Argentina – Measures Relating to Trade in Goods and Services

(DS453)

Responses of the United States

To the Panel's Questions for the Third Parties

Following the First Panel Meeting

October 13, 2014

Table of Reports

Short Title	Full Case Title and Citation
Canada – Autos (AB)	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, circulated 22 May 2014
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012

1. SCOPE OF APPLICATION OF THE GATS

Question 3 (*Advance question No. 2*). In *Canada – Autos*, the Appellate Body identified two key legal issues that must be analysed to determine whether a measure "affects trade in services", and, therefore, is covered by the GATS. These two issues are (i) whether there is "trade in services" in the sense of Article I:2; and, (ii) whether the measure at issue "affects" such trade in services within the meaning of Article I:1 of the GATS. In paragraph 2 of its third party written submission, the United States argues that "three elements must be demonstrated for a measure to fall within the scope of the GATS". According to the United States, the first element entails a demonstration that "a 'service' is not supplied in the exercise of governmental authority". With this in mind:

a. What are your views regarding the approach proposed by the United States, i.e. the inclusion of an additional legal issue – demonstrating that there is "a 'service' that is not supplied in the exercise of governmental authority"– in order for the measure to fall within the scope of application of the GATS?

b. In case that a new element must be added to the test established by the Appellate Body in *Canada – Autos* for a measure to fall within the scope of the GATS, specifically what should the complainant demonstrate?

1. For a measure to be subject to the disciplines of the *General Agreement on Trade in Services* ("GATS"), it must "affect trade in services." The United States notes that the definition of "services" in Article I:3(b) excludes services "supplied in the exercise of governmental authority." Therefore, a complaining Member must demonstrate that the particular service that it alleges is "affected" by a measure is not supplied in the exercise of governmental authority.

2. The United States does not consider this requirement to be an additional element to the approach used by the Appellate Body in *Canada – Autos*. The U.S. point is simply to highlight this important aspect of a complaining Member's *prima facie* case.

3 NATIONAL TREATMENT

Question 6 (*Advance question No. 4*). Pursuant to paragraph 220 of Argentina's first written submission, "service suppliers from cooperating jurisdictions are not "like" to service suppliers from non-cooperating jurisdictions … This regulatory distinction directly affects Argentina's capacity to enforce its taxation laws and to guarantee the integrity of its taxable base. This makes the service suppliers from these two types of jurisdictions "not like" from a regulatory point of view".

a. Based on the above, what would be the relevance of the fact that the foreign service supplier is located in a cooperating or a non-cooperating jurisdiction in light of the jurisprudence of panels and the Appellate Body in relation to the concept of "likeness" under the GATS?

3. Argentina appears to identify a risk associated with the supply of services by suppliers from "non-cooperating" countries that may not be associated with the supply of services by

suppliers from "cooperating" countries, including the risk that Argentina will not be able to enforce its taxation laws and guarantee the integrity of its taxable base. It appears that Argentina considers this risk may affect government and public interests.

4. The United States does not take a position on Argentina's views but does consider that, as a general matter, regulatory differentiations based on the risks or potential risks posed by a service or service supplier compared to the risks or potential risks posed by another service or service supplier can be factors of "likeness" under the national treatment or most-favoured-nation provisions of the GATS. The Appellate Body found in *EC – Asbestos* that the relative risks associated with particular products can be a relevant – and even dispositive – factor of likeness.[1] The Appellate Body reasoned that it can be presumed in the context of Article III.4 of the GATT 1994 that risk factors associated with a product will affect the physical properties of the product or consumer tastes and habits and that, therefore, such risks need not be analyzed as a separate criterion of likeness.[2]

5. Similarly, in the context of Articles II and XVII of the GATS, such relative risks or other bases for regulatory differentiations may be factors in the analysis of whether services or service suppliers are "like." In addition, it cannot necessarily be presumed that risks or other bases for regulatory differentiations among services and service supplier will affect consumer tastes and habits[3] (or otherwise affect the competitive relationship among services or services suppliers). The supply of services often is highly regulated precisely because key differences among services or suppliers are not readily apparent to consumers, and regulation in part seeks to ensure that services meet certain standards and requirements.

