

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 WRITTEN SUBMISSION

23 September 2024

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Short Title	Full Case Title and Citation
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R , adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>EC – Citrus</i>	GATT Panel Report, <i>European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region</i> , L/5776, unadopted 7 February 1985
<i>US - Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R , adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R , adopted 27 January 2000, DSR 2000:II, p. 815

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
APEC	Asia-Pacific Economic Cooperation
CTS	Council for Trade in Services
Declaration	Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129, circulated on 2 December 2021
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
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
JSI	Joint Statement Initiative
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
MFN	Most-Favoured-Nation
modifying Member	A "modifying Member" as defined in Article XXI:1(a) of the General Agreement on Trade in Services
OECD	Organisation for Economic Cooperation and Development
Reference Paper	Joint Initiative on Services Domestic Regulation, Reference Paper on Services Domestic Regulation, INF/SDR/2, circulated on 26 November 2021

Abbreviation	Full Form or Description
Schedule	Schedule of Specific Commitments under the General Agreement on Trade in Services
Scheduling Guidelines	Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, S/L/92, adopted by the Council for Trade in Services on 23 March 2001
SDR JSI	Services Domestic Regulation Joint Statement Initiative
USD	United States Dollar
WTO	World Trade Organization

LIST OF EXHIBITS

Exhibit No.	Exhibit Name	Short Title
AUS-1	India's proposed terms of reference for Arbitration with Australia under Article XXI of GATS	India's proposed ToR for Arbitration
AUS-2	Definition of 'Adjustment' in the online Oxford English Dictionary	'Adjustment' definition
AUS-3	Definition of 'Compensatory' in the online Oxford English Dictionary	'Compensatory' definition
AUS-4	Definition of 'Compensation' in the online Oxford English Dictionary	'Compensation' definition
AUS-5	Definition of 'Benefit' in online Oxford English Dictionary	'Benefit' definition
AUS-6	WTO and OECD – Services Domestic Regulation in the WTO; Cutting Red Tape, Slashing Trade Costs and Facilitating Services Trade	WTO and OECD – SDR in the WTO
AUS-7	WTO Document Nomenclature	WTO Document Nomenclature

I. INTRODUCTION

1. This arbitration concerns Australia's proposed modification to its Schedule of specific commitments to undertake additional commitments, pursuant to Article XVIII of the General Agreement on Trade in Services (GATS), resulting from Australia's participation in the Services Domestic Regulation Joint Statement Initiative (SDR JSI).¹

2. This is the very first time that an arbitration body has been composed under Article XXI of the GATS to examine compensatory adjustments and "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 the modifying Member's existing Schedule.²

3. However, Australia submits that the matter presented by India to this Arbitration Body does *not* constitute a proper use of the arbitration procedure foreseen in Article XXI:3(a) of the GATS. That arbitration procedure is governed by explicit terms of reference that Members have carefully delineated in paragraph 13 of S/L/80. It is clear from paragraph 13, properly interpreted in the context of Article XXI, that the process exists to allow affected Members to seek necessary compensatory adjustments. That is, adjustments to offset any level of commitments that are less favourable to trade than that provided in the modifying Member's existing Schedule.

4. Yet, India does not engage these arbitral proceedings for that purpose. Instead, India engages these arbitral proceedings to address its policy concerns regarding Joint Statement Initiatives (JSIs) within the WTO. These matters are not relevant for the purpose of this arbitration. To the extent India considers it necessary to raise such concerns, it should do so in the appropriate fora, namely the General Council and the Ministerial Conference.

5. As Australia will demonstrate in this submission, its proposed modification to inscribe additional commitments arising from its participation in the SDR JSI is *trade liberalising*. By definition, trade liberalising commitments do not trigger necessary compensatory

¹ Communication from Australia, S/C/W/429, circulated on 16 March 2023, (Exhibit IND-1). For completeness, Australia has six Schedules of specific commitments. The proposed modification will apply to every sector where Australia has specific commitments.

² Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS), S/L/80, para. 13 (S/L/80).

adjustments because they do not, and cannot, detrimentally affect the level of specific commitments in the modifying Member's existing Schedule. Indeed, India's opposition to Australia's proposed Schedule modification does not concern the *substance* of the additional commitments that Australia intends to inscribe. Rather, India objects to the fact that these additional commitments have their genesis in a plurilateral JSI.

