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

FINDINGS OF THE ARBITRATION

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|----------------|-----------------------------------|--|
| IND-1 | S/C/W/429 | Communication from Australia – Certification of Schedule of Specific Commitments, 16 March 2023 |
| IND-2 | S/L/477 | Communication from India – Notification of objection to Australia's request for certification of its Schedule of Specific Commitments, 18 April 2023 |
| IND-3 | S/SECRET/13 | Notification from Australia pursuant to Article XXI of the General Agreement on Trade in Services (GATS), 17 November 2023 |
| IND-4 | S/SECRET/13/CL/2 | Modification of Schedules – Invocation by Australia of Article XXI of the General Agreement on Trade in Services (GATS) – Notification of claim of interest from India, 2 January 2024 |
| IND-6 | | Draft letter of Australia (Without prejudice) |
| IND-8 | S/SECRET/13/ARB/1 | Negotiations under Article XXI of the General Agreement on Trade in Services (GATS) – Request for Arbitration, 31 May 2024 |
| IND-9 | S/SECRET/13/ARB/2 | Arbitration concerning Australia's intended modification of its Schedule of Specific Commitments under the GATS – Appointment of the Arbitration Body – Communication from the Secretariat, 27 August 2024 |
| IND-33 | | Proposed model for modification of the GATS Schedule |

ABBREVIATIONS USED IN THESE FINDINGS

| Abbreviation | Description |
|---------------------------|---|
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| GATS | General Agreement on Trade in Services |
| GATS Schedule | Schedule of Specific Commitments under the GATS |
| INF/SDR/2 | Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation |
| MFN | most-favoured-nation |
| S/L/80 | Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) – Modification of Schedules |
| S/L/84 | Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments |
| SDR | Services Domestic Regulation |
| WTO | World Trade Organization |

1 INTRODUCTION

1.1 Procedural background to these arbitration proceedings

1.1. On 16 March 2023, Australia requested the initiation of a certification procedure regarding "improvements" to its Schedule of Specific Commitments under the General Agreement on Trade in Services (GATS), pursuant to the "Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments" ([S/L/84](#)). Australia's proposed "improvements" were in the form of new additional commitments relating to services domestic regulation.¹

1.2. On 18 April 2023, India notified its objection to the certification of Australia's Schedule of Specific Commitments under the GATS (GATS Schedule).² This was followed by consultations between India and Australia on 12 June 2023, in accordance with Paragraph 2 of [S/L/84](#). These consultations did not result in a satisfactory solution of the matter, and India maintained its objection to the certification of Australia's GATS Schedule.³

1.3. On 17 November 2023, pursuant to Paragraph 4 of [S/L/84](#) and Paragraph 1 of the "Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) – Modification of Schedules" ([S/L/80](#)), Australia notified its intention to modify its GATS Schedule to incorporate additional commitments relating to services domestic regulation.⁴ On 2 January 2024, pursuant to Article XXI:2(a) of the GATS and Paragraph 3 of [S/L/80](#), India⁵ and South Africa⁶ identified themselves as "affected Members" and notified Australia of their respective claims of interest.

1.4. Pursuant to Paragraph 4 of [S/L/80](#), India and Australia held negotiations on 18 March and 10 April 2024 with a view to reaching an agreement.⁷ The period to conclude these negotiations was extended by mutual agreement until 19 April 2024.⁸ However, no agreement was reached.⁹

1.2 Request for arbitration by India

1.5. On 31 May 2024, India requested arbitration proceedings with Australia pursuant to Article XXI:3(a) of the GATS and Paragraph 7 of [S/L/80](#).¹⁰

1.3 Appointment of the Arbitration Body

1.6. In accordance with Paragraph 10 of [S/L/80](#), the parties informed the WTO Secretariat on 19 August 2024 of their mutual agreement on the appointment of the Arbitration Body. Further to the agreement of the parties, the Arbitration Body was appointed on 23 August 2024, with the following composition:

¹ Communication from Australia – Certification of Schedule of Specific Commitments, 16 March 2023, [S/C/W/429](#) (Exhibit IND-1).

² Communication from India - Notification of objection to Australia's request for certification of its Schedule of Specific Commitments, 18 April 2023, [S/L/477](#) (Exhibit IND-2). On 19 April 2023, South Africa also notified its objection to the certification of Australia's Schedule ([S/L/478](#)).

³ India's written submission, para. 36; Australia's written submission, para. 15.

⁴ Notification from Australia pursuant to Article XXI of the General Agreement on Trade in Services (GATS), 17 November 2023, [S/SECRET/13](#) (Exhibit IND-3).

⁵ Modification of Schedules – Invocation by Australia of Article XXI of the General Agreement on Trade in Services (GATS) – Notification of claim of interest from India, 2 January 2024, [S/SECRET/13/CL/2](#) (Exhibit IND-4).

⁶ Modification of Schedules – Invocation by Australia of Article XXI of the General Agreement on Trade in Services (GATS) – Notification of claim of interest from South Africa, 2 January 2024, [S/SECRET/13/CL/1](#).

⁷ India's written submission, para. 6; Australia's written submission, para. 17.

⁸ Communication from Australia and India – Mutual Agreement pursuant to Paragraph 4 of the Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) Modification of Schedules ([S/L/80](#)), 3 April 2024 [S/SECRET/13/E/2](#).

⁹ India's written submission, para. 7; Australia's written submission, para. 18.

¹⁰ Negotiations under Article XXI of the General Agreement on Trade in Services (GATS) – Request for Arbitration, 31 May 2024, [S/SECRET/13/ARB/1](#) (Exhibit IND-8).

Chairperson: Mr Ricardo RAMÍREZ HERNÁNDEZ

Arbitrators: Ms Deborah MILSTEIN
Mr Peter MORRISON¹¹

1.4 Arbitration proceedings

1.7. This Arbitration Body is the first to be appointed to undertake arbitration proceedings under [S/L/80](#).

1.8. Following consultation with the parties, the Arbitration Body adopted its Working Procedures¹² and Timetable¹³ on 30 August 2024. The Arbitration Body held a meeting with the parties on 30 September 2024. Pursuant to Paragraph 14 of [S/L/80](#), the Arbitration Body communicated its findings to the parties through the WTO Secretariat on 22 November 2024.

2 PARTIES' REQUESTS FOR FINDINGS

2.1. India submits that: (i) India's benefits under the GATS have been affected by the proposed modifications to Australia's GATS Schedule; and (ii) the compensatory adjustments that India requests are necessary to maintain the general level of mutually advantageous commitments not less favourable to trade.¹⁴ Consequently, India requests the Arbitration Body to grant compensatory adjustments.¹⁵ The requested compensatory adjustments require the following actions by Australia:

- a. India requests that Australia withdraw its certification request in its current form;
- b. Alternatively, India requests that Australia: (i) delete the reference to [INF/SDR/2](#) in its draft GATS Schedule; (ii) amend its certification request whereby the proposed modifications/improvements are appended separately to Australia's draft GATS Schedule under a separate title, "Disciplines on Services Domestic Regulation"; (iii) in the amended certification request, adopt the model proposed in Exhibit IND-33; and (iv) issue certain clarifications via a cover page to its certification request titled "Corrigendum";
- c. Alternatively, India requests that Australia: (i) delete the reference to [INF/SDR/2](#) in its draft GATS Schedule; (ii) amend its certification request whereby the proposed modifications/improvements are appended separately to Australia's draft GATS Schedule under a separate title, "Disciplines on Services Domestic Regulation"; and (iii) issue certain clarifications via a cover page to its certification request titled "Corrigendum".¹⁶

2.2. Australia requests that the Arbitration Body determine preliminarily that India's request for compensatory adjustments falls outside the Arbitration Body's terms of reference under Paragraph 13 of [S/L/80](#).¹⁷ In the alternative, Australia requests the Arbitration Body to find that no compensatory adjustments are necessary because Australia's proposed modification of its GATS Schedule "is trade liberalising and India has failed to demonstrate otherwise".¹⁸

¹¹ Arbitration concerning Australia's intended modification of its schedule of specific commitments under the GATS - Appointment of the Arbitration Body - Communication from the Secretariat, 27 August 2024, [S/SECRET/13/ARB/2](#) (Exhibit IND-9).

