

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 RESPONSES TO QUESTIONS FROM THE ARBITRATION BODY
FOLLOWING THE MEETING WITH THE PARTIES**

18 October 2024

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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
INF/SDR/2	Joint Initiative on Services Domestic Regulation, Reference Paper on Services Domestic Regulation, circulated on 26 November 2021
MFN	Most-Favoured Nation
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
SDR JSI	Services Domestic Regulation Joint Statement Initiative
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?

Response to Question 1(a)

1. Yes. Please refer to paragraphs 42 and 43 of Australia's written submission.

Response to Question 1(b)

2. Australia agrees that, in order to execute the mandate provided for in paragraph 13 of S/L/80, an arbitration body must be satisfied that there is, to quote the language used in the Arbitration Body's question, "an imbalance in rights and obligations occasioned by the proposed modification" such that compensatory adjustment may be warranted. Australia emphasises, however, that the phrase "rights and obligations" is not used in paragraph 13 of S/L/80 to encapsulate all manner of rights and obligations conceived by the affected Member. In this regard, the phrase "rights and obligations" has to be understood in light of the immediate context provided by paragraph 13 itself and Article XXI of the GATS. For reasons set forth in Australia's written submission, the rights and obligations referred to in paragraph 13 can only be those arising from the level of specific commitments in the relevant Schedule.¹

3. Hence, in order to establish whether there is an imbalance in such rights and obligations, the Arbitration Body must determine, as a threshold matter, whether Australia's proposed modification has detrimentally impacted the general level of commitments provided for in Australia's existing Schedule so as to warrant any "necessary" compensatory adjustment. Australia refers the Arbitration Body to paragraphs 43 to 45 of its written submission.

Response to Question 1(c)

4. Australia agrees that the benchmark for such comparison must necessarily be the Member's Schedule of specific commitments prior to negotiations. In such a case, the proposed modified Schedule should be compared against the existing Schedule, to determine whether there is any loss of existing rights afforded to an affected Member under that Schedule² - and therefore, whether there is any basis to continue the examination.

¹ Australia's written submission, paras. 35-46.

² Australia refers to our written submission at para. 36 and applicable reasoning at para. 65, on the issue of "loss".

Response to Question 1(d)

5. The comparison in Question 1(c) above would require the Arbitration Body to ascertain the content and scope of the proposed modification to determine whether it does – or even can – cause an imbalance of rights and obligations arising from the existing Schedule.

6. Australia's proposed modification cannot, and does not, alter the sectors and subsectors covered under its existing Schedule. Nor can it, or in fact does it, alter the limitations (or the absence thereof) already existing in Australia's Schedule.³ The result of Australia's modification is to facilitate the exercise of existing rights by ensuring that the market access and national treatment commitments under the GATS are supported by good regulatory practice. As such, the Arbitration Body must find that Australia's proposed modification results in a level of commitments more favourable to trade than that provided for in Australia's existing Schedule.

1.3 TO AUSTRALIA

QUESTION 4

Article XXI:5 mandates the Council for Trade in Services to "establish procedures for rectification or modification of Schedules." Article XXI of the GATS does not identify the types of "modifications" that should be subject to negotiations on compensatory adjustments and those that should not. Moreover, Paragraph 4 of S/L/84 recognises that where an objection to a modifying Member's certification is not withdrawn, the modifying Member may initiate the modification procedures under S/L/80. In light of these provisions, could Australia please elaborate on the following assertion at paragraph 9 of its opening statement?

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.

³ In support of these submissions, Australia refers to paras. 70-71 of its written submission, to the Summary of the SDR JSI at Annex A of its written submission and also to the facially evident characteristics of Australia's proposed modification.

Response

7. The S/L/84 procedure provides a streamlined process by which Members can consider individual requests for the introduction of changes to existing Schedules deemed as new commitments, improvements of commitments, or changes of a purely technical character. It was established to address the recognition by WTO Members that not all modifications under Article XXI of the GATS would involve negotiations on compensation and arbitration, as envisaged under the S/L/80 procedure. Modifications that improve existing commitments or do not alter the scope or the substance of the existing commitments would fall under S/L/84 and therefore benefit from a simplified procedure.

