BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANISATION

Argentina – Measures Relating to Trade in Goods and Services

(DS453)

Third Party Written Submission of Australia

19 November 2015
Introduction

1. Australia considers that these proceedings, initiated by Panama under the DSU, raise important issues of interpretation of the GATS.

2. In particular, Australia notes that this dispute is important as it considers the scope of the prudential exception under paragraph 2 in the Annex on Financial Services of the GATS. Australia also notes the special significance in that this is the first case to address this provision.

3. Australia reserves the right to raise other issues in the third party hearing with the Appellate Body.

Paragraph 2 of the Annex on Financial Services

4. Paragraph 2 of the Annex on Financial Services in the GATS provides:

   2. Domestic Regulation

      (a) Notwithstanding any other provisions of the Agreement, A Member shall not be prevented from taking measures for prudential reasons, including 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. 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.

      (b) Nothing in the agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

5. This submission relates to the scope of application of the prudential exception in paragraph 2(a). In particular, as raised by Panama at the panel stage and on appeal, whether the title of the paragraph limits the scope of application of the prudential exception to particular parts of the GATS agreement.

6. The argument from Panama both at the panel stage and on appeal has been that the title of paragraph 2, ‘domestic regulation’, has the effect of limiting the scope of application of the text of paragraph 2. Panama maintains this claim in spite of the absence of any clear language in the text that would indicate any such limitation.

7. Australia’s view, in support of the panel decision, the view of Argentina and other third parties to this dispute, is that if the drafters intended to limit the scope of application of the prudential exception in paragraph 2, they would have done so with clear language in the text of the provision.
8. The Appellate Body has repeatedly indicated that the silence of a treaty provision on a particular issue ‘must have some meaning’.\(^1\) In applying this principle in *US – Carbon Steel*, the Appellate Body observed that the lack of an indication in the text is ‘at least at first blush, an indication that no such requirement exists’.\(^2\)

9. The text of paragraph 2 provides, without qualification, the right for WTO members to not be prevented from taking measures affecting the supply of financial services for prudential reasons. *Prima facie*, the absence of any limitation as to the scope of that right in the text of the agreement must raise the strong presumption that no such limitation exists.

10. Australia’s view is, firstly, that this presumption is confirmed by a textual analysis of the Agreement, the objects and purposes of the Agreement and subsequent practice. Secondly, that Panama has not raised any persuasive reason as to why a presumption should be rebutted.

**Textual Analysis**

11. The Panel understood that Panama’s argument at the panel stage that the meaning of the title of paragraph 2 was a reference to Article VI of the GATS which carries the same heading. The effect would be that the scope of application of paragraph 2 was therefore limited only to measures taken under Article VI. On appeal, Panama has offered a different interpretation of ‘domestic regulations’ which is defined in opposition to the concept of ‘market access’ barriers which are dealt with in Article XVI of the GATS.\(^3\) In each of the respective cases, the effect of Panama’s interpretation would be to limit the application of the prudential exception to Article VI or to limit the application to all provisions except Article XVI.

12. There is no basis in the text of the GATS to believe that ‘domestic regulations’ are defined in opposition to ‘market access’. Moreover, if the drafters had intended to limit the scope of application of the prudential exception to include or exclude specific provisions of the GATS, they would have clearly articulated that in the substance of the provisions. Throughout the GATS and the Annexes, the drafters cross-reference other parts of the GATS where they intend to limit the scope of the application of a provision or otherwise refer to or alter the rights and obligations in other parts of the agreement. Examples include Articles II:2, IV:1, V:1(b), V:5, VIII:4, IX:1, X:2, XI:1, XI:2, XIII:1, XIV, XVIII, XIX:2, XIX:3, XX:2, XXII:3, Article XXIII, XXV:1 and even in the immediately preceding clause in paragraph 1(d) of the Annex on Financial Services. Given the widespread use of this drafting technique in the GATS, the fact that the drafters did not employ this technique to limit the scope of the prudential exception leads to the conclusion that it was not intended to be so limited. The simpler conclusion is that the drafters did not intend to limit the scope of the prudential regulation to exclude market access measures.

\(^1\) *Canada – Term of Patent Protection* [78]; *Japan – Alcoholic Beverages II* at 111; *US – Carbon Steel* [65].

\(^2\) *US – Carbon Steel* [65].