¹² Working Procedures of the Arbitration Body (Annex A).

¹³ Timetable for the Arbitration Proceedings (Annex B).

¹⁴ India's opening statement at the Arbitration Body's meeting with the parties, paras. 17 and 33; written submission, para. 134.

¹⁵ India's opening statement at the Arbitration Body's meeting with the parties, para. 34.

¹⁶ India's written submission, para. 130.

¹⁷ Australia's written submission, paras. 93 and 126.

¹⁸ Australia's written submission, paras. 101 and 127.

3 ANALYSIS

3.1 Overview

3.1. The contention between the parties in this arbitration originates from Australia's intention to modify its GATS Schedule.¹⁹ Australia's proposed modifications are in the form of "new additional commitments" relating to services domestic regulation.²⁰ Following Australia's notification of its intention, India and Australia (the parties) engaged in consultations pursuant to Paragraph 2 of [S/L/84](#), and subsequently engaged in negotiations pursuant to Paragraph 4 of [S/L/80](#). Both these engagements failed to resolve the disagreement between India and Australia. This resulted in India's recourse to arbitration pursuant to Article XXI:3(a) of the GATS and Paragraph 7 of [S/L/80](#).

3.2. Based on the written submissions by the parties, as well as the exchanges at our meeting with the parties, we consider the following to be the issues before us:

- a. Whether this Arbitration Body has the authority to address the matter referred to arbitration by India;
- b. Whether Australia's proposed modification of its GATS Schedule is sufficiently clear to allow for the comparison between the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations, and that provided for in Australia's GATS Schedule, if modified as proposed;
- c. Whether Australia's proposed modification of its GATS Schedule alters negatively the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that provided for in GATS Schedules prior to the negotiations between the parties, such that it warrants compensatory adjustments;
- d. If compensatory adjustments are warranted, what adjustments could restore the balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in GATS Schedules prior to the negotiations; and
- e. What constitutes the "findings of the arbitration" in these proceedings.

3.3. We address each of these issues in turn.

3.2 Whether this Arbitration Body has the authority to address the matter referred to arbitration by India

3.4. Australia asserts that in order to exercise its mandate, this Arbitration Body must determine, as a threshold issue, whether the matter presented to it by India engages its jurisdiction.²¹ In Australia's view, the matter that India referred to this Arbitration Body does not fall within the scope of arbitration proceedings under Article XXI:3(a) of the GATS.²² Australia also contends that India's "purported" request for compensatory adjustments falls outside the Arbitration Body's terms of reference under Paragraph 13 of [S/L/80](#).²³ Australia requests the Arbitration Body to "decline India's open invitation to rule outside of its clear mandate and issue findings that unduly restrict WTO Members' right under the GATS to liberalise their Schedules without hindrance."²⁴

3.5. India, for its part, argues that under Article XXI of the GATS, and in accordance with the Arbitration Body's terms of reference, this Arbitration Body possesses jurisdiction to examine benefits to India that may have been affected and compensatory adjustments offered by Australia or requested by India.²⁵ India elaborates that under Article XXI of the GATS and [S/L/80](#), this Arbitration Body is "invested with a broad jurisdiction" to examine: (i) any previous exchange or

¹⁹ Australia's written submission, para. 1.

²⁰ [S/C/W/429](#) (Exhibit IND-1) and [S/SECRET/13](#) (Exhibit IND-3).

²¹ Australia's written submission, para. 33.

²² Australia's written submission, paras. 3 and 8.

²³ Australia's written submission, para. 93.

²⁴ Australia's written submission, para. 8.

²⁵ India's written submission, para. 38.

agreement between Australia and India with respect to "compensatory adjustments"; (ii) the impact and/or effect of the modifications to the GATS Schedules proposed by Australia; and (iii) to find a resulting balance of rights and obligations that maintains mutually advantageous commitments as contained in the parties' GATS Schedules prior to the negotiations.²⁶

3.6. As mentioned above, this arbitration originates from Australia's notification of its intention to modify its GATS Schedule. Article XXI of the GATS governs WTO Members' modification of their GATS Schedules, including the possibility to access arbitration. As such, we begin our assessment of whether we have the authority to address the matter referred to arbitration by India by laying out our understanding of Article XXI of the GATS.

3.7. Article XXI:1(a) of the GATS permits WTO Members to modify or withdraw any commitments in their GATS Schedules at any time after three years have elapsed from the date on which those commitments entered into force, in accordance with the provisions of Article XXI. Pursuant to Article XXI:1(b) of the GATS, any Member seeking to modify or withdraw a commitment in its GATS Schedule ("modifying Member") must notify the Council for Trade in Services of its intention to modify or withdraw the commitment no later than three months before the intended date of implementation of the modification or withdrawal.

3.8. Following this notification, and at the request of any Member that considers that its benefits under the GATS may be affected ("affected Member") by the proposed modification or withdrawal, the modifying Member and the affected Member(s) shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment.²⁷ Article XXI:3(a) of the GATS contemplates the situation that presents in the proceedings before us; that is, a situation in which no agreement is reached between the modifying Member and any affected Member before the end of the period provided for negotiations. In this situation, the affected Member may refer the "matter" to arbitration, which is what India did on 31 May 2024.²⁸

3.9. We consider Article XXI:2(a) to be relevant to our understanding of what constitutes the matter referred to arbitration within the meaning of Article XXI:3(a) of the GATS. Article XXI:2(a) of the GATS states:

At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

3.10. Article XXI:2(a) identifies who may be an "affected Member" as well as the aim of the negotiations between the modifying Member and the affected Member. According to Article XXI:2(a), an affected Member is any WTO Member which can point to benefits under the GATS that may be affected by the proposed modification notified by the modifying Member. There is no explicit limitation in Article XXI:2 as to the nature of benefits under the GATS that would qualify a WTO Member as an "affected Member". As such, we understand that a WTO Member has the discretion to decide whether it considers itself to be an affected Member within the meaning of Article XXI:2(a).

3.11. Moreover, Article XXI:2(a) underlines that the aim of the negotiations between the affected Member and the modifying Member is to "reach[] agreement on any necessary compensatory adjustment". India suggests that a "compensatory adjustment" is a "change to something to counterbalance variations or to restore the initial equilibrium".²⁹ Australia submits that a "compensatory adjustment" is an alteration or modification in a manner that offsets for loss.³⁰ Both parties' suggested definitions converge on the notion that a "compensatory adjustment" is brought

²⁶ India's written submission, para. 48.

²⁷ Article XXI:2 of the GATS.

²⁸ [S/SECRET/13/ARB/1](#) (Exhibit IND-8).

²⁹ India's written submission, para. 47.

³⁰ Australia's written submission, para. 36.

about by the need to redress a loss or change to an initial state of affairs. The first part of the first sentence of Article XXI:2(a) informs our understanding that the "compensatory adjustment" referred to in this provision would be warranted to redress the benefits under the GATS owed to an affected Member that may be adversely impacted by a modifying Member's proposed modification of its GATS Schedule.

3.12. The purpose of the "compensatory adjustment" is further clarified by the second sentence of Article XXI:2(a), which provides that "[i]n such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations."³¹ This reinforces our understanding that for compensatory adjustments to be warranted, the modifying Member's proposed modification of its GATS Schedule should have affected adversely the "level of mutually advantageous commitments" (i.e. the benefits) resulting in a situation less favourable to trade than that provided for in GATS Schedules prior to the negotiations between the parties.

3.13. Given that the recourse to the arbitration in Article XXI:3(a) arises only if the modifying Member and affected Member fail to reach an agreement under Article XXI:2, we understand the "matter" to be referred to arbitration pursuant to Article XXI:3(a) as being identical to the subject of the failed negotiations in Article XXI:2. Accordingly, based on our understanding of paragraphs 2 and 3 of Article XXI, we agree with India that "the adjudicatory function of this Arbitration Body is to make a determination in the context of 'benefits [under GATS ...] that may have been affected'."³²

3.14. However, this context is not without limits. Article XXI:2 confines this Arbitration Body's assessment to India's affected benefits under the GATS only. Moreover, we understand paragraphs 2 and 3 of Article XXI to imply that the adjudicatory function of this Arbitration Body does not extend to an unfettered assessment of all of India's benefits under the GATS that may be affected. As discussed above, for compensatory adjustments to be warranted, it does not suffice for an affected Member to assert only that its benefits under the GATS would be impacted by a proposed modification of a modifying Member's GATS Schedule. Rather, the affected Member must demonstrate that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations. Hence, our engagement with the "matter" referred to arbitration is premised on a demonstration by India that Australia's proposed modification of its GATS Schedule would result in a situation less favourable to trade than that occurring in the GATS Schedules prior to the parties' negotiations.