6. India has no valid claim. It raises issues which are not only without merit, but which the Arbitration Body is not vested with jurisdiction to examine. In particular, the legality or validity of the SDR JSI does not fall within the terms of reference of this Arbitration Body under paragraph 13 of S/L/80, properly interpreted in the context of Article XXI of the GATS. India demonstrates no relevant "loss" under those provisions. Nothing in Australia's cross-reference to Section II of document INF/SDR/2 in its proposed Schedule modification makes the legality or validity of the plurilateral process resulting in such document relevant to this Arbitration Body's mandate. The cross-reference is simply a recognised and legitimate mechanism for efficiently importing clear and specific language into Australia's Schedule.

7. Australia, like all other WTO Members, has the right to introduce new regulation and make the corresponding modification of its GATS Schedule in pursuit of its own policy objectives. What is relevant is whether the modification improves or detrimentally affects rights and, if the latter, whether compensatory adjustments are required. As the SDR JSI commitments are entirely liberalising, this is not the case here.

8. Australia will demonstrate 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. Australia respectfully requests the Arbitration Body 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.

9. In **Section II**, Australia provides an overview of the procedural background to these proceedings. Next, in **Section III**, Australia demonstrates that the purported compensatory adjustments requested by India falls outside this Arbitration Body's terms of reference for at least three fundamental reasons: (i) India fails to argue, and therefore cannot substantiate, that Australia's proposed modification is "less favourable to trade" and gives rise to necessary compensatory adjustments; (ii) India has, in any event, failed to articulate a request for

"compensatory adjustments" within the meaning of paragraph 13 of S/L/80 and Article XXI:2(a) of the GATS, properly interpreted; and (iii) India's claims of violations of the GATS and its objectives fall within the exclusive jurisdiction of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Each of these reasons provides an independent ground for this Arbitration Body to preliminarily conclude that the matter referred to it by India does not fall within its terms of reference.

10. Australia further demonstrates in **Section IV** that India has not and cannot demonstrate any loss to be compensated because the proposed modification is conclusively and irrefutably trade liberalising. Consequently, the Arbitration Body need not engage in any further analysis to conclude that no compensatory adjustment is necessary. Nevertheless, in the event that the Arbitration Body were to conclude that the matter referred by India is properly within its terms of reference, Australia demonstrates in **Section V**, strictly on an *arguendo* basis, that India has failed to demonstrate that any benefits accruing to it under the GATS would be affected because Australia's proposed schedule modification is both specific and clear. Accordingly, even if this Arbitration Body were to conclude that India's request falls within its mandate, it should nonetheless find that India failed to establish that compensation is *in fact* "necessary" in accordance with the specific standard established under the terms of reference and Article XXI:2(a) of the GATS.

II. PROCEDURAL BACKGROUND

11. After several rounds of negotiations, on 2 December 2021, 67 WTO Members adopted the Declaration on the Conclusion of Negotiations on Services Domestic Regulation (Declaration) announcing the successful conclusion of negotiations of the SDR JSI.³ The Declaration attached a "Reference Paper on Services Domestic Regulation" (Reference Paper), which set out the new disciplines agreed between the participants. A summary of the SDR JSI provisions is at Annex A.

12. The SDR JSI is not a standalone WTO agreement. The new provisions agreed under the SDR JSI (as set out in the Reference Paper) are to be brought into the WTO framework by

³ Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129, circulated on 2 December 2021.

participating WTO Members incorporating, pursuant to Article XVIII of the GATS, the proposed additional commitments into their GATS Schedules.⁴

13. Consistent with the timeframes in the Declaration, many participants submitted their certification requests to the WTO Secretariat in December 2022. Due to the timing requirements of Australia's domestic parliamentary processes, Australia submitted its request on 16 March 2023.⁵

14. On 3 February 2023, India submitted objections against all certification requests under S/L/84 that had been circulated at that time. Subsequently, India objected to Australia's request on 18 April 2023.⁶

15. Australia held consultations with India under S/L/84 on 12 June 2023. These consultations were inconclusive, and unable to resolve India's objection.

