”²⁴ constituting “unjustifiable discrimination,”²⁵ “arbitrary discrimination,”²⁶ or a “disguised restriction on trade.”²⁷

¹⁹ See, e.g., *US – Shrimp (AB)*, paras. 141-42.

²⁰ See, e.g., Working Group on Financial Services Including Insurance, ‘Communication from the European Communities’ (MTN.GNS/FIN/W/1, 10 July 1990), p. 8 (“Notwithstanding any other provisions of the Agreement and of this Annex, in order to prevent or to solve a serious economic or financial disturbance, parties may take reasonable measures to safeguard the integrity of the financial system, provided that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against financial services providers of other parties.”).

²¹ See Argentina’s First Written Submission, para. 556; Brazil’s First Written Submission, para. 20; EU’s First Written Submission, para. 134; EU’s Second Written Submission, para. 20; United States’ First Written Submission, para. 22.

²² See, *US – Shrimp (AB)*, para. 158 (interpreting the chapeau in the context of Article XX of GATT) (emphasis added).

²³ See, e.g., *US – Shrimp (AB)*, para. 150.

²⁴ See, e.g., *US – Shrimp (AB)*, para. 160; *US – Gambling (AB)*, paras. 339.

²⁵ See, e.g., *US – Shrimp (AB)*, paras. 120, 150, 161-76; *US – Gambling (AB)*, paras. 339, 348-51.

²⁶ See, e.g., *US – Shrimp (AB)*, paras. 120, 150, 177-86; *US – Gambling (AB)*, paras. 339, 348-51.

19. By contrast, the anti-abuse provision of the prudential exception states only that measures “shall not be used as a means of avoiding” GATS commitments. Together with the first sentence of the exception, which requires only that a measure be “tak[en] . . . for prudential reasons,” this provision does not permit the “taking” of a measure in order to circumvent a Member’s GATS commitments. Nothing in the text of the prudential exception requires or permits the Panel to apply a different standard and determine whether the measures were “applied in a manner” constituting “unjustifiable discrimination,” “arbitrary discrimination,” or a “disguised restriction on trade.” The exception’s anti-abuse provision could have simply replicated the language of the chapeau to GATS Article XIV. But the option to incorporate an “arbitrary and unjustifiable discrimination” standard was suggested early on in the negotiations and discarded by Members.²⁸

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20. To conclude: in this dispute, it is the U.S. view that, as set forth by Argentina, the Panel should first determine whether the two measures for which Argentina has invoked the prudential exception are *prima facie* inconsistent with the GATS and, then, if it were to find such an inconsistency, determine whether the measure would fall within the prudential exception. At the same time, the United States sees no reason to set forth a broad rule or test beyond the approach that is appropriate to the circumstances of this dispute.

21. In the event that the Panel must interpret the prudential exception, the text of the exception sets out two requirements:

- First, for a Member’s measure to fall within the exception, the Member must identify a “prudential reason” “for” which the measure was “tak[en].” The text of the exception makes clear that the scope of the exception is broad.
- Second, the Panel must then, according to the anti-abuse provision, determine whether the measure is “used as a means of avoiding the Member’s commitments or obligations under the Agreement.” Together with the first sentence of the exception, this provision does not permit the “taking” of a measure in order to circumvent a Member’s GATS commitments.

²⁷ See, e.g., *US – Shrimp (AB)*, paras. 120, 150, 184.

²⁸ See, e.g., Working Group on Financial Services Including Insurance, “Communication from the European Communities” (MTN.GNS/FIN/W/1, 10 July 1990), p. 8 (“Notwithstanding any other provisions of the Agreement and of this Annex, in order to prevent or to solve a serious economic or financial disturbance, parties may take reasonable measures to safeguard the integrity of the financial system, provided that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against financial services providers of other parties.”); Trade Negotiations Committee, “Communication from Canada, Japan, Sweden, and Switzerland” (MTN.TNC/W/50/Add.2, 15 October 1991), p. 4 (“Such [prudential] measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable (a) restriction on the provision of financial services by financial service providers of another Party or (b) discrimination between domestic and foreign financial service providers or between countries.”)

22. Lastly, in interpreting the text of the prudential exception, the Panel should not import standards from differently worded provisions. The distinct text of the prudential exception reflects the explicit choice that WTO Members made to include an exception that broadly recognizes Members' ability to take measures for prudential reasons.