3.15. This understanding of our authority is buttressed by the procedures adopted by the Council for Trade in Services for the modification of GATS Schedules. Article XXI:5 of the GATS instructs the Council for Trade in Services to establish procedures for the rectification or modification of GATS Schedules. Article XXI:5 underlines that any Member which has modified or withdrawn scheduled commitments under Article XXI shall modify its GATS Schedule according to the procedures developed by the Council for Trade Services. Importantly, Article XXI does not distinguish explicitly between the types of modifications that would warrant negotiations for compensatory adjustments and those that would not.

3.16. In 1999 and 2000, the Council for Trade in Services adopted two sets of procedures pursuant to the mandate in Article XXI:5 of the GATS. Starting in the reverse order, on 14 April 2000, the Council for Trade in Services adopted [S/L/84](#), which sets out procedures for the certification of modifications of GATS Schedules consisting of "new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments".³³ Pursuant to Paragraph 2 of [S/L/84](#), Members wishing to object to the certification of modifications of a modifying Member's GATS Schedule must submit a notification to the Secretariat for circulation to Members. The objecting Member(s) and the modifying Member are required to enter into consultations and endeavour "to reach a satisfactory solution of the matter".³⁴ Paragraph 4 of [S/L/84](#) indicates that if any of the objections are not withdrawn, the

³¹ Additionally, Article XXI:2(b) of the GATS provides that any compensatory adjustments must be made on a most-favoured-nation (MFN) basis.

³² India's written submission, para. 50 (emphasis omitted).

³³ [S/L/84](#), para. 1.

³⁴ [S/L/84](#), para. 2.

procedures under [S/L/84](#) "shall cease to apply". In this situation, the modifying Member may: (i) withdraw its proposed modifications; or (ii) initiate the procedures under [S/L/80](#).

3.17. On 19 July 1999, the Council for Trade in Services adopted [S/L/80](#). Paragraph 7 of [S/L/80](#) reiterates what is articulated in Article XXI:3(a) of the GATS; that is, if the modifying Member and affected Member do not reach agreement by the end of the negotiation period, the affected Member may request arbitration. Paragraphs 9 to 14 of [S/L/80](#) outline procedures relating to the arbitration proceedings contemplated in Article XXI:3(a) of the GATS.

3.18. As described in section 1.1 above, on 16 March 2023, Australia requested to initiate a certification procedure to modify its GATS Schedule, pursuant to [S/L/84](#).³⁵ On 18 April 2023, India notified its objection to the certification of Australia's GATS Schedule.³⁶ This was followed by consultations in accordance with [S/L/84](#), which did not result in a satisfactory solution of the matter. On 17 November 2023, pursuant to Paragraph 4 of [S/L/84](#) and Paragraph 1 of [S/L/80](#),³⁷ Australia notified its intention to modify its GATS Schedule to incorporate additional commitments relating to services domestic regulation.³⁸ On 2 January 2024, pursuant to Article XXI:2(a) of the GATS and Paragraph 3 of [S/L/80](#), India identified itself as an "affected Member" and notified Australia of its claim of interest.³⁹ Pursuant to Paragraph 4 of [S/L/80](#), India and Australia entered into negotiations with a view to reaching an agreement. The period to conclude these negotiations was extended by mutual agreement until 19 April 2024.⁴⁰ However, no agreement was reached. On 31 May 2024, India submitted a request for arbitration.⁴¹

3.19. We note that, to date, the majority of certification procedures initiated under [S/L/84](#) have not resulted in negotiations for compensatory adjustments under [S/L/80](#). However, the sequence of events leading to these arbitration proceedings, as well as the text of Paragraph 4 of [S/L/84](#), underline that proposed modifications that were originally notified under [S/L/84](#) may become the subject of negotiations for compensatory adjustments under [S/L/80](#). If these negotiations do not end in agreement, the matter may be referred to arbitration, pursuant to Paragraph 7 of [S/L/80](#). Moreover, we recall that Article XXI of the GATS, from which these two sets of procedures flow, does not explicitly distinguish between the types of modifications that would warrant negotiations for compensatory adjustments and those that would not. For these reasons, we do not find a basis to agree with Australia's suggestion that the modifications pursued under [S/L/84](#) are simply not the type of modifications that there is anything for which to compensate.⁴²

3.20. Bearing this in mind, we take note that Paragraph 13 of [S/L/80](#) sets out the Arbitration Body's terms of reference. The first sentence of Paragraph 13 provides that "[t]he arbitration body shall have the following terms of reference unless the parties to the arbitration agree otherwise within ten days from the request for arbitration". On 8 June 2024, India proposed to Australia the adoption of terms of reference for the Arbitration Body different to those set out in Paragraph 13 of [S/L/80](#). However, the parties did not agree on adopting these alternative terms of reference.⁴³

3.21. Therefore, this Arbitration Body's terms of reference are those set out in Paragraph 13 of [S/L/80](#), and communicated to the parties on 27 August 2024 as follows:

To 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

³⁵ [S/C/W/429](#) (Exhibit IND-1).

³⁶ [S/L/477](#) (Exhibit IND-2).

³⁷ Paragraph 1 of [S/L/80](#) states that:

A Member intending to modify or withdraw a scheduled commitment in accordance with Article XXI (the "modifying Member") shall transmit a notification to that effect, no later than three months before the intended date of implementation of such modification or withdrawal, to the Secretariat which will distribute the notification to all other Members in a secret document. The intention by a Member to modify or withdraw scheduled commitments shall be included in the agenda of the next meeting of the Council for Trade in Services.

³⁸ [S/SECRET/13](#) (Exhibit IND-3).

³⁹ [S/SECRET/13/CL/2](#) (Exhibit IND-4).

⁴⁰ India's written submission, para. 5; [S/SECRET/13/E/2](#).

⁴¹ [S/SECRET/13/ARB/1](#) (Exhibit IND-8).

⁴² Australia's responses to the Arbitration Body's questions at the meeting with the parties; response to Question 4 of the Arbitration Body's additional questions to the parties.

⁴³ India's written submission, para. 9; Australia's written submission, para. 24.

of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations. In such examination, the Arbitration body shall take into account any agreement reached, in negotiations under paragraph 4² above, between the modifying Member and any affected Member.⁴⁴

² Paragraph 4 of [S/L/80](#) states, in relevant part that "[t]he modifying Member and any affected Member ... shall negotiate with a view to reaching agreement within three months following the last date on which such a claim of interest may be made."

3.22. Additionally, during their negotiations under [S/L/80](#), Australia and India did not reach any agreement that could be taken into account by the Arbitration Body in its examination. Nor are we aware of an agreement reached between Australia and the other affected Member.⁴⁵

3.23. Accordingly, pursuant to Article XXI:3(a) of the GATS and Paragraph 13 of [S/L/80](#), this Arbitration Body's terms of reference are limited to: (i) examining the compensatory adjustments offered by Australia or requested by India, if any; and (ii) 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 GATS Schedules prior to the negotiations between India and Australia.

3.24. Paragraph 13 of [S/L/80](#) clarifies that the examination of the "compensatory adjustments" offered by Australia or requested by India 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 GATS Schedules prior to the negotiations. The instruction in Paragraph 13 for the Arbitration Body to find a "resulting balance of rights and obligations" appears to be a confirmation of the exhortation in Article XXI:2(a) of the GATS to employ the compensatory adjustments towards "maintain[ing] a general level of mutually advantageous commitments not less favourable to trade than that provided for in [GATS Schedules] prior to the negotiations."

