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 OPENING STATEMENT AT THE MEETING OF THE ARBITRATION BODY AND THE PARTIES

30 September 2024

I. INTRODUCTION

1. Mr. Chairman, distinguished members of the Arbitration Body – good morning. Australia wishes to thank the arbitrators and the WTO Secretariat for your service in these proceedings. We look forward to engaging constructively with the Arbitration Body and with India during the course of today's hearing.

2. Australia regrets India's decision to have recourse to arbitration under Article XXI of the GATS to ventilate the political concerns it has already aired before the General Council. Paragraph 13 of S/L/80 entrusts this Arbitration Body with jurisdiction to examine requests or offers for adjustment to a WTO Member's GATS Schedule that are necessary to compensate for that Member's unilateral modification or withdrawal of specific commitments. Any extraneous concerns pertaining to the multilateral framework of the WTO evidently do not fall within this narrow mandate.

3. Australia's position is set out in detail in our written submission, and we will not repeat our arguments here. Instead, at the outset of this hearing, Australia considers it useful to recall three fundamental principles of the GATS that are highly relevant for the Arbitration Body's disposition of the matter before it.

II. MEMBERS ARE FREE TO LIBERALISE THEIR SERVICES SECTORS

4. First, the GATS accords WTO Members with the right to unilaterally liberalise their services sectors. Indeed, the GATS was intended to encourage Members to undertake progressive liberalisation. They can do so by undertaking further market access or national treatment commitments in their GATS Schedules, or by undertaking additional commitments under Article XVIII with respect to other measures affecting trade in services, including qualifications, standards, or licensing matters. Australia acts in pursuit of this right when it

proposes to modify its Schedule to undertake additional commitments unilaterally or resulting from plurilateral or multilateral processes. There is nothing in the text of the GATS which requires *any* mandate – multilateral or otherwise – for a WTO Member to liberalise its services sectors. On the contrary, the GATS *reinforces* Members' unilateral rights to liberalise services, by ensuring that autonomous liberalisation is properly recognised.[1]

5. Second, the GATS provides WTO Members with the right to lock in the additional commitments they wish to undertake through unimpeded modifications of their GATS Schedules. Towards this end, WTO Members may have recourse to streamlined procedures under S/L/84 to update their Schedules, as over 50 Members have done to date to implement the Services Domestic Regulation Joint Statement Initiative. WTO Members may further modify their Schedules through regular procedures in S/L/80, in which case the certification of the Schedule modification must proceed unless negotiations under Article XXI of the GATS are necessary.

6. Third, the GATS expressly recognises plurilateral negotiations as one of the modalities for advancing services trade liberalisation. Similarly, the 2001 Scheduling Guidelines,[2] which were adopted by consensus, affirm that liberalisation shall be advanced through, amongst other means, plurilateral negotiations. It is in furtherance of this right that 72 WTO Members have used a plurilateral approach to agree on additional trade liberalising commitments under Article XVIII of the GATS regarding qualifications, standards, and licensing matters under the Services Domestic Regulation Joint Statement Initiative.

[1] GATS, Article XIX:3. See also, the Modalities for the Treatment of Autonomous Liberalization (TN/S/6, 2003).
[2] S/L/93, para. 11.

III. INDIA'S OBJECTION IS A MATTER OF FORM, NOT SUBSTANCE

7. Against these three fundamental tenets of the GATS, India's posture in these proceedings is paradoxical. The additional commitments Australia proposes to undertake through a modification of its Schedule seek to *facilitate* trade in services by mitigating the trade-restrictive effects of measures relating to licensing, qualifications, and standards. The proposed modification is therefore undoubtedly trade-liberalising because it results in a general level of specific commitments that is *more favourable* to trade than Australia's existing Schedule.

8. India does not dispute that these additional commitments apply on an) most-favoured-nation basis, such that India's services suppliers would enjoy the certainty of *greater* access to Australia's services sectors as a result of the proposed modification. For example, India's providers of management consulting services in Australia through mode 3, commercial presence, would benefit from the certainty of simplified and streamlined application procedures for obtaining their licenses and qualifications. India is not required to reciprocate these commitments for its services suppliers to benefit. Yet, India overtly acts against its interest by blocking Australia's certification.