16. In accordance with the procedures in S/L/84,⁷ as the objection was not withdrawn and Australia did not withdraw its proposed modification, on 17 November 2023, Australia initiated procedures under Article XXI of the GATS and S/L/80 to implement its modification.⁸

17. On 4 January 2024, India filed a notification of its claim of interest.⁹ As required by the procedures in S/L/80, Australia and India entered into negotiations.¹⁰ Australia held two rounds of negotiations with India under Article XXI of the GATS and S/L/80. Negotiations were held on 18 March 2024 and 10 April 2024.

18. Australia entered into those negotiations in good faith. Specifically, contrary to the contentions of India,¹¹ Australia actively sought to reach a compromise with India. The "without prejudice" Ambassador-to-Ambassador letter exhibited by India¹² was provided to India in the spirit of finding a middle ground between the Parties' respective positions. The clarifications provided in that letter were not offered as compensatory adjustments, within

⁴ Joint Initiative on Services Domestic Regulation, INF/SDR/2, s. I, Art. 7 (SDR JSI).

⁵ Communication from Australia, S/C/W/429, circulated on 16 March 2023, (Exhibit IND-1).

⁶ Communication from India, S/L/477, circulated on 18 April 2023, (Exhibit IND-2).

⁷ Procedures for the Certification of Rectifications or Improvements to the Schedule of Specific Commitments, S/L/84, para. 4 (S/L/84).

⁸ Notification from Australia pursuant to Article XXI of the General Agreement on Trade in Services (GATS), S/SECRET/13, circulated on 17 November 2023, (Exhibit IND-3).

⁹ Communication from India, S/SECRET/13/CL/2, dated 2 January 2024 (circulated on 4 January 2024), (Exhibit IND-4).

¹⁰ GATS, Art. XXI:2(a); S/L/80, paras. 3-4.

¹¹ India's written submission, paras. 6-7.

¹² See Draft Letter of Australia (Without Prejudice), (Exhibit IND-6).

the meaning of Article XXI:2(b) of the GATS and are incapable of constituting the same. In any event, despite Australia's efforts to address India's concerns through these good faith clarifications, India rejected that proposal and maintained its objection.

19. On 31 May 2024, India requested arbitration under Article XXI:3(a) of the GATS and paragraph 7 of S/L/80.

III. THE MATTER RAISED BY INDIA FALLS OUTSIDE THE ARBITRATION BODY'S TERMS OF REFERENCE

A. INTRODUCTION

20. In its written submission to this Arbitration Body, India essentially argues that the reference to "benefits [...] under this Agreement" in Article XXI:2(a) of the GATS operates to broaden the jurisdiction of this Arbitration Body to encompass claims of violation of Articles XVIII and XX of the GATS, as well as the institutional framework and decision-making rules reflected in Articles II:2, III:2, and IX of the Marrakesh Agreement.¹³

21. Properly interpreted, paragraph 13 of S/L/80 makes it clear that the mandate of this Arbitration Body is limited to:

- examining compensatory adjustments offered by Australia or requested by India that are necessary by virtue of a proposed modification or withdrawal of any commitments in a WTO Member's schedule; and
- 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 proposed modification or withdrawal.

22. 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. Nor are any claims of violation of GATS obligations or other nullification or impairment of benefits under the covered agreements, which, pursuant to Article 23.1 of the DSU, fall within the exclusive jurisdiction of WTO panels.

¹³ India's written submission, paras. 45-54.

23. India's blatant attempt to include broader political concerns into the terms of reference of this Arbitration Body is also evident from its request for purported compensatory adjustment. Rather than requesting any additional commitments that Australia could undertake in its GATS Schedule to further liberalise trade in services, India essentially seeks reassurance that Australia's proposed modification does not create a precedent for incorporating JSIs into the WTO, and confirmation that its rights and obligations under the GATS are fully preserved. These types of assurances evidently do not seek to offset any possible lower level of commitments less favourable to trade resulting from Australia's proposed Schedule modification.