3.25. As discussed above, based on our understanding of paragraphs 2 and 3 of Article XXI, we agree with India that "the adjudicatory function of this Arbitration Body is to make a determination in the context of 'benefits [under GATS ...] that may have been affected'."⁴⁶ Read together with Paragraph 13 of [S/L/80](#), we consider that compensatory adjustments would be warranted if India's benefits under the GATS may be affected by Australia's proposed modification of its GATS Schedule. If warranted, the purpose of the compensatory adjustments would be to restore the "balance of rights and obligations" that existed prior to the negotiations. This reading reinforces our understanding that for compensatory adjustments to be warranted, it does not suffice for India to assert that its benefits under the GATS may be impacted by Australia's proposed modification of its GATS Schedule. Rather, India must show that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations.

3.26. Our assessment of whether India has demonstrated that its benefits under the GATS would be so affected as to alter negatively the "level of mutually advantageous commitments" necessarily calls for a comparison. In this regard, we agree with both parties that the two aspects of comparison are the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations on the one hand, and that provided for in Australia's GATS Schedule, if modified as proposed, on the other hand.⁴⁷ These two Schedules should be compared to establish whether Australia's proposed modification results in a general level of mutually advantageous commitments less favourable to trade than that provided for in GATS Schedules prior to the negotiations.

3.27. A corollary of this need for comparison is that there must be clarity as to what are being compared. There is no debate between the parties as to the exact nature and scope of the commitments in Australia's GATS Schedule prior to the failed negotiations leading to these

⁴⁴ [S/SECRET/13/ARB/2](#) (Exhibit IND-9).

⁴⁵ On 17 November 2023, that is, on the same date as India, South Africa also identified itself as an "affected Member" and notified Australia accordingly ([S/SECRET/13/CL/1](#)).

⁴⁶ India's written submission, para. 50 (emphasis omitted).

⁴⁷ Australia's written submission, para. 45; India and Australia's responses to Question 1(c) of the Arbitration Body's additional questions to the parties.

arbitration proceedings. However, India repeatedly contends that Australia's proposed modification of its GATS Schedule "lacks clarity and specificity".⁴⁸ In response, Australia argues that its proposed modification of its GATS Schedule is "sufficiently specific and clear".⁴⁹ Hence, to the extent that it is relevant to establishing the baseline for comparison between the relevant GATS Schedules, the Arbitration Body will engage with the parties' arguments regarding the clarity and specificity of Australia's proposed modification of its GATS Schedule.

3.28. Beyond its contention that Australia's proposed modification of its GATS Schedule lacks clarity and specificity, India further posits that Australia's proposed modification "adversely impacts India's benefits" on two additional counts.⁵⁰ According to India, Australia's proposed modification of its GATS Schedule: (i) violates the consistency of the GATS multilateral framework (established mechanisms and trade bodies, such as the Council for Trade in Services)⁵¹; and (ii) undermines the single undertaking principle of the WTO.⁵² Australia, for its part, contends that any concerns arising from the single undertaking architecture of the WTO or from the GATS "multilateral framework" are not matters to be adjudicated by this Arbitration Body.⁵³

3.29. Pursuant to paragraphs 2 and 3 of Article XXI and Paragraph 13 of [S/L/80](#), we consider that we have the authority to examine whether the compensatory adjustments requested by India⁵⁴ would be warranted to redress India's benefits under the GATS that may be affected by Australia's proposed modification of its GATS Schedule. This examination would be premised on India's demonstration that its benefits under the GATS may be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations.

3.30. The language of paragraphs 2 and 3 of Article XXI and Paragraph 13 of [S/L/80](#) confines our assessment to the potential adverse impact on India's benefits under the GATS, as contained in GATS Schedules. We do not agree with India that the structural consistency of the GATS multilateral framework and the single undertaking principle are benefits under the GATS within the meaning of Article XXI:2(a) of the GATS. Neither has India demonstrated how or why a discourse on the structural consistency of the GATS multilateral framework or the single undertaking principle would contribute towards establishing whether compensatory adjustments would be warranted in this case. For these reasons, we agree with Australia⁵⁵ that opining on these issues is not within this Arbitration Body's terms of reference.

3.31. In sum, we reject Australia's assertion that the "matter" that India referred to this Arbitration Body does not fall within the scope of arbitration proceedings under Article XXI:3(a) of the GATS.⁵⁶ Instead, we find that, pursuant to paragraphs 2 and 3 of Article XXI of the GATS and Paragraph 13 of [S/L/80](#), we have the authority to address the "matter" referred to arbitration by India, insofar as our terms of reference are limited to: (i) examining the compensatory adjustments requested by India; and (ii) 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 GATS Schedules prior to the negotiations. In exercising this authority, we consider that for compensatory adjustments to be warranted, it does not suffice for India to assert that its benefits under the GATS may be impacted by the proposed modification of Australia's GATS Schedule. Rather, India must demonstrate that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations. Our assessment of whether India has demonstrated that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" necessarily calls for a comparison. The two aspects of this comparison are the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations on the one hand, and that provided for in Australia's GATS Schedule, if modified as

⁴⁸ See, for example, India's written submission, para. 97; and India's opening statement at the Arbitration Body's meeting with the parties, para. 9.

⁴⁹ Australia's written submission, para. 106. See also *ibid.* paras. 107-115.

⁵⁰ India's written submission, para. 96; India's opening statement at the Arbitration Body's meeting with the parties, para. 20.

⁵¹ India's written submission, paras. 96-97, and 115-120.

⁵² India's written submission, paras. 96-97, and 121-123.

⁵³ Australia's written submission, paras. 22 and 104.

⁵⁴ See para. 2.1 above.

⁵⁵ Australia's written submission, para. 22.

⁵⁶ Australia's written submission, para. 8.

proposed, on the other hand. There must be clarity as to what are being compared. Hence, to the extent that it is relevant to establishing the baseline for comparison between the relevant GATS Schedules, we will engage with the parties' arguments regarding the clarity and specificity of Australia's proposed modification of its GATS Schedule.

3.3 Whether Australia's proposed modification of its GATS Schedule is sufficiently clear

3.32. India argues that Australia's proposed modification of its GATS Schedule lacks clarity and specificity.⁵⁷ According to India, Australia's cross-referencing to [INF/SDR/2](#) in its proposed modification, instead of directly incorporating the relevant disciplines into its GATS Schedule, "does not reasonably communicate the substance of the commitments being undertaken with any certitude".⁵⁸ India submits that commitments must be inscribed in a GATS Schedule so that they are self-explanatory and readily understandable.⁵⁹ India further contends that, if [INF/SDR/2](#) were to be amended in the future, Australia's incorporation of this document by cross-referencing may lead to "the practically automatic and corresponding amendment" to Australia's GATS Schedule, without any remedy being available to affected WTO Members.⁶⁰

3.33. Australia responds that its proposed modification is both specific and clear.⁶¹ Australia maintains that its proposed modification refers to a specific section of a unique document, and that the content of the commitments it intends to undertake is fixed at the point in time when the document was "established", that is, on 26 November 2021.⁶² According to Australia, there "cannot be any uncertainty" regarding what is the referenced document, or how to find its content.⁶³ Australia submits that if, in the future, it needs to modify the additional commitments contained in its proposed modification, the procedures envisaged in the GATS, [S/L/80](#), and [S/L/84](#) – for the modification of GATS Schedules – would apply.⁶⁴

3.34. We note that Australia proposes to modify its GATS Schedule by adding the text below:

| Sector or Sub-sector | Limitations on Market Access | Limitations on National Treatment | Additional Commitments |
|---------------------------------------|------------------------------|-----------------------------------|---|
| ALL SECTORS INCLUDED IN THIS SCHEDULE | | | Australia undertakes as additional commitments the disciplines contained in Section II of document INF/SDR/2 for all sectors included in this Schedule. |

Source: [S/C/W/429](#) (Exhibit IND-1) and [S/SECRET/13](#) (Exhibit IND-3).

3.35. Both parties appear to acknowledge that the reference to "[INF/SDR/2](#)" in Australia's proposed modification is a reference to the document titled "Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation" ([INF/SDR/2](#)), published on 26 November 2021. [INF/SDR/2](#) is a publicly available document.⁶⁵ In presenting their arguments, both parties referred to the content of this document repeatedly.⁶⁶ Given the parties' apparent convergence of views, we understand the reference to [INF/SDR/2](#) in Australia's proposed modification to be to the document bearing this symbol, as it was published on 26 November 2021.

