BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

Argentina — Measures Relating to Trade in Goods and Services

(DS453)

Third Participant Oral Statement of Australia

28 January 2016
I. INTRODUCTION

Mr Chairman, distinguished Members of the Division —

1. Thank you for the opportunity to present Australia’s views on this appeal.

2. Australia is a third participant in this proceeding because of our systemic interest in the proper interpretation of the General Agreement on Trade in Services (GATS) and the proper functioning of the dispute settlement system.

3. Australia includes in this statement comments which support its written submissions, on the interpretation of paragraph 2(a) of the Annex on Financial Services. In addition, Australia makes a number of points concerning the Panel’s analysis and application of the term ‘like services and service suppliers’ within Articles II and XVII of GATS.

I. PARAGRAPH 2(a) OF THE GATS ANNEX ON FINANCIAL SERVICES

4. Australia’s firm view is that the correct interpretation of the prudential exception in paragraph 2(a) of the Financial Services Annex does not limit a Member’s right to take measures for bona fide prudential reasons.

5. The text of paragraph 2(a) is clear in articulating the scope of the prudential exception. The opening phrase, ‘Notwithstanding any other provisions of the Agreement …’, makes clear that the ability of a Member to take any measure, within
the scope of the Financial Services Annex and for prudential reasons, is not limited by any other part of the Agreement.

6. Australia submits that the term, ‘measures’, which is unqualified by any descriptor, leaves no doubt that the exception covers all forms of measures. The only textual limitation on the exception is that a measure ‘shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement’. It is Australia’s view that a Member will act in a manner consistent with this requirement if the prudential measure is *bona fide* for prudential reasons.

7. As to the extent to which the heading of a provision may aid its interpretation, Australia submits that a heading provides context to the substantive provision, but is unlikely to significantly modify its ordinary meaning in the manner suggested by Panama. Australia believes that the heading, ‘Domestic Regulation’, is consistent with the text of paragraph 2(a), and supports an interpretation that a broad range of measures relating to financial services may be adopted by a government to ensure the stability of the domestic financial market. This includes measures which may have the effect of limiting market access.

8. Australia further submits that such an interpretation is consistent with the objects and purposes of the GATS. The Preamble to the GATS articulates that the purpose of the agreement is to achieve growth and development and also makes explicit, ‘the right of Members to *regulate*, and to introduce new *regulations* … in order to meet *national policy objectives*’ (emphasis added, ie. *domestic regulations*). The prudential exception is the basis for Members to maintain the stability of global financial
markets, which is a fundamental precondition to stable growth. In this context, Australia submits that the prudential exception ought not be limited, especially in the absence of clear words in the Agreement that would have such an effect.

II. ARTICLES II AND XVII OF THE GATS

Likeness

9. Australia submits that the Panel correctly stated that the starting point to its enquiry of ‘like services and service suppliers’ in GATS Articles II and XVII is a comparison of the competitive relationship between the services and service suppliers of the cooperative countries, on the one hand, and the services and service suppliers of the non-cooperative countries on the other.

10. However, having stated its approach the Panel appears to have conflated the comparison of the competitive relationship to analysing the treatment accorded to the respective groups of services and service suppliers. Australia submits that the Panel thereby failed to undertake a proper assessment of ‘like services and service suppliers’.

11. Further, while it was open to the Panel to explore whether a presumption of likeness could be found to apply, where the only material difference between the services and service suppliers of the respective groups was solely national origin, the Panel took the unusual approach of assessing whether the treatment accorded to the respective groups could be distinguished solely on origin. Australia submits that the Panel failed in this second respect to undertake a proper assessment of ‘likeness’.
12. Australia agrees with the Panel, that part of its consideration of assessing the validity of the presumption of likeness, is whether any other factor represents a material difference between the services and service suppliers of the respective groups. Australia submits that the regulatory framework was a factor that should have been considered by the Panel in assessing whether there was a material difference in the services and service suppliers of the respective groups.

III. Conclusion

13. This concludes Australia’s remarks. Australia thanks the Chairman and Members of the Division for the opportunity to present its views.