6. To take an example, a customer could fund a purchase by borrowing from a pawn shop, using a credit card, going to a bank for a personal loan, taking out a mortgage, or resorting to the informal sector. While these services share the characteristic of providing money in return for a promise of repayment, this does not mean that these are all identical services or service suppliers, and the types of regulation are important factors in differentiating them.[4]

7. Therefore, a likeness analysis may need to consider such factors as: how a service or service supplier is regulated; the nature and character of that service or service supplier; how that service or service supplier is perceived by consumers; and the nature and extent of a competitive

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[1] *EC – Asbestos* (AB), para. 113 ("We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994").

[2] *EC – Asbestos* (AB), paras. 113, 145 (The Appellate Body stated that "we consider it likely that presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product." The Appellate Body found that, by not submitting evidence to counter such presumption, Canada could did meet its burden of to establish like products).

[33] And, of course, "physical properties" would not normally be a relevant criterion on "likeness" in the services context.

[4] In particular, this example underscores that even where there may be some overlap in supply of a service, the service suppliers may be quite different and not qualify as "like" service suppliers.

relationship between services or service suppliers. While these factors may at times be related, each is potentially relevant, by itself, to whether services or services suppliers are "like." An analysis focused solely on whether, and to what extent, services and services suppliers compete may not adequately take account of all the relevant factors of likeness.

8. Finally, the United States would emphasize that the Panel should carefully consider the relevance of the *Border Tax* criteria to analyzing the "likeness" of services and services suppliers, and not necessarily constrain itself to this framework. As the Appellate Body observed in *EC – Asbestos*:

> These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the 'likeness' of particular products on a case-by-case basis. The criteria are […] simply tools to assist in the task of sorting and examining the relevant evidence. They are neither treaty-mandated nor a closed list of criteria that will determine the legal characteristics of products."[5]

The Panel, therefore, should consider *all* factors relevant to whether services and services suppliers in this dispute are "like."

4 LESS FAVORABLE TREATMENT

Question 8. With respect to the determination of "likeness", the panel in *China – Publications and audiovisual products* found that:

When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".

a. In particular, how or under what circumstances can it be concluded that "origin" is the "only factor" that determines a differential treatment?

b. Please clarify, by using examples, which could be these "other factors" that would require a "more detailed analysis" of "likeness".

9. The United States understands this question essentially to ask when different treatment is "exclusively linked" to origin such that a measure can be considered to accord *de jure* differential treatment based on origin (and, therefore, the "likeness" of services or services

[5] *EC – Asbestos* (AB), para. 102.

suppliers should be assumed), as opposed and when different treatment is linked to other "factors," indicating that the measure does not accord *de jure* differential treatment based on origin, and requires a more detailed analysis of "likeness."[6]

10. When a measure is based on factors other than the origin of the service or service supplier, then the difference in treatment is not "exclusively linked" to origin, and the origin of the service or service supplier is not the "only factor" that determines the different treatment. Such a measure is not *de jure* discriminatory based on origin, and further analysis is required to evaluate whether the other factor or factors are merely a disguise for a measure that, in fact or in practice, accords differential treatment based on origin.

11. That Argentina's measures distinguish among regulatory conditions in the home jurisdictions of service suppliers (and thus the measure designates countries as "cooperating" or "non-cooperating") means that the treatment accorded by the measures is not exclusively linked to the origin of the service suppliers, and that the measures do not accord *de jure* differential treatment based on origin. The EU's argument to the contrary – that the distinction is based on origin because the measures list countries as "cooperating" or "non-cooperating" – misconstrues the meaning of "based on origin." The measure itself indicates differentiation based on *conditions* that prevail in particular jurisdictions and raise concerns regarding the authorities' ability to tax payments for services supplied from those jurisdiction. The listing of countries is thus simply a means for the regulator to identify which payments raise those concerns.