3.36. Through its proposed modification, Australia intends to undertake, as additional commitments for all sectors included in its Schedule, the disciplines contained in Section II of [INF/SDR/2](#), under

⁵⁷ India's written submission, paras. 98-102.

⁵⁸ India's written submission, para. 100.

⁵⁹ India's written submission, para. 112.

⁶⁰ India's written submission, para. 122.

⁶¹ Australia's written submission, paras. 10 and 106.

⁶² Australia's written submission, para. 111.

⁶³ Australia's written submission, para. 113.

⁶⁴ Australia's written submission, para. 120.

⁶⁵ WTO Documents Online, available at:

<https://docs.wto.org/dol2festaff/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/2.pdf&Open=True> (accessed on 18 November 2024).

⁶⁶ India's written submission, paras. 16, 67, 101, 103-105, and 117; opening statement at the Arbitration Body's meeting with the parties, para. 3; Australia's written submission, paras. 111, 121-122, and 124-125.

the heading "Disciplines on Services Domestic Regulation". Section II of [INF/SDR/2](#) consists of 22 paragraphs setting out disciplines applicable to measures "relating to licensing requirements and procedures, qualifications requirements and procedures, and technical standards affecting trade in services".⁶⁷ In our view, the text of Australia's proposed modification is clear insofar as it articulates Australia's intention to incorporate the disciplines contained in Section II of [INF/SDR/2](#) into its GATS Schedule.

3.37. We acknowledge India's concern that the cross-referencing to [INF/SDR/2](#) in Australia's proposed modification might lead to the automatic incorporation into Australia's GATS Schedule of any future amendments to [INF/SDR/2](#). However, we observe that, if Australia's GATS Schedule is modified as proposed, the disciplines contained in Section II of [INF/SDR/2](#), as published on 26 November 2021, will be incorporated by reference as additional commitments into Australia's GATS Schedule. This modified Schedule will form an "integral part" of the GATS.⁶⁸ Accordingly, the additional commitments will become subject to the rules on the modification of GATS Schedules established in Article XXI of the GATS and to the procedures in [S/L/80](#) or [S/L/84](#). Based on these rules and procedures, Australia's GATS Schedule cannot be modified automatically to reflect amendments to [INF/SDR/2](#). Rather, for any future amendment to [INF/SDR/2](#) to be incorporated into its GATS Schedule, Australia would need to successfully complete a new modification procedure pursuant to Article XXI of the GATS.

3.38. India argues that Australia's cross-referencing to [INF/SDR/2](#) in its proposed modification would create two separate regimes; one for the disciplines in [INF/SDR/2](#), and another for the existing commitments in Australia's GATS Schedule. According to India, any conflict arising between the two regimes may not be reconciled effectively.⁶⁹

3.39. Australia responds that the additional commitments under Article XVIII of the GATS only cover measures distinct from those under Articles XVI and XVII of the GATS, "by definition".⁷⁰ Australia maintains that the proposed modification made under Article XVIII leaves the rights and obligations provided in its GATS Schedule "intact and fully enforceable", and cannot create any conflict with Australia's existing commitments.⁷¹

3.40. We note that, while India alludes to a potential conflict, it has not identified any specific instance where the additional commitments referred to in the proposed modification would conflict with existing commitments in Australia's GATS Schedule.⁷² We also acknowledge that Australia's proposed modification of its GATS Schedule concerns "additional commitments" under Article XVIII of the GATS, which reads:

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.

3.41. Article XVIII allows Members to negotiate additional commitments concerning measures "not subject" to scheduling under Articles XVI and XVII.⁷³ Australia's proposed modification concerns additional commitments, distinct from existing specific commitments under Articles XVI and XVII of the GATS. Moreover, the text of Australia's proposed modification and the text of Section II of [INF/SDR/2](#) do not contain language that would modify Australia's existing commitments under Articles XVI and XVII in Australia's GATS Schedule.

⁶⁷ [INF/SDR/2](#), Section II, para. 1.

⁶⁸ Article XX:3 of the GATS reads: "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

⁶⁹ India's written submission, para. 99.

⁷⁰ Australia's written submission, para. 70.

⁷¹ Australia's written submission, paras. 71 and 119.

⁷² At the meeting with the parties, the Arbitration Body invited India to provide specific examples of a conflict between the proposed modification and existing commitments (Arbitration Body's questions at the meeting with the parties). India did not provide any such example.

⁷³ Article XVI of the GATS governs specific commitments relating to market access, while Article XVII concerns national treatment obligations.

3.42. In addition to the concerns regarding the scheduling technique employed by Australia, India has identified certain specific aspects of the proposed modification which, in its view, are not sufficiently clear.

3.43. India argues that the references in [INF/SDR/2](#) to "overlapping terms" such as "Member", "Members", "other Members", "professional body of Members", and "all Members of the WTO", could pose two main interpretive problems if incorporated into Australia's GATS Schedule.⁷⁴ First, India argues that these references could be read as creating new commitments binding on all Members, and not just Australia. According to India, one such instance concerns paragraph 8 of Section II of [INF/SDR/2](#), which provides that "[t]he competent authorities of a Member shall ensure that authorization, once granted, enters into effect without undue delay".⁷⁵ Second, India alleges that the lack of clarity as to the meaning of "Members" could lead to interpretations of Australia's additional commitments in a manner favourable to participants in the Joint Initiative on Services Domestic Regulation (SDR), discriminating against other WTO Members.⁷⁶

3.44. In Australia's view, the references to "Member" and "Members" in Section II of [INF/SDR/2](#) do not pose interpretive problems if read properly in their context.⁷⁷ Australia also contests India's reading of paragraph 8 of Section II of [INF/SDR/2](#). According to Australia, its proposed modification does not create new obligations for other Members; the proposed additional commitments would be binding on Australia only.⁷⁸ In this connection, Australia points to the language of Article XX:1 of the GATS to argue that no Member can create new commitments for other Members in its GATS Schedule.⁷⁹ Australia also objects to India's allegation that the proposed modification may discriminate against Members that did not take part in the Joint Initiative on SDR. Australia maintains that, pursuant to Article II of the GATS, the most-favoured-nation (MFN) treatment obligation applies to any measure covered by the GATS, and that unless an exemption is duly scheduled in accordance with Article II:2 of the GATS, no Member can qualify the application of MFN through their GATS Schedules.⁸⁰

3.45. By stipulating that "[e]ach Member shall set out in a schedule the specific commitments it undertakes", Article XX:1 of the GATS clearly links such commitments exclusively to the scheduling Member. Moreover, MFN treatment is a general obligation established in Article II:1 that applies to any measure covered by the GATS, irrespective of the commitments undertaken in Members' GATS Schedules. Thus, we agree with Australia that a Member's GATS Schedule cannot qualify the application of the MFN treatment obligation.

3.46. With reference to India's concerns over the use of "overlapping terms" such as "Member" and "Members" in Section II of [INF/SDR/2](#), we note the following.

3.47. Regarding India's concern that the proposed modification may introduce additional obligations for other WTO Members, Australia's proposed modification provides, in relevant part, that "Australia undertakes as additional commitments the disciplines contained in Section II of document [INF/SDR/2](#)".⁸¹ This language informs our understanding that Australia's proposed additional commitments are in the form of the disciplines contained in Section II of [INF/SDR/2](#). As discussed at paragraph 3.45 above, through Australia's proposed modification of its Schedule, the obligations in Section II of [INF/SDR/2](#) will be binding exclusively on Australia.

3.48. We also take note of India's concern that the benefits of the disciplines in Section II of [INF/SDR/2](#) would be enjoyed exclusively by the participants in the Joint Initiative on SDR, to the detriment of other WTO Members. Section II of [INF/SDR/2](#) does not explicitly limit the benefits of its disciplines to participants in the Joint Initiative on SDR. Absent any indication to the contrary, we

⁷⁴ India's written submission, para. 101; opening statement at the Arbitration Body's meeting with the parties, para. 5.

⁷⁵ India's written submission, para. 103 (quoting [INF/SDR/2](#), Section II, para. 8).

⁷⁶ India's written submission, paras. 104-105.