24. Relevantly, India appears to be aware it faces challenges in bringing these issues within the scope of paragraph 13 of S/L/80. On 8 June 2024, India proposed alternate terms of reference for this Arbitration Body¹⁴ which sought to expand the mandate to include the operation of various provisions under the GATS and the Marrakesh Agreement. Such proposed terms encompassed many of the issues it now seeks to improperly bring within the Arbitration Body's terms of reference.¹⁵ If India thought such matters were covered by paragraph 13 of S/L/80, then there would have been no need for India to have suggested such alternative language.

25. As Australia will proceed to demonstrate in **Section II.B**, the terms of reference of this Arbitration Body are limited to an examination of any compensatory adjustments eventually "necessary" by virtue of Australia's proposed modification 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 Australia's Schedule prior to the proposed modification or withdrawal.

26. When assessed against the correct legal standard of paragraph 13 of S/L/80, India's request for a purported compensatory adjustment must fall outside of the terms of reference of this Arbitration Body. As Australia explains in **Section II.C**, India's claim is therefore entirely

¹⁴ India's written submission, para. 9.

¹⁵ For example, references to GATS, Art. VI:4, and language such as, "to modify its schedule of specific commitments [...] in light of the Marrakesh Agreement Establishing the World Trade Organisation (Marrakesh Agreement) and the GATS" and "Will not there be any implications of undertaking additional commitments on domestic regulation under Article XVIII of the GATS on the mandate entrusted to the Council for Trade in Services under Article VI:4 of the GATS". See India's proposed ToR for Arbitration, (Exhibit AUS-1).

outside the Arbitration Body's mandate and there is nothing for the Arbitration Body to examine, or "compensate", under Article XXI and the terms of reference.

27. Australia then demonstrates in **Section II.D** that compensatory adjustments must take the form of alternative modifications to Australia's existing Schedule in a manner that offsets any commitment levels that are less favourable to trade as a result of Australia's proposed modification. The types of requests made by India do not fall within the purview of this Arbitration Body.

28. Finally, India's purported request for compensatory adjustment seeks to offset alleged violations of the GATS and its objectives. As Australia demonstrates in **Section III.E**, Article 23(1) of the DSU reserves to WTO panels (and the Appellate Body) compulsory and *exclusive* jurisdiction to adjudicate claims of violations of the obligations provided under the covered agreements and of the objectives thereof. In doing so, India impermissibly seeks to expand the terms of reference of this Arbitration Body to encroach on the jurisdiction that the DSU reserves exclusively to WTO panels and to the Appellate Body.

**B. THE TERMS OF REFERENCE OF THIS ARBITRATION BODY UNDER PARAGRAPH 13
OF S/L/80 AND ARTICLE XXI OF THE GATS**

29. The present arbitration follows from the process initiated by Australia under S/L/84, and subsequently under S/L/80, to give legal effect to the additional commitments that Australia intends to inscribe in its Schedule of commitments pursuant to Article XVIII of the GATS. Article XXI of the GATS provides a framework of rules for the modification or withdrawal of specific commitments contained in a Member's Schedule, in a manner that strikes a balance between a Member's right to regulate trade in services and to introduce new regulation¹⁶ and the objective of achieving "progressive liberalization."¹⁷

30. That balance is reflected in a negotiating process which, on the one hand, gives effect to WTO Members' rights to modify or withdraw specific commitments made in its Schedule. On the other hand, the process also affords affected Members an avenue to seek necessary compensatory adjustments in the form of more liberal commitments elsewhere in the modifying Member's Schedule. In undertaking this negotiating process, Members shall

¹⁶ GATS, preamble.

¹⁷ GATS, preamble.

endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules prior to the proposed modification.

31. In furtherance of the mandate provided in Article XXI:5 of the GATS, the Council for Trade in Services (CTS) adopted detailed procedures for the modification of schedules under Article XXI of the GATS (document S/L/80). The procedures provide for a three month period for negotiations on compensatory adjustment between the modifying Member and any affected Member. The affected Member may request arbitration at the end of that period, if no agreement is reached during negotiations.