\(^3\) Panama Appellate Submission [6.26].
13. Notwithstanding the above, Panama has argued that the principle that ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’\(^4\) should be applied to the title of paragraph 2.

14. Australia agrees with the assessment of the Panel, that the proper application of this principle to the relevant paragraph would place greater emphasis on the substantive phrases ‘[n]otwithstanding any other provisions of the Agreement’ and ‘[w]here such measures do not conform with the provisions of the agreement’. An interpretation that would allow the title ‘domestic regulation’ to read in a limitation in the text of paragraph 2 would have the effect of reducing the above clauses into redundancy and inutility, particularly if, as claimed, it does so on the basis of a separation of concepts in other provisions of the Agreement.

15. In any event, Australia does not consider that the interpretation adopted by the Panel does reduce the title of the provision to redundancy or inutility. The ordinary meaning of the phrase ‘domestic regulation’ contemplates a broad range of measures relating to financial service that might be adopted by a government to ensure the stability of the domestic financial market, including measures which may have the effect of limiting market access. In this respect, there is no reason to suggest that the title has any limiting effect. Such an interpretation is entirely consistent with the usage of the phrase throughout the GATS.

16. Even if a narrow interpretation of the phrase ‘domestic regulation’ were to be adopted, a literal interpretation of the excerpt of the Appellate Body Report in US – Gasoline quoted above would suggest that titles of paragraphs do not enjoy the same status as ‘whole clauses and paragraphs’. In the past, titles and headings have been used to ‘inform the interpretation’ of substantive clauses.\(^5\) However, they have not been given any special meaning of their own or been used to add or subtract from the substantive obligations contained within the text of a provision. The interpretation offered by Panama, which already relies upon a narrow understanding of the phrase ‘domestic regulations’, would have the effect of using a heading to insert an alteration of the scope of the obligations which has no basis in the words of the text. In Australia’s view, this outcome is not convincing.

**Objects and Purposes of the GATS**

17. The construction offered by the Panel is consistent with the objects and purposes of the GATS. The preamble to GATS, in recognising the importance of trade in service to economic growth and development and wishing to progressively liberalise trade for the purposes of promoting economic growth and development, is clear in demonstrating that the aim of economic growth was foremost in the drafters’ minds in bringing this agreement into fruition.

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\(^4\) US – Gasoline at 23.

\(^5\) China – Raw Materials [320].
The preamble is also especially clear in balancing trade liberalisation with the recognition of ‘the right of Members to regulate, and to introduce new regulations … in order to meet national policy objectives’.

18. Australia takes particular note of these aims in the context of this provision, given the shared interest of all Members in maintaining the integrity and stability of the financial system through prudential regulation, knowing that it is a fundamental precondition to achieving stable economic growth and development. The importance of the prudential exception with respect to the underlying objects of the agreement has to be taken into account when interpreting the text and must be given considerable weight, especially in circumstances where the right to legislate for prudential reasons, and thus protect economic stability, is purported to be limited.

Subsequent State Practice

19. Subsequent state practice in the application of a treaty is a key element to be considered alongside the text and the context of a treaty in interpreting its provisions under Article 31 of the Vienna Convention on the Law of Treaties. Panama has failed to raise any example of state practice that would give credence to a narrow construction of the agreement. In contrast, the United States’ observation that the broad application of the prudential exception has informed the market access commitments and limitations that members undertook in the financial services sector, as highlighted in Argentina’s panel submissions, provide further weight to prefer a broad interpretation.

20. Australia along with a range of countries from the Asia-Pacific region is developing the Asia Region Funds Passport, a framework to ‘facilitate the crossborder offering of eligible collective investment schemes in economies participating in the Passport,’ that is, to facilitate market access by financial service suppliers.

21. Subject to ongoing development work, this is to be achieved partly on the basis of mutual recognition and harmonisation in line with paragraph 3(a) of the Financial Services Annex, while ‘maintaining legal and regulatory frameworks which promote investor protection, fair, efficient and transparent markets for financial services, supporting financial stability and providing high standards in the management and distribution of collective investment schemes,’ i.e. prudential measures. This provides clear evidence in the current practice of a range of WTO members for the interpretation that prudential matters are relevant to market access, and should be interpreted more broadly than Panama’s submissions suggest.

Conclusion

22. Australia thanks the Appellate Body for the opportunity to provide this third party submission.