8. As Australia points out at paragraph 9 of its opening statement, India's withdrawal of objections concerning the certification requests of the other 50-odd Members amounts to a tacit acknowledgement that the changes proposed by those Members constitute improvements to existing Schedules that do not require negotiations on compensation. As Australia set out in its written submission, the scope and substance of its proposed modification is identical to those certified modifications. Accordingly, like the other certified modifications, Australia's proposed modification must be deemed as an improvement to Australia's existing Schedule, which does not require compensation. As such, India's objections to Australia's proposed modification under S/L/80 is without basis and no compensatory adjustment is necessary.

9. Finally, Australia notes that while Article XXI of the GATS does not identify the types of "modifications" that should be subject to negotiations on compensatory adjustments, it identifies the objective of the negotiations as "reaching agreement on any *necessary* compensatory adjustment" (emphasis added). The fact that the modification process may have originated in S/L/84 does not exonerate the arbitrator acting under Article XXI:3 from determining whether compensatory adjustment is necessary in the first place.

II. AUSTRALIA'S INTENDED MODIFICATION OF ITS GATS SCHEDULE

2.1 TO AUSTRALIA

QUESTION 5

Please respond to India's argument, at paragraph 11 of its opening statement, that:

The existing GATS Schedule already uses the term 'Members' – referring to all WTO members. The additional commitment uses 'Member' to refer only to JI-SDR members. Australia's GATS Schedule would thus use the same phrase 'Member' with different meanings. (footnotes omitted)

Response

10. India's complaint, as quoted above, is baseless. India seeks to divorce specific references to "Member" in Australia's proposed modification from their context in order to artificially create purported ambiguities.

11. However, as Australia explained in paragraphs 121-125 of its written submission, when read in context, the references to "Member" in Australia's proposed modification can *only* be read as referring to the Member undertaking the additional commitments in question, in this case, Australia. In particular:

- a. pursuant to Article XX:1 of the GATS, each Member can only "set out in a schedule the specific commitments *it* undertakes under Part III of [the GATS]" (emphasis added). No Member can create new commitments for *other* Members; and
- b. no WTO Member can qualify the application of MFN through their Schedules, under Part III of the GATS. Accordingly, India's imagined interpretation of "Members" as "[SDR JSI] Members" in the relevant paragraphs of INF/SDR/2 cannot be viable under the GATS.

12. The language of Australia's intended modification is therefore clear on its face. The meaning of the term "Member" as it appears at various points in that modification can be readily ascertained.

QUESTION 6

Article XVIII of the GATS states that:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

In light of the text of Article XVIII, could Australia please elaborate on its assertion, at paragraph 4 of its closing statement, that its "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"?

Response

13. Australia's modification, which consists of additional commitments under Article XVIII of the GATS, only covers measures distinct from those under Articles XVI and XVII. As such, the rights and obligations provided through Australia's existing commitments under Articles XVI and XVII are legally distinct from those provided through Australia's intended modification, consistent with the language of Article XVIII of the GATS.⁴

14. Australia's proposed modification improves its existing commitments by reducing adverse effects of other measures not covered by Articles XVI and XVII of the GATS. The intended modification facilitates services trade by ensuring that opportunities created by market access and national treatment commitments under the GATS are supported by good regulatory practices.

15. Put another way, Australia's intended modification provides new enforceable rights to Members and *does not diminish existing rights and obligations* in Australia's Schedule. Rather than diminishing those existing rights, the modification in fact facilitates their exercise. As such, the modification results in both a general level of specific commitments which is more favourable to trade, *and* a balance of rights and obligations which is more favourable to other WTO Members, than existed in Australia's Schedule prior to negotiations.

⁴ Please also see Australia's written submission on this point, at paras. 70-71.