32. As relevant to the present arbitration, paragraph 13 of S/L/80 provides that the Arbitration Body shall have the following terms of reference:

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 of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations [...].¹⁸

33. Thus, the mandate of this Arbitration Body is: (i) to examine compensatory adjustments offered by Australia or requested by India that are necessary by virtue of Australia's proposed Schedule modification; and (ii) 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 in Australia's existing Schedule of specific commitments prior to the proposed Schedule modification. 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. It must not continue to examine a request which falls outside its terms of reference. Where the terms of reference are engaged, the Arbitration Body should determine whether compensatory adjustments are even necessary in light of the trade liberalising nature of Australia's proposed modification.

34. Australia addresses the elements of the Arbitration Body's terms of reference in turn.

¹⁸ Arbitration Concerning Australia's Intended Modification of its Schedule of Specific Commitments under the GATS, S/SECRET/13/ARB/2, para. 3, which states that the terms of reference of the Arbitration Body are in accordance with paragraph 13 of S/L/80.

1. Examination of compensatory adjustments

35. The first task of this Arbitration Body in accordance with the first clause of paragraph 13 of S/L/80 is to examine compensatory adjustments offered by Australia or requested by India.

36. The ordinary meaning of the term "adjustment" is "the action or process of adjusting something"; an "alteration" or "modification".¹⁹ The ordinary meaning of "compensatory" is to afford compensation.²⁰ "Compensation", in turn, means to "recompense for loss or damage".²¹ Accordingly, a "compensatory adjustment" is an alteration or modification in a manner that recompenses, or offsets²² for loss.

37. Australia submits that in the context of paragraph 13 of S/L/80 and Article XXI:2(a) of the GATS, the subject to be modified or altered by any "compensatory adjustment" is the modifying Member's Schedule.

38. This interpretation is corroborated by the immediate context provided both in the remainder of paragraph 13 of S/L/80 and in Article XXI:2(a) of the GATS. The second sentence of Article XXI:2(a) defines the purpose of both "negotiations" and "agreement" on compensatory adjustment as seeking "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."

39. This underscores, first, that the relevant "Schedules of specific commitments" are those of the parties to the negotiations. Second, the requirement to "maintain" the existing standard indicates that compensatory adjustments must necessarily take the form of improvements to the modifying Member's Schedule, such that the resulting level of commitments are "not less favourable to trade" than prior to negotiations.

40. This interpretation is corroborated by paragraph 13 of S/L/80, which empowers this Arbitration Body to determine whether compensatory adjustments result in a "balance of rights and obligations which maintains a general level of mutually advantageous commitments

¹⁹ 'Adjustment' definition, (Exhibit AUS-2).

²⁰ 'Compensatory' definition, (Exhibit AUS-3).

²¹ 'Compensation' definition, (Exhibit AUS-4).

²² See for example, GATT Panel Report, *EC – Citrus*, para. 4.37, addressing the equivalent provision under the GATT.

not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations."

41. Thus, compensatory adjustments are modifications to the modifying Member's Schedule of specific commitments, either requested by the affected Member or offered by the modifying Member, aimed at maintaining a general level of mutually advantageous commitments that are not less favourable to trade than that provided for in the modifying Member's schedule prior to the negotiations.

2. Determination of whether compensatory adjustments result in a balance of rights and obligations that maintain general levels of commitments not less favourable to trade

42. Paragraph 13 of S/L/80 further tasks the Arbitration Body with the mandate 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 negotiations." Paragraph 13 of S/L/80 gives effect to the second sentence of Article XXI:2(a). It empowers the arbitrators to substitute themselves for the modifying and affected Members in finding whether "any [...] compensatory adjustment" would result in a balance of rights and obligations that maintains "a general level of mutually advantageous commitments not less favourable to trade" than that provided for in the modifying Member's Schedule prior to the proposed modification or withdrawal.

43. The use of the term "resulting" in paragraph 13 links the balance of rights and obligations to the concept of compensatory adjustments. Accordingly, the "balance of rights and obligations" must result from the Arbitration Body's examination of compensatory adjustments offered or requested. This also confirms that any "balancing" of rights and obligations must take the form of modifications to a Member's Schedule of concessions through compensatory adjustments (if required). The Arbitration Body must ascertain whether such adjustments to the Schedule result in a balance of rights and obligations that maintains a general level of mutually advantageous commitments not less favourable to trade.