12. The EU, in fact, addresses the other criteria offered by Argentina in this dispute: that the measures draw a distinction based on the level of transparency in the home jurisdictions of service suppliers. At paragraph 51 of its third party submission and in paragraph 8 of its answer to the Panel's advance question No. 3, the EU notes this criterion and expresses skepticism about whether Argentina has applied it objectively. By questioning Argentina's objectivity in doing so, the EU is actually suggesting that the other factor identified by Argentina is a disguise for differential treatment based on origin. Without taking a position on whether the EU's assessment is correct, the United States notes that this evaluation is the essence of the *de facto* analysis. It is not a reason to conclude that a measure accords differential treatment based solely on nationality.

[6] The United States offers this response to address Panel Question No. 5 (Advanced question No. 3), as well.

Question 9. In paragraph 17 of its written submission, the United States contend that:

> **Given a difference in regulatory treatment by their home country authorities, it may be that a Member complained against views the two suppliers as unlike and accords differential treatment on that basis. Where such a difference in regulation affects the service suppliers as service suppliers, in that the regulations affect how they supply the service, a panel may find that those service suppliers are not like for purposes of Articles II.1 and XVII of the GATS. Other factors may also affect the likeness of service suppliers, such as their size or relevant experience.**
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> **a. Would you consider that, for instance, regulations concerning fiscal transparency could affect service suppliers as such, to the extent that these regulations affect the way in which the service is supplied?**

13. The United States refers the Panel to its response to Question No. 6. As indicated in that response, regulations, including those concerning fiscal transparency, could affect the way in which the service is supplied. Regulations concerning fiscal transparency in a home jurisdiction could affect, for example, the risks associated with the supply of a service. Such a risk may constitute a factor of likeness, even it if does not affect consumer perceptions or otherwise affect the competitive relationship between the services or services suppliers.

14. In addition, the United States notes that a regulatory differentiation, such as a risk or potential risk associated with the supply of a service, may be a relevant factor under more than one provision of the GATS (for example, the "likeness" analysis, "less favourable treatment" analysis, and the analyses under the prudential exception or other exceptions). The Appellate Body has observed that the same evidence may be relevant to "different inquiries" under "different Articles" and may serve a "different purpose."[7]

Question 10 (*Advance question No. 6)*. In paragraph 225 of its first written submission, Argentina makes reference to the Appellate Body's jurisprudence on Article 2.1 of the Agreement on Technical Barriers to Trade (TBT) in order to interpret the concept of "less favourable treatment" under Articles II and XVII of the GATS. What would be the relevance of this jurisprudence when interpreting the concept of "less favourable treatment" under the GATS?

15. Articles II and XVII of the GATS should be interpreted using customary rules of interpretation of public international law (Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU")) – that is, in accordance with the

[7] *EC – Asbestos* (AB), para. 115 (Explaining that the health risks associated with the products could be relevant in both the analysis of Article III.4 and Article XX(b) of the GATT 1994, without nullifying the effect of either provision).

ordinary meaning of their terms, in their context, and in light of the treaty's object and purpose.[8] Context includes the preamble, as well other covered agreements.[9] Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") is relevant context, and the Appellate Body's approach to that interpreting that provision may provide a useful perspective when interpreting the "less favourable treatment" concept in Articles II and XVII of the GATS.

16. In *US – Clove Cigarettes,* the Appellate Body set out observations on the specific contextual factors informing its interpretation of the national treatment obligation – and specifically the concept of "less favorable treatment" – under the TBT Agreement.[10] Among the specific contextual factors that the Appellate Body considered were: the preamble of the TBT Agreement; the unique characteristics of the subject covered under the provision at issue (in that case, technical regulations); and the relationship between the TBT Agreement and other covered agreements and the availability of exceptions.[11]

17. While the GATS and the TBT Agreement differ in significant respects – and thus the analysis of contextual factors will differ – the Appellate Body's assessment of the contextual factors noted above, and the relationship between them, offers relevant perspective in the interpretation of Articles II and XVII of the GATS.

