

Before the World Trade Organization

S/SECRET/13/ARB

**ARBITRATION CONCERNING AUSTRALIA'S INTENDED
MODIFICATION OF ITS SCHEDULE OF SPECIFIC COMMITMENTS
UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES**

**AUSTRALIA'S CLOSING STATEMENT AT THE MEETING OF THE
ARBITRATION BODY AND THE PARTIES**

30 September 2024

1. Thank you Chair. Australia wishes to thank you, the other arbitrators and the WTO Secretariat for your service in today's hearing. Australia believes that this case is open and shut and, after today's exchanges, ripe for a decision by this Arbitration Body.

2. The positions that India espoused during the course of these proceedings amount to no more than conjecture and speculation. India wants this Arbitration Body to read into Australia's use of cross-referencing as a technique to incorporate additional commitments under Article XVIII of the GATS, some ulterior motive related to the proper application of the MFN obligation in Article II of the GATS. India wants this Arbitration Body to speculate about a purported ambiguity with the use of the term "Member" in Section II of INF/SDR/2 and to presume a violation of Article II.1 of the GATS.

3. This is not the appropriate forum to discuss any purported ambiguities in Australia's proposed modification, let alone to adjudicate violations of Article II.1 of the GATS. However, for the sake of completeness let me be perfectly clear: there is no ambiguity or lack of clarity or specificity in Australia's proposed modification. Australia's proposed draft Schedule pertains to Australia only and cannot create obligations for other WTO Members. It consists of specific commitments under Part III of the GATS which, by definition, cannot impinge upon the general rights and obligations provided under Part II thereof, including the MFN obligation. It refers to the single, identifiable document properly placed in the official documentation of the World Trade Organization. It has clearly set out the sectors and subsectors concerned. It provides further clarification and transparency for service suppliers seeking to benefit from the market access opportunities offered in Australia's existing commitments.

4. India further seeks to draw an artificial distinction between cross-referencing and what it considers to be inscriptions in a Member's schedule. Cross-references *are in fact* inscriptions within the meaning of Article XX of the GATS, through which Australia undertakes additional commitments that seek to facilitate trade in services by removing the trade-restrictive effects of qualifications, standards, and licenses. These additional commitments do, as a factual matter, result in a general level of specific commitments that are more favourable to trade, because they improve upon Australia's existing commitments under Articles XVI and XVII.

5. Finally, India wishes this Arbitration Body to presume "inherent jurisdiction" to examine claims of violations under the GATS, while dispensing with *any* obligation to make a *prima facie* case that these violations did in fact occur. Remarkably, India even stated today that the jurisdiction under Article 23.1 of the DSU is not exclusive, such that this Arbitration Body could somehow encroach into the jurisdiction of the WTO dispute settlement system.

6. It is simply not in dispute that India has explicitly tied its request for compensatory adjustments to alleged violations of the GATS. This was made clear by India today, with frequent references to speculative violations of the MFN obligation as a basis for compensatory adjustments. Contrary to what India asserts, however, this Arbitration Body has no jurisdiction, implied or otherwise, to examine alleged violations of Australia's obligations under the GATS. The Arbitration Body's jurisdiction is governed by the terms of reference in paragraph 13 of S/L/80, and extends no further.

7. Mr Chairman, distinguished Members of the Arbitration Body, it is understandable that India wishes to sweep S/L/80 under the carpet. In Australia's view, the issues before you are perfectly joined. India's expansive interpretation of the term "benefit" in Article XXI:2(a)

is contrary to the plain meaning of the term “compensatory adjustment” and to the context provided to it by the remainder of Article XXI. The only way to read the term "benefit" harmoniously with the other provisions of the GATS is to find that it refers to benefits that are capable of being compensated through adjustments in a Member’s schedule. Absent any demonstration that Australia's proposed modification results in general levels of specific commitments that are less favourable to trade than its existing Schedule, no compensatory adjustments are necessary. On this basis alone, the Arbitration Body must conclude that India’s requests in these proceedings are outside its terms of reference.

8. Australia thanks you for your careful consideration of this matter and looks forward to receiving your written questions in due course.