44. The text of paragraph 13 also clarifies the nature of proposed modifications to a Member's Schedule that would render compensatory adjustments "necessary" within the meaning of Article XXI:2(a). The reference to a general level of commitments "not less

favourable to trade" in both paragraph 13 and Article XXI:2(a) indicates that only modifications with a detrimental impact on the general level of commitments would require negotiations and agreement on compensatory adjustment. Conversely, those modifications which result in general levels of commitments more favourable to trade than that reflected in the modifying Member's Schedule, such as the one in the present case, do not require negotiations and agreement on compensatory adjustment.

45. Finally, paragraph 13 establishes the *benchmark* against which the Arbitration Body must assess compensatory adjustments. The Arbitration Body must compare the general level of specific commitments that would result from the compensatory adjustment offered or requested, against those provided for in the modifying Member's existing Schedule. It should determine whether the offered or requested compensatory adjustments result in a 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 proposed modification.

46. In sum, the text of paragraph 13 of S/L/80, interpreted in the context provided by Article XXI of the GATS, establishes that the mandate of this Arbitration Body is to examine compensatory adjustments (either proposed by the modifying Member or requested by affected Members) in the form of modifications to the modifying Member's Schedule of specific commitments to offset the modification or withdrawal of specific commitments that the modifying Member intends to implement. The Arbitration Body is further tasked with the mandate to determine whether such compensatory adjustments result in a balance of rights and obligations which maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the proposed modification.

3. India misinterprets the Arbitration Body's terms of reference

47. Against this background, Australia addresses some of the specific arguments made by India in its submission. India posits that the terms of reference of this Arbitration Body are sufficiently broad to encompass any "benefits" accruing to it under the GATS and the Marrakesh Agreement, including: (i) the need for clarity and specificity in Australia's Schedule

of specific commitments; (ii) the "preserved structural consistency of the GATS multilateral framework"; and (iii) the single undertaking architecture of the WTO.²³

48. India advances two interpretative arguments in support of its expansive reading of paragraph 13 of S/L/80. First, India posits that the "matter" that is referred to arbitration under Article XXI:3(a) of the GATS is "a reference to the failed negotiations between parties relating to the request of any Member the benefits of which under this Agreement may have been affected" under Article XXI:2(a).²⁴

49. Second, India maintains that the nature of benefits accruing to WTO Members under the GATS is not limited to monetary exchanges and bargains in the GATS Schedules. According to India, the terms of reference "refers to existing commitments in GATS Schedules only as a metric to measure the outcome, and not as adjudicatory limits of the Arbitration Body – which is required to balance 'rights and obligations' in the context of wider 'benefits under GATS that may have been' affected'."²⁵

50. As Australia will proceed to demonstrate, both lines of argument are entirely divorced from the text of paragraph 13 of S/L/80 when properly interpreted in the context of Article XXI of the GATS, and therefore totally devoid of merit.

(a) The matter referred to arbitration under Article XXI:3(a) of the GATS is "any necessary compensatory adjustment"

51. Pursuant to Article XXI:3(a) of the GATS, arbitration can only be requested in circumstances where "agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations". The subject matter of such "agreement" and "negotiations" is defined in the first sentence of Article XXI:2(a) as "negotiations with a view to reaching agreement on any necessary compensatory adjustment" arising from a proposed modification or withdrawal of commitments in a Member's schedule. The second sentence of Article XXI:2(a) further establishes that in such negotiations and agreement, the Members concerned "shall endeavour to maintain a general level of mutually

²³ India's written submission, para. 50.

²⁴ India's written submission, para. 50.

²⁵ India's written submission, para. 51.

advantageous commitments not less favourable to trade" than that provided in the existing Schedules.

52. Accordingly, the "matter" referred to the Arbitration Body is "compensatory adjustments" that the modifying Member and/or the affected Member(s) consider "necessary" to result in a balance of rights and obligations which maintains the general level of commitments not less favourable to trade than that provided in the existing Schedules. That is the only interpretation which is consistent with the plain meaning of the text of Articles XXI:2(a) and XXI:3(a) of the GATS.

53. In summary, the Arbitration Body's mandate does not encompass all manner of matters raised by an affected Member such as India, during negotiations. As Australia sets out below, it also does not encompass the specific so-called "benefits" raised by India in its request for compensatory adjustments.