18. Preamble. The Panel's analysis of less favorable treatment should reflect the object and purpose of the GATS, as set forth in the preamble, to, *inter alia*, balance progressive trade liberalization with Members' right to regulate to meet national objectives. The third recital of the preamble affirms the Members' desire to achieve "progressively higher levels of liberalization of trade in services." The sixth recital recognizes the right of Members "to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives[…]." An analysis consistent with this object and purpose should take into consideration that a measure taken to meet certain national policy objectives – including other regulatory objectives – does not necessarily accord "less favourable treatment" even where it modifies the conditions of competition to the advantage of some domestic services or service suppliers compared to a like services or service suppliers of another Member.

19. As noted above, the Appellate Body applied this approach in interpreting less favorable treatment under Article 2.1 of the TBT Agreement in *US – Clove Cigarettes*. First, the Appellate Body observed that the preamble of the TBT Agreement reflects both a "trade liberalization" objective and an aim at "reducing obstacles to international trade", qualified and counterbalanced

[8] Vienna Convention on the Law of Treaties, Article 31.1.

[9] Vienna Convention on the Law of Treaties, Article 31.2; *See also US – Clove Cigarettes* (AB), paras. 100, 176; *EC – Asbestos* (AB), paras. 88-89 (the same provisions in the same or other covered agreements may also be relevant context.)

[10] *US – Clove Cigarettes* (AB), para. 88.

[11] *US – Clove Cigarettes* (AB), para. 88; see also *EC – Seal Products* (AB), para. 5.121.

by the affirmation of Members' right to regulate to "fulfill certain legitimate policy objectives."[12] This observation led in part to the Appellate Body's finding that:

> [T]he object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact upon competitive opportunities for imports in cases where such a detrimental impact on imports stems exclusively from a legitimate regulatory distinction.[13]

20. The preamble of the GATS, recognizing the objective to balance progressive trade liberalization with Members' right to regulate to meet national objectives, similarly supports an interpretation of less favorable treatment that requires more than a simple finding of detrimental impact in order to find a breach of the national treatment provision.

21. Nature of the covered subject. In interpreting Article 2.1 of the TBT Agreement, the Appellate Body considered it significant that the TBT Agreement concerns *only* technical regulations, which are defined as "document[s] which lay[] down product characteristics […]."[14] The Appellate Body observed that, by their very nature, technical regulations (unlike the broader scope of measures covered under Article III.4 of the GATT 1994) draw distinctions among products.

22. Article XVII of the GATS, like Article III.4 of the GATT 1994, applies to *all* measures (not to a particular type of measure, like Article 2.1 of the TBT Agreement). While there is no separate agreement covering an analogue to technical regulations in the services context, there are many types of measures that may, in a similar way, draw distinctions among services or services suppliers. In fact, the supply of services is carefully regulated, and services and services suppliers are often defined and distinguished by the particular regulatory framework to which they are subject. Thus, as explained below in relation to TBT measures, measures affecting trade

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[12] *US – Clove Cigarettes* (AB), paras. 88-96. *EC – Seal Products* (AB), para. 5.121. The sixth recital of the preamble to the TBT Agreement states that Members "*recognize[e]* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, plant or animal life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement[.]"

[13] *US – Clove Cigarettes* (AB), para. 174. The Appellate Body further stated that "the existence of a detrimental impact on the competitive opportunities for the group of imported products vis a vis the group of domestic like products is not dispositive of less favorable treatment under Article 2.1" and that "the 'treatment no less favourable' requirement of Article 2.1 [does] not prohibit[] detrimental impact on imports that stems exclusively from a legitimate regulatory distinction." Paras. 181-82.

[14] *US – Clove Cigarettes* (AB), para. 97 (emphasis added).

in services may have unique characteristics that could inform the "like services", "like services suppliers" or "less favorable treatment" analyses.

23. Stemming from its observation about the unique nature of technical regulations, the Appellate Body made two key findings in its interpretation of Article 2.1 of the TBT Agreement. First, the Appellate Body found that "product characteristics laid down in a technical regulation *may themselves be relevant* to the determination of whether products are like[.]"[15] A similar finding may apply to certain measures in the GATS context, as well: regulatory characteristics of services or service suppliers set out or reflected in the measures themselves (including identification of certain risks or other factors) may be relevant to the determination of whether services or service suppliers are like.