9. India understands this contradiction very well. In fact, India has acknowledged the trade-liberalising nature of these additional undertakings when it removed its objection to identical certifications of over 50 WTO Members under S/L/84. This amounts to a recognition by India that the additional commitments Australia wishes to undertake do not alter the scope or substance of its existing commitments, and do not engage negotiations for compensation under Article XXI of the GATS.

10. This raises the question of why we are actually here today. On a close review of India's submission, it appears that its objection to Australia's proposed modification does not relate to the substance of the additional commitments, but rather the form Australia chose to inscribe them in its Schedule.[3] India merely objects to the technique of cross-referencing chosen by Australia in its proposed modification – despite the fact that such a technique produces results which are both clear and specific.

11. India's formalistic objection is without merit. Cross-referencing is a technique widely used in WTO Members' Schedules in conformity with the Scheduling Guidelines, provided they do not constitute unspecified general references. The fact that the European Union and other WTO Members decided not to use this technique is irrelevant. There is nothing in Australia's use of cross-referencing as a technique that would provide a proper basis for India's request for "compensatory adjustment", let alone engage broader interests stemming from the political architecture of the Marrakesh Agreement.

IV. INDIA'S REQUEST RAISES SUBSTANTIAL SYSTEMIC CONCERNS

12. Mr. Chairman, distinguished members of the Arbitration Body, even though India presents itself as defending the multilateral system, its request for a "compensatory adjustment", if successful, would raise substantial systemic concerns under the covered agreements.

13. Firstly and critically, India's request infringes upon WTO Members' rights under the GATS to autonomously liberalise their services sectors and to lock in such liberalisation through Schedule modifications. If India's request is accepted, WTO Members could be prevented from progressively liberalising their services sectors. Moreover, arbitrators acting

[3] See, e.g., India's written submission, para. 75.

under Article XXI of the GATS could be frequently invited to second-guess not only the proposed Schedule modification but also the content of the communications to which the proposed modification is attached. Consequently, the right to liberalise services sectors under the GATS could be highjacked by all manner of requests for superfluous cover letters, side letters, representations and warranties that bear no conceivable relation to the levels of specific commitments in the modifying Member's Schedule.

14. Second, India's expansive definition of what constitutes a compensatory adjustment would render the procedure of Article XXI of the GATS and of S/L/80 simply unworkable. By definition, it would be impossible for the modifying Member entering into negotiations under Article XXI:2(a) to propose further amendments to its GATS Schedule to compensate for modifications that are trade-liberalising in the first place. Given such “compensatory adjustments” would be entirely unrelated to commitment levels, it would likewise be impossible for arbitrators to ascertain whether any such "compensatory adjustments" result in general commitment levels not less favourable to trade. Finally, there would be no "equivalent benefits" that the affected Member could modify or withdraw in its Schedule exclusively against the modifying Member under Article XXI:4(b) of the GATS.

15. Third, as we have addressed in our written submission, India invites the Arbitration Body to usurp the exclusive jurisdiction of the dispute settlement system. India's claims that Australia's proposed modification violates the GATS are properly addressed under Article XXIII of the GATS, and reserved to panels and the Appellate Body acting under the Dispute Settlement Understanding. The Arbitration Body is not permitted to expand its jurisdiction beyond the terms of reference and to digress into matters for the Dispute Settlement Body.

V. CONCLUSION

16. Mr. Chairman, distinguished members of this Arbitration Body, Article XXI of the GATS and S/L/80 quite simply do not operate in the manner that India assumes. The systemic role of those provisions is narrow and limited to facilitating adjustments to Members' Schedules so as to allow for regulatory flexibility. It is well-established that those provisions do not look to the underlying validity of the process leading to a Member's proposed modifications, nor to any benefits beyond those which arise from Schedules of specific commitments. India's pursuit of its complaint before the Arbitration Body is misconceived and a regrettable waste of the multilateral opportunity to properly engage with Australia's Schedule modifications, as intended under Article XXI.

17. Australia is confident that the Arbitration Body will reject India's attempt to trample upon the fundamental right of Members to autonomously liberalise their services sectors. Australia is also confident that this Arbitration Body will reject India's attempt to re-write its terms of reference and confer upon it a jurisdiction that it does not have.

18. This concludes our opening statement. Australia thanks the Arbitration Body for its careful consideration and looks forward to responding to tits questions.