(b) "Benefits" within the meaning of Article XXI:2(a) are only those provided through the modifying Member's GATS Schedule

54. Moreover, India is incorrect that the reference in Article XXI:2(a) to "benefits" under "this Agreement" effectively operates to expand the terms of reference of this Arbitration Body to encompass wider benefits under the GATS and the Marrakesh Agreement. Properly interpreted, the reference to "benefits" under the GATS that may be affected under Article XXI:2(a) is narrow and limited to the benefits provided through specific commitments in the modifying Member's GATS Schedule.

55. The ordinary meaning of "benefit" is "advantage" or "profit".²⁶ The concept of an "advantage" is essentially transactional in nature. An "advantage" is something which is gained, and which can also be lost. It does not exist in the abstract. It must be derived from something.

56. The immediate context of the term "benefits" is the first sentence of Article XXI:2:(a), which reads "[a]t the request of any Member the benefits of which under this Agreement may be affected [...] by a proposed modification or withdrawal notified under subparagraph 1(b),

²⁶ "Benefit" definition, (Exhibit AUS-5).

the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment". It confines the scope of such "benefits" in four ways. First, such "benefits" are apt to be "affected" by the proposed modification or withdrawal of specific commitments. Second, such "benefits" are limited to those "under this Agreement", i.e. the GATS. Third, "benefits" pertain to the affected Member specifically, rather than to a broader community, or general interests. Fourth, such "benefits", when "affected", are apt to be rebalanced by "any necessary compensatory adjustment" to the modifying Member's Schedule of commitments. Accordingly, the "benefits" that are "affected" by a Schedule modification must be of the same *nature* as the "compensatory adjustment" offered or requested in response, i.e. specific commitments in a Member's Schedule.

57. The second sentence of Article XXI:2(a) provides further context to understand the nature of the compensatory adjustment to be agreed in the negotiations mandated in the first sentence. It provides that any compensatory adjustment within the meaning of the first sentence must eventually be evaluated against the "level of [...] commitments [...] provided for in Schedules of specific commitments" prior to the negotiations. Since the nature of the "benefits" must be of the same nature as the compensatory adjustment, they must also closely relate to the "level" of "commitments" derived from the modifying Member's Schedule of specific commitments. In other words, the second sentence of Article XXI:2(a) further confines the scope of "benefits" to those derived from a specific part of the GATS, i.e. Members' Schedules of commitments.

58. Accordingly, the term "benefits" in Article XXI:2(a) means an "advantage[s]" derived from the commitments that the modifying Member made under its Schedule of specific commitments under the GATS.

59. This interpretation is supported by other paragraphs of Article XXI of the GATS. Specifically, Article XXI:4(b) uses the term "equivalent benefits" to directly equate the substance of "benefits" with the findings of the arbitration, i.e. whether the compensatory adjustments offered or requested result in a "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".

60. The term "benefits" or "benefit" is also used in other provisions of the GATS. For example, Article XXIII refers to a "benefit" that Members could "reasonably have expected to accrue to it under a specific commitment of another Member". If a Member considers that such "benefit" "is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement", such "affected" Member shall resort to dispute settlement under the DSU. This provision is significant as it sheds light in two ways on what the "benefits" under Article XXI:2(a) are and are not. First, it confirms that a "benefit" or "benefits" apt to be "affected" can only accrue to the Member "under a specific commitment of another Member" under Part III of the GATS, and not any other parts of the GATS. Second, not all such "benefits" are subject to the scope of negotiations and therefore the arbitration procedure under Article XXI of the GATS; only "benefits" affected or triggered by the modification of Schedules are. "Benefits" affected or triggered by a measure not in conflict with the GATS (i.e. non-violation) shall be subject to the review of a panel established under the DSU.

61. Other provisions of the GATS that contain the term "benefits", including footnote 13 of the GATS, and paragraph 4 of the Annex on Movement of Natural Persons, also confirm that "benefits" must be "under a specific commitment"²⁷ or accrued to a Member under "the terms of a specific commitment".²⁸

62. Australia's interpretation of "benefits" is also supported by the object and purpose of Article XXI of the GATS. To recall, Article XXI is housed under