⁷⁷ Australia's response to Question 5 of the Arbitration Body's additional questions to the parties.

⁷⁸ Australia's written submission, paras. 122-123.

⁷⁹ Australia's written submission, para. 123; response to Question 5 of the Arbitration Body's additional questions to the parties.

⁸⁰ Australia's written submission, para. 125.

⁸¹ [S/C/W/429](#) (Exhibit IND-1) and [S/SECRET/13](#) (Exhibit IND-3).

read the unqualified references to "Members" as extending the benefits of the disciplines in Section II of [INF/SDR/2](#) to all WTO Members.

3.49. Additionally, we observe that, in the context of the negotiations mandated under Article XXI:2(a) of the GATS and paragraphs 3 and 4 of [S/L/80](#), Australia provided India with certain clarifications of its proposed modification of its GATS Schedule, through a "without prejudice" draft letter. Specifically, Australia offered the following clarifications:

- [T]he new additional commitments Australia intends to incorporate into its Schedule of Specific Commitments will be applied on a most-favoured-nation basis to all WTO Members;
- [T]he proposed modification only incorporates additional commitments into Australia's existing Schedule of Specific Commitments, and does not withdraw any benefit currently enjoyed by WTO Members pursuant to that Schedule; and
- [T]he proposed modification of Australia's Schedule of Specific Commitments pursuant to [S/L/80](#) is without prejudice to the outcome of other negotiations, and does not diminish rights or obligations of other WTO Members under the GATS, including Article VI:4.⁸²

3.50. We also observe that Australia made similar remarks at a meeting of the Working Party on Domestic Regulation, in the context of a discussion on [INF/SDR/2](#).⁸³ These clarifications and remarks reinforce our understanding of Australia's proposed modification of its GATS Schedule.

3.51. Based on the foregoing, we find that Australia's proposed modification is sufficiently clear to allow for the comparison between the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations, and that provided for in Australia's GATS Schedule, if modified as proposed.

3.4 Whether the proposed modification alters negatively the "level of mutually advantageous commitments"

3.52. We recall our finding that for compensatory adjustments to be warranted, India must demonstrate that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations. Our assessment of whether India's benefits under the GATS would be so affected calls for a comparison between the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations, on the one hand, and that provided for in Australia's GATS Schedule, if modified as proposed, on the other hand.⁸⁴

3.53. We recall further India's contention that the proposed modification affects its benefits under the GATS because it: (i) violates the structural consistency of the GATS multilateral framework; (ii) undermines the single undertaking principle; and (iii) lacks clarity and specificity.⁸⁵ We have found that India's arguments pertaining to the structural consistency of the GATS multilateral framework and the single undertaking principle are not within this Arbitration Body's terms of reference.⁸⁶ With respect to India's arguments regarding clarity and specificity, we have found, in section 3.3 above, that Australia's proposed modification is sufficiently clear to allow for a comparison between the level of commitments in Australia's GATS Schedule prior to the negotiations, and that in Australia's GATS Schedule, if modified as proposed. In arriving at this finding, we noted that India had not identified any instance where the additional commitments

⁸² Draft letter of Australia (Without prejudice) (Exhibit IND-6).

⁸³ Working Party on Domestic Regulation, Report of the Meeting held on 29 March 2022 – Note by the Secretariat, [S/WPDR/M/78](#), paras. 1.21-1.22. This document is referred to in footnote 19 of India's written submission.

⁸⁴ See para. 3.31 above.

⁸⁵ India's written submission, para. 97.

⁸⁶ See para. 3.30 above.

referred to in the proposed modification would conflict with existing commitments in Australia's GATS Schedule.⁸⁷

3.54. In alleging that its benefits under the GATS have been affected adversely, India contends that "Australia's intended modification restricts trade in services rather than facilitating it".⁸⁸ Australia asserts that India is making no claim that the proposed modification results in general levels of specific commitments that are less favourable to trade compared to existing commitments.⁸⁹ According to Australia, its proposed modification is not apt to lower the level of existing commitments in its GATS Schedule, and India has failed to establish that compensatory adjustments are necessary.⁹⁰ In Australia's view, its proposed modification results in "a general level of specific commitments which is more favourable to trade ... than existed in Australia's Schedule prior to negotiations."⁹¹

3.55. Despite a request from the Arbitration Body, India has not provided any specific example of how Australia's proposed modification alters the level of mutually advantageous commitments in a manner that is less favourable to trade than that provided for in Australia's GATS Schedule prior to the negotiations.⁹²

3.56. For these reasons, we find that India has not demonstrated that Australia's proposed modification of its GATS Schedule alters the level of mutually advantageous commitments resulting in a situation less favourable to trade than that provided for in GATS Schedules prior to the negotiations between the parties. Absent this demonstration by India, we find that compensatory adjustments are not warranted. Accordingly, the Arbitration Body considers it unnecessary to engage with the compensatory adjustments requested by India.

3.5 What constitutes the "findings of the arbitration" in these proceedings

3.57. During the course of this arbitration, the parties expressed different views as to what constitutes the "findings of the arbitration" in these proceedings. The divergence between the parties manifests in two respects. First, the parties disagree on whether the reference to "arbitration body's findings" in Paragraph 14 of [S/L/80](#) is synonymous with the reference to "the findings of the arbitration" in the last line of Paragraph 15 of [S/L/80](#). Second, regardless of the terminology, the parties disagree on what constitutes the findings of the arbitration that are to be circulated to WTO Members.

3.58. On the first issue, India asserts that the differences in terminology in Paragraphs 14 and 15, as well as the distinct circulation requirements under these two paragraphs, suggest that the phrases "arbitration body's findings" and "findings of the arbitration" are not synonymous. Instead, India contends that the "findings of the arbitration" in Paragraph 15 may refer to the conclusion relating to the resulting balance of rights and obligation that the Arbitration Body must find pursuant to its terms of reference, whereas the "arbitration body's findings" in Paragraph 14 may also include the detailed reasoning of the Arbitration Body.⁹³ Australia, for its part, refers to Paragraph 18 of [S/L/80](#)

⁸⁷ See para. 3.40 above.

⁸⁸ India's comments on Australia's response to Question 6 of the Arbitration Body's additional questions to the parties.

⁸⁹ Australia's written submission, para. 65.

⁹⁰ Australia's written submission, paras. 68 and 100. See also Australia's response to Question 6 of the Arbitration Body's additional questions to the parties.

⁹¹ Australia's response to Question 6 of the Arbitration Body's additional questions to the parties.

⁹² At its meeting with the parties, the Arbitration Body invited India to "elaborate on how Australia's intended modification of its Schedule, as reflected in [S/SECRET/13](#), alters the level of mutually advantageous commitments in a manner that is less favourable to trade than that provided for in Australia's Schedule prior to the negotiations" (Arbitration Body's question at the meeting with the parties). In its response to the Arbitration Body's question, India referred to arguments contained in its opening statement at the Arbitration Body's meeting with the parties. These arguments pertained to the alleged lack of clarity of Australia's proposed modification and the scope of the Arbitration Body's terms of reference (India's opening statement at the Arbitration Body's meeting with the parties, paras. 11-14, 27). In our view, nothing in India's arguments illustrates that Australia's proposed modification alters the level of mutually advantageous commitments in a manner that is less favourable to trade than that provided for in Australia's GATS Schedule prior to the negotiations.

⁹³ India's response to the Arbitration Body's question at the meeting with the parties; response to Question 7 of the Arbitration Body's additional questions to the parties.

to posit that the phrases in Paragraphs 14 and 15 are synonymous grammatically, and when read in context.⁹⁴

3.59. We recall that Article XXI of the GATS governs the modification of Members' GATS Schedules. Article XXI:4 of the GATS refers to "the findings of the arbitration". Thus, the contention between the parties concerning the use of different terminology is confined to the language of [S/L/80](#), which provides, in relevant part:

14. The arbitration body's findings shall be communicated to the parties to the arbitration through the Secretariat within three months of the appointment of the arbitration body.

15. When an arbitration has been conducted in accordance with paragraphs 7 through 14 above, the modifying Member shall be free to implement a modification or withdrawal which is in conformity with the findings of the arbitration body after completing the certification procedure under paragraphs 20 to 22, and shall notify the date of implementation to the Secretariat for circulation to the Members of the WTO together with the findings of the arbitration.

