

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 COMMENTS ON INDIA'S RESPONSES TO QUESTIONS FROM
THE ARBITRATION BODY FOLLOWING THE MEETING WITH THE PARTIES**

24 October 2024

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TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Banana Tariffs Arbitration</i>	Award of the Arbitrator, <i>European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001</i> , WT/L/616 , 1 August 2005, DSR 2005:XXIII, p. 11669
<i>EC – Chicken Cuts</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, DSR 2005:XIX, p. 9157
<i>EC – The ACP-EC Partnership Agreement</i>	Award of the Arbitrator, <i>European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001</i> , WT/L/616 , 1 August 2005, DSR 2005:XXIII, p. 11669
<i>Japan Alcoholic Beverages II</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, DSR 1996:I, p. 97
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R , WT/DS162/AB/R , adopted 26 September 2000, DSR 2000:X, p. 4793
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
affected Member	An "affected Member" as defined in Article XXI:2(a) of the General Agreement on Trade in Services
GATS	General Agreement on Trade in Services
Member	Member of the World Trade Organization
modifying Member	A "modifying Member" as defined in Article XXI:1(a) of the General Agreement on Trade in Services
Schedule	Schedule of Specific Commitments under the General Agreement on Trade in Services
Vienna Convention	United Nations, <i>Vienna Convention on the Law of Treaties</i> , United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969
WTO	World Trade Organization

I. ARBITRATION BODY'S TERMS OF REFERENCE

1.1 TO BOTH PARTIES

QUESTION 1

This Arbitration Body's terms of reference include a mandate "[t]o examine the compensatory adjustments offered by Australia or requested by India and to find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations."

- a. Do the parties agree that the Arbitration Body's examination of the compensatory adjustments is aimed at finding a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations?
- b. Based on your response to (a) above, do the parties agree that the Arbitration Body is required to establish that there is an imbalance in rights and obligations occasioned by the proposed modification as a necessary element to warrant the compensatory adjustments?
- c. Do the parties agree that the Arbitration Body's assessment of the resulting balance calls for a comparison between the modifying Member's Schedule of specific commitments prior to the negotiations, and the proposed modified Schedule?
- d. Does the comparison in (c) above require the Arbitration Body to ascertain:
 - i. the content and scope of the proposed modification?
 - ii. How the proposed modification alters the existing Schedule of specific commitments?

Australia's Comment to India's Response

1. The Parties are largely in agreement that this Arbitration Body is required to establish whether compensatory adjustments are necessary by examining the scope and content of the

proposed modification and how, if at all, it alters the general commitment levels in Australia's existing Schedule. A key point of divergence, however, is the content of the "rights and obligations" which may be captured by the Arbitration Body's mandate.

2. India suggests that the Arbitration Body's mandate confers a broad power to assess and "restor[e] the benefits available to India under GATS which may have been affected by the proposed modification", rather than solely those arising from the level of specific commitments in Australia's Schedule.¹ India is not, and cannot be, correct. In particular, the rights and obligations referred to in paragraph 13 of S/L/80, setting forth the mandate of the Arbitration Body, can only be those arising from the level of specific commitments in the relevant Schedule. Australia refers to its previous submissions in support of its position.²

1.2 TO INDIA

QUESTION 2

Please respond to Australia's assertion at paragraph 16 of its opening statement that "[i]t is well-established that [Article XXI of the GATS and S/L/80] do not look to the underlying validity of the process leading to a Member's proposed modifications".

Australia's Comment to India's Response

3. Contrary to what India suggests in its response to Question 2, India's political complaints are neither explicitly, nor implicitly, captured by the Arbitration Body's terms of reference as set out in paragraph 13 of S/L/80.³

4. The Arbitration Body has an inherent power to satisfy itself as to its jurisdiction to examine the matter before it.⁴ This can involve an assessment of whether there is any valid

¹ India's response to questions from the Arbitration Body, response to Question 1, paras. 2, 4 and 6.

² Please see Australia's response to questions from the Arbitration Body, response to Question 1, paras. 2 - 3; Australia's closing statement at the meeting of the Arbitration Body and the Parties, para. 7; Australia's opening statement at the meeting of the Arbitration Body and the Parties, para. 16; and Australia's written submission, Section III and in particular, paras. 35 - 62.

³ For completeness, Australia also notes that India's response to Question 2 incorrectly paraphrases the report of the Australian Parliament's Joint Standing Committee on Treaties concerning the Joint Initiative on Services Domestic Regulation (Report 205, dated February 2023). India's selective quotations from paras. 2.12 and 2.31 of that report are self-evidently from separate parts of the report and therefore do not support the incorrect conclusion which India cumulatively draws from them, at paragraph 10 of its response.

⁴ Appellate Body Report, *US – 1916 Act*, fn. 30, referring specifically to the powers of "international tribunals".

compensatory adjustment request before it, and whether any compensatory adjustments are necessary in the first place. It is well-established that the Arbitration Body cannot expand its terms of reference to include unrelated matters.⁵

QUESTION 3

We refer to paragraph 30 and footnote 51 of India's opening statement at the meeting with the parties. Is it India's position that the examples of previous negotiations provided for in paragraphs 85-95 of its written submission constitute "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention?