24. Second, the Appellate Body found that "the measure itself *may* provide elements that are relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products[.]"[16] Again, a similar finding may apply in the GATS context. For example, where a measure provides elements that affect the terms, nature, or character of the service supplied, such elements may be relevant to whether the services or services suppliers are like, or whether less favourable treatment has been accorded.

25. Therefore, just as the Appellate Body took note that in the TBT context there are some unique characteristics of technical regulations that could inform the "like product" and "less favorable treatment" analysis, so should this Panel take note that, in the context of services, some measures affecting trade in services may have unique characteristics that could inform the "like services", "like services suppliers" or "less favorable treatment" analyses.

26. Relationship to other covered agreements and the availability of exceptions. The Appellate Body in *US – Clove Cigarettes* also considered the TBT Agreement's relationship to the GATT 1994, and the fact that the GATT 1994 contains general exceptions while the TBT Agreement does not. With respect to the relationship, the Appellate Body noted that technical regulations are subject to the national treatment obligations in both agreements, and that the national treatment provisions "are built around the same core terms, namely, 'like products' and 'treatment no less favourable.'"[17] The Appellate Body further noted that the national treatment obligation in the GATT 1994 is counterbalanced by general exceptions, while the national treatment provision in the TBT Agreement is not.[18] The language of the general exceptions in the GATT 1994 is largely reflected, however, in the sixth recital to the TBT Agreement.

27. Applying a similar analysis to the GATS, it should be noted as a preliminary matter that there is no overlap in coverage between the national treatment obligation in the GATS and the

[15] *US – Clove Cigarettes* (AB), para. 97.

[16] *US – Clove Cigarettes* (AB), para. 97 (emphasis in original).

[17] *US – Clove Cigarettes* (AB), para. 100.

[18] *US – Clove Cigarettes* (AB), para. 100.

national treatment obligations in either the GATT 1994 or the TBT Agreement. Therefore, conclusions based on the relationship of the GATT 1994 to the TBT Agreement would not apply to interpretation of the GATS. However, other rules of treaty interpretation apply, such as the requirement to interpret the terms in their context and in light of the object and purpose of the agreement, as expressed in the preamble, which recognizes the right of Members to meet national policy objectives. As noted, the preamble to the GATS recognizes the right of Members to regulate in order to meet national policy objectives. Unlike the preamble to the TBT Agreement, however, the preamble of the GATS does *not* enumerate particular policy objectives.

28. The general exceptions to the GATS, which are part of the context in which to interpret Articles II and XVII, are in the form of a closed list, and they do not necessarily cover all of the "national policy objectives" referenced in the preamble or all of the regulatory objectives reflected in the provisions of GATS. For one, there are exceptions in the GATS in addition to the general exceptions. And other provisions reflect additional regulatory objectives, such as transparency (Article III), ensuring the competence and ability of service suppliers (Article VI:4), competition (Article IX), and access to public telecommunications access (Annex on Telecommunications). Therefore, an interpretation of Articles II and XVII of the GATS, in light of the right to regulate set out in the preamble, would need to take account of all potential bases for regulation and not only those reflected in the general exceptions.

29. The Panel's interpretation of Articles II and XVII of the GATS should take account of any relevant regulatory distinctions among services and services suppliers. In interpreting Article 2.1 of the TBT Agreement, the Appellate Body factored in legitimate regulatory distinctions in its analysis of less favorable treatment. For the reasons set out above, the United States considers that, in the context of measures affecting trade in services, regulatory differentiations among services or services suppliers are relevant as a factor in the analysis of which domestic service or service supplier is "like" the foreign service or service supplier.

6. GENERAL EXCEPTIONS UNDER ARTICLE XIV OF THE GATS AND THE PRUDENTIAL CARVE-OUT OF PARAGRAPH 2(A) OF THE ANNEX ON FINANCIAL SERVICES

Question 13 (*Advance question No. 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?

30. In response to this question, the United States refers the Panel to its previous submission "Responses of the United States to the Panel's Advance Questions Before the Third Party Session," dated September 24, 2014.