16. If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

...

18. Modifications or withdrawals implemented in accordance with paragraph 16 shall be terminated if the modifying Member complies with the findings of the arbitration body under paragraph 14.

3.60. A literal reading of the paragraphs quoted above suggests to us that the phrases "arbitration body's findings"⁹⁵, "findings of the arbitration body"⁹⁶, and "findings of the arbitration"⁹⁷ are synonymous. Like Australia, we find support for our view in Paragraph 18. The first clause of Paragraph 18 refers to the modifications or withdrawals implemented in accordance with Paragraph 16, which indicates the recourse that an affected member may have when a modifying Member fails to comply with the "findings of the arbitration". The second clause of Paragraph 18 clarifies that the affected Member's actions under Paragraph 16 shall be terminated if the modifying Member complies with the "findings of the arbitration body". This second clause identifies "the findings of the arbitration body" as those communicated to the parties, pursuant to Paragraph 14, which used the possessive phrasing "arbitration body's findings". Thus, Paragraph 18 confirms that there is identity among the phrases "arbitration body's findings", "findings of the arbitration body", and "findings of the arbitration" as used in [S/L/80](#).

3.61. We observe that India attributes significance to the fact that the "arbitration body's findings" in Paragraph 14 are to be communicated to the parties, while the "findings of the arbitration" in Paragraph 15 are to be circulated to WTO Members.⁹⁸ However, we see no reason why the identity of the recipient of the findings would alter the literal meaning of the words in [S/L/80](#), read in their context. In any event, India's assertion ignores the fact that Paragraph 15 uses the phrases "findings of the arbitration body" and "findings of the arbitration" interchangeably.

⁹⁴ Australia's response to the Arbitration Body's question at the meeting with the parties; comments on India's response to Question 7 of the Arbitration Body's additional questions to the parties.

⁹⁵ [S/L/80](#), para. 14.

⁹⁶ Ibid., paras. 15 and 18.

⁹⁷ Ibid., paras. 15 and 16.

⁹⁸ India's response to the Arbitration Body's question at the meeting with the parties; response to Question 7 of the Arbitration Body's additional questions to the parties.

3.62. For these reasons, we find that the phrases "arbitration body's findings", "findings of the arbitration body", and "findings of the arbitration" in [S/L/80](#), are used synonymously. The second point of disagreement between the parties raises a more substantive issue for our consideration.

3.63. Citing the need to safeguard the confidentiality of these arbitration proceedings, India maintains that the entire finding of this Arbitration Body cannot be circulated to WTO Members.⁹⁹ India submits that the findings of the arbitration to be circulated to WTO Members refer only to the conclusion relating to the resulting balance of rights and obligation that the Arbitration Body must find pursuant to its terms of reference.¹⁰⁰ Australia disagrees, arguing that the findings of the arbitration under [S/L/80](#) must include reasons and conclusions. Australia suggests that, otherwise: (i) 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; and (ii) a modifying Member may be impeded in implementing the results of the arbitration under Paragraph 15.¹⁰¹

3.64. We observe that Article XXI:4 of the GATS, which refers to "the findings of the arbitration", does not specify the form or content of these findings. [S/L/80](#) is also silent in this regard. Accordingly, we revert to Article XXI of the GATS, which governs the modification of GATS Schedules, to seek guidance on what should constitute "the findings of the arbitration" for purposes of these proceedings.

3.65. As we discussed in section 3.2 above, Article XXI:3(a) of the GATS contemplates a situation in which no agreement is reached between the modifying Member and any affected Member. In this situation, the affected Member may refer the "matter" to arbitration. Thus, we understand the arbitration contemplated in Article XXI:3 to be the route which allows for the completion of the process of modifying a Member's GATS Schedule where the negotiations under Article XXI:2(a) have not resulted in an agreement.

3.66. Bearing this in mind, we note that Article XXI:4 of the GATS states:

(a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

3.67. Article XXI:4 highlights two roles of the findings of the arbitration. First, the findings of the arbitration provide the basis upon which a modifying Member may proceed with the modification of its GATS Schedule. Indeed, in order to complete the modification of its GATS Schedule, the modifying Member must comply with the findings of the arbitration. Second, where a modifying Member fails to comply with the findings of the arbitration, an affected Member that participated in the arbitration may "modify or withdraw substantially equivalent benefits". The affected Member must do so in conformity with the findings of the arbitration. This implies that the determination of what would constitute "substantially equivalent benefits" is necessarily informed by the findings of the arbitration.

3.68. Hence, the findings of the arbitration not only guide the behaviour of the modifying Member in the process of completing the modification of their GATS Schedule, but they also inform the behaviour of the affected Member in the event of the modifying Member's failure to comply with the findings. Accordingly, we consider that what is communicated as the "findings of the arbitration" must be sufficiently clear to fulfil the two roles identified in Article XXI:4 of the GATS. To achieve

⁹⁹ India's response to the Arbitration Body's question at the meeting with the parties.

¹⁰⁰ India's response to the Arbitration Body's question at the meeting with the parties; response to Question 7 of the Arbitration Body's additional questions to the parties.

¹⁰¹ Australia's comments on India's response to Question 7 of the Arbitration Body's additional questions to the parties.

this clarity, we consider that "the findings of the arbitration" should include the reasoning underpinning the arbitration body's conclusion.

3.69. Based on the foregoing, we find that there is identity among the phrases "arbitration body's findings", "findings of the arbitration body", and "findings of the arbitration" as used in [S/L/80](#). We consider that the findings of the arbitration should include the reasoning underpinning our conclusion below. In sum, this document in its entirety constitutes "the findings of the arbitration".

4 CONCLUSION

4.1. India has not demonstrated that Australia's proposed modification of its GATS Schedule alters the level of mutually advantageous commitments resulting in a situation less favourable to trade than that provided for in GATS Schedules prior to the negotiations between the parties. Absent this demonstration by India, we find that compensatory adjustments are not warranted.

Signed this 22nd day of November 2024 by:

Mr Ricardo RAMÍREZ HERNÁNDEZ
Chairperson

Ms Deborah MILSTEIN
Arbitrator

Mr Peter MORRISON
Arbitrator

ANNEX A

ARBITRATION CONCERNING AUSTRALIA'S INTENDED MODIFICATION OF ITS SCHEDULE OF SPECIFIC COMMITMENTS UNDER THE GATS

WORKING PROCEDURES OF THE ARBITRATION BODY

Adopted on 30 August 2024

General

1. (1) In these proceedings, the Arbitration Body shall follow the relevant provisions of the *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) – Modification of Schedules (S/L/80)*. In addition, the following Working Procedures shall apply.
 - (2) The Arbitration Body reserves the right to modify these procedures and adopt additional procedures, as necessary, after consultation with the parties.
 - (3) These arbitration proceedings shall be conducted exclusively in English.
 - (4) The Arbitration Body shall be assisted by the WTO Secretariat.

Confidentiality

2. (1) These arbitration proceedings are confidential.
 - (2) The deliberations of the Arbitration Body shall be confidential, and the documents submitted to it shall be treated as confidential and shall be made available only to the parties. Parties shall treat as confidential all the information that is submitted to the Arbitration Body, including the information disclosed at the meeting with the parties.
 - (3) Upon request, the Arbitration Body may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.
 - (4) Nothing in these Working Procedures shall preclude a party from disclosing statements of its own positions to the public following the circulation of the findings of the arbitration to WTO Members in accordance with Paragraph 15 of [S/L/80](#).

Submissions

3. (1) Each party to the arbitration proceedings shall transmit to the Arbitration Body one (1) written submission in which it presents the facts of the case and its arguments, and all evidence in support of its submission, except evidence necessary for answers to questions, in accordance with the timetable adopted by the Arbitration Body.
 - (2) The Arbitration Body may invite the parties to make additional submissions during the proceedings.
 - (3) There shall be no *ex parte* communications with the Arbitration Body concerning matters under consideration by the Arbitration Body. Any communication by a party to the Arbitration Body must be sent simultaneously to the other party.