Australia's Comment to India's Response

5. As set out in its terms of reference, the task before this Arbitration Body is to examine "compensatory adjustments" offered by Australia or requested by India in the context of the procedures set out in S/L/80. Australia does not agree that the examples provided by India in its written submission constitute subsequent practice on the interpretation of "compensatory adjustment" within the meaning of paragraph 13 of S/L/80.⁶

6. To be qualified as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision – in this case, paragraph 13 of S/L/80.⁷

7. To begin with, India puts forward no evidence of any practice regarding compensatory adjustments in arbitration under paragraph 13 of S/L/80. In fact, none of the three examples that India puts forward were referred to arbitration at all. Its attempts to draw inferences as to what might have happened if the parties had proceeded to arbitration in the examples that it refers to are entirely speculative and without basis.⁸

⁵ By way of example, see *EC – The ACP-EC Partnership Agreement*, para. 46. This principle is also a necessary consequence of the concept of "jurisdiction" and one which India itself seems to accept, as demonstrated at paragraph 9 of its response.

⁶ Australia has explained in its written submission why India erred in its interpretation of Article XXI:2(a) of the GATS. See Australia's written submission, paras. 47-62.

⁷ Appellate Body, *US – Gambling*, paras. 191-192.

⁸ India demonstrates this speculative exercise at paragraph 94 of its written submission, stating: "India believes that in the hypothetical scenario [that objections were maintained], the certification procedure would have proceeded under SL80, where the clarifications would have been requested as 'compensatory adjustment'."

8. India's three examples are also insufficient to establish any "consistent, common and concordant" sequence of acts or pronouncements amongst Members,⁹ let alone agreement by WTO Membership on the interpretation of paragraph 13 of S/L/80.

9. India puts forward a mere handful of examples, originating under different procedures,¹⁰ with limited factual relevance. For example, Egypt's incorporation of the Additional Commitments on Basic Telecommunications (in paragraphs 90–92 of India's written submission) is rooted in a certification request made under S/L/84. The procedures under S/L/84 do not even use the term "compensatory adjustment", as drafters of these procedures did not envisage the need for any "compensatory adjustment" in this scenario. Thus, consultations conducted in accordance with paragraphs 2 and 3 of S/L/84 cannot be assumed to pursue "compensatory adjustment" under another procedure (S/L/80).

10. Consequently, the lack of objections from other WTO Members to the modification resulting from consultations under S/L/84 cannot be considered as implied agreement to the interpretation of "compensatory adjustments" under paragraph 13 of S/L/80. As the Appellate Body has emphasized, "'lack of reaction' should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty".¹¹

11. In any event, on an *arguendo* basis, the purported "practice" cited by India in fact supports Australia's submission that negotiations for "compensatory adjustment" relate to the level of commitments in Members' Schedules:

- a. EC renegotiations: the so-called "clarification" that the European Union provided in its Schedule relates to the sectoral definition of two sectors in which the European Union had undertaken specific commitments: computer and related services, and telecommunication services. It is evident that the sectoral coverage is closely linked to the "level" of specific commitments that the European Union undertook in these

⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, pg. 13.

¹⁰ Articles V, XXI of the GATS; S/L/80; S/L/84.

¹¹ Appellate Body Report, *EC – Chicken Cuts*, para. 273. See also, Appellate Body Report, *Japan – Alcoholic Beverages II*, pg. 13.

two sectors. Thus, the European Union's alleged "practice" supports Australia's position that "benefits" under Article XXI:2(a) must be closely related to Members' Schedules and more specifically to the level of commitments;

- b. Egypt's incorporation of the Additional Commitments on Basic Telecommunications: the objections raised by the European Union and the United States related to two issues: (i) an entry with a general reference to a "reference paper" without attachment or specification of the document; and (ii) the nature of an "economic needs" test listed as a limitation on market access. While the first relates to an unspecified general reference, which is not the case here, the latter relates to the level of commitments in terms of market access in the relevant telecommunication sectors; and
- c. Brazil's incorporation of the Additional Commitments on Basic Telecommunications: the objections raised by the United States and other Members concerned a horizontal commitment that Brazil inserted, which "would permit the Executive Branch to use its 'legal prerogative' to establish limits on foreign participation in the capital composition of telecommunications service providers."¹² It is evident that this proposed modification would have had a direct impact on the level of market access commitments in all telecommunication sectors.

III. ARBITRATION BODY'S FINDINGS

3.1 TO INDIA

QUESTION 7

Paragraph 14 of S/L/80 refers to the "arbitration body's findings". Paragraph 15 of S/L/80 refers to the "findings of the arbitration". In its oral response to a question by the Arbitration Body, Australia was of the view that the terms "arbitration body's findings" and the "findings of the arbitration" are synonymous. India disagreed. Could India please provide the legal basis for its disagreement?

¹² Notification of Objection from the United States, S/L/94, dated 11 June 2001.

Australia's Comment to India's Response

12. India's response to this question identifies a distinction without a difference. As Australia has said in its oral responses at the meeting, these phrases are synonymous grammatically, and when read in context.

13. The "findings of the arbitration" under S/L/80 must include reasons and conclusions. Otherwise, any affected Member would be unable to establish "substantially equivalent benefits in conformity with those findings" under paragraph 16 of S/L/80 merely from the bare conclusions of the arbitration. Further, a modifying Member may be impeded in implementing the results of the arbitration under paragraph 15.

14. Paragraph 18 of S/L/80 also dissolves any grammatical distinction, by referring to the "arbitration body's findings" (as they are described under paragraph 14) as the "findings of the arbitration body under paragraph 14". Under that same paragraph 18, compliance with the "arbitration body's findings" is sufficient to remedy non-compliance with the "findings of the arbitration" described in paragraph 16 – further suggesting that those terms are synonymous and used interchangeably.