Evidence

4. Each party shall submit all evidence to the Arbitration Body in accordance with paragraph 3 of these Procedures.

5. Exceptions regarding the submission of evidence may be granted upon a showing of good cause. If any new evidence has been admitted upon a showing of good cause, the Arbitration Body shall accord the other party an opportunity to comment on the new evidence submitted.
6.
 - (1) To facilitate the maintenance of the record of the arbitration proceedings and maximize the clarity of submissions, each party shall sequentially number its exhibits throughout the course of the proceedings, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by India should be numbered IND-1, IND-2, etc. Exhibits submitted by Australia should be numbered AUS-1, AUS-2, etc. If a party withdraws one or more exhibits, or submits one or more exhibits intentionally blank, it should indicate "exhibit withdrawn"; or "exhibit left intentionally blank", respectively.
 - (2) Each party shall provide a complete list of its exhibits in Word or Excel format. This list is to be submitted simultaneously with the submissions, in accordance with paragraph 3 of these Procedures.
 - (3) If a party includes a hyperlink to the content of a website in a submission and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with the date that it was accessed.
 - (4) Any publicly available WTO document that is relied on by either party need not be submitted as an exhibit, provided that the party indicates the document's official WTO document symbol. Such publicly available WTO documents shall be deemed to form part of the record of the arbitration proceedings.

Meeting

7. Subject to consultation with the parties, the Arbitration Body may hold a meeting with the parties.
8. The meeting shall be held at the WTO in Geneva, Switzerland. Participation at the meeting shall be in person, to the extent possible. The Secretariat will provide a secure video link to enable observation of the meeting by members of the parties' delegations who will not be participating in person.
9. Only the Secretariat will record the entirety of the meeting. The recording of the meeting will form part of the record of these arbitration proceedings. The parties have a responsibility to ensure that no member of their respective delegations (attending in person or virtually) records this meeting in whole or in part. Such audio or visual recording of the meeting is prohibited.
10.
 - (1) Each party has the right to determine the composition of their respective delegations when meeting with the Arbitration Body.
 - (2) Each party shall have the responsibility for all members of their respective delegations and shall ensure that each member of their delegation acts in accordance with [S/L/80](#) and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.
11. Each party shall provide to the Arbitration Body the list of members of their delegation no later than 5.00 p.m. (Geneva time) three (3) working days before the meeting.
12. The meeting will be conducted exclusively in English, with no simultaneous interpretation to the other WTO working languages.
13. The meeting shall be conducted as follows:
 - a. The Arbitration Body shall invite India to make an opening statement to present its case first. Subsequently, the Arbitration Body shall invite Australia to present its point of view.

Before each party takes the floor, it shall provide the Arbitration Body and the other participants at the meeting with a provisional written version of its statement.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to no more than 20 minutes. If either party considers that it requires more time for its opening statement, it should inform the Arbitration Body and the other party at least three (3) working days before the meeting, together with an estimate of the expected duration of its statement. The Arbitration Body will accord equal time to the other party, noting that the total time that each party will have for its opening statement shall not exceed 30 minutes.

c. After the conclusion of the opening statements, the Arbitration Body shall give each party the opportunity to make comments.

d. The Arbitration Body shall subsequently pose questions to the parties. Owing to the time limitations of these proceedings, it is expected that parties should be able to respond orally, and as comprehensively as possible, to the Arbitration Body's questions.

e. Once the questioning has concluded, the Arbitration Body shall afford each party an opportunity to present a brief closing statement, with Australia presenting its statement first. Before each party takes the floor, it shall provide the Arbitration Body and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement, and a final written version of any prepared closing statement that it delivered at the meeting, no later than 5:00 p. m. (Geneva time) on the working day following the meeting.

ii. The Arbitration Body shall send in writing, within the timeframe foreseen in the timetable adopted by the Arbitration Body, any questions to the parties to which it wishes to receive a response in writing.

iii. Each party shall respond in writing to the questions from the Arbitration Body within the timeframe foreseen in the timetable adopted by the Arbitration Body.

iv. Each party shall have the opportunity to comment on the other party's written responses to the Arbitration Body's questions within the timeframe foreseen in the timetable adopted by the Arbitration Body.

14. The Arbitration Body reserves the right to adopt additional working procedures governing a meeting with remote participation, as necessary.

Questions

15. The Arbitration Body may, at any time during these proceedings, ask questions or seek clarifications from the parties.

16. The Arbitration Body shall endeavour to provide the parties with an indicative list of questions that the Arbitration Body intends to raise during the meeting one (1) working day before the meeting by 5:00 p. m. (Geneva time). The Arbitration Body may ask additional questions at the meeting.

Right to seek information

17. Pursuant to Paragraph 11 of [S/L/80](#), the Arbitration Body may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. The Arbitration Body shall inform the parties of any consultations with experts and provide an opportunity for the parties to comment on the results of such consultations.

Arbitration Body's findings

18. In accordance with Paragraph 14 of [S/L/80](#), the Arbitration Body's findings shall be communicated to the parties through the Secretariat within three months of the appointment of the Arbitration Body.
19. The Arbitration Body's findings shall be kept strictly confidential before the official circulation to all WTO Members of the findings of the arbitration in accordance with Paragraph 15 of [S/L/80](#).

Service of documents

20. The following procedures regarding service of documents apply to all documents submitted by the parties during the proceedings:
 - a. Each party shall submit all documents to the Arbitration Body via the email address [REDACTED] by 5:00 p.m. (Geneva time) on the due dates established by the Arbitration Body. The electronic version of submissions sent to this email address shall constitute the official version for the purposes of submission deadlines and the record of the arbitration proceedings. All emails sent by the parties and to this email address must be copied to the other party.
 - b. The Arbitration Body shall provide the parties with questions, the Arbitration Body's findings, as well as all other documents or communications issued by the Arbitration Body during the proceedings, via the email address [REDACTED].
 - c. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be submitted to the Arbitration Body through the Secretariat, and to the other party, in an electronic medium acceptable to the recipient. The party wishing to submit such exhibits should contact the WTO Secretariat at the email address [REDACTED] to arrange a specific date and time for the alternative submission of the exhibits to the Arbitration Body. Any such communication must be copied to the other party as appropriate, identifying the numbers of the exhibits that cannot be transmitted by email.

Correction of clerical errors

21. The Arbitration Body may grant leave to a party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.
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ANNEX B**ARBITRATION CONCERNING AUSTRALIA'S INTENDED MODIFICATION OF ITS SCHEDULE OF SPECIFIC COMMITMENTS UNDER THE GATS****TIMETABLE FOR THE ARBITRATION PROCEEDINGS****Adopted on Friday, 30 August 2024**

India requested arbitration on Friday, 31 May 2024

Arbitration Body appointed on Friday, 23 August 2024

| | Description | Date |
|-----|---|--|
| 1. | Appointment of the Arbitration Body | Friday, 23 August 2024 |
| 2. | Draft Working Procedures and timetable sent to the parties | Tuesday, 27 August 2024 |
| 3. | Parties' written comments on the draft Working Procedures and timetable | Wednesday, 28 August 2024 (noon Geneva time) |
| 4. | Organizational meeting (virtual meeting) | Thursday, 29 August 2024 (2.30 p.m. Geneva time) |
| 5. | Adoption of the Working Procedures and Timetable | Friday, 30 August 2024 |
| 6. | Written submission of India | Tuesday, 10 September 2024 |
| 7. | Written submission of Australia | Monday, 23 September 2024 |
| 8. | Arbitration Body communicates indicative list of questions to parties | Friday, 27 September 2024 |
| 9. | Arbitration Body meeting with the parties (held in person at WTO, Geneva) | Monday, 30 September 2024 |
| 10. | Additional written questions from the Arbitration Body to the parties (if any) | Tuesday, 8 October 2024 |
| 11. | Parties' written responses to the Arbitration Body's questions (if any) | Friday, 18 October 2024 |
| 12. | Parties' written comments on each other's responses to the Arbitration Body's questions | Thursday, 24 October 2024 |
| 13. | Communication of Arbitration Body's findings to the parties | Friday, 22 November 2024 |

* The above calendar may be changed in light of unforeseen developments. Additional meetings with the parties may be scheduled if required. The Arbitration Body reserves the right to request additional information from the parties at any time in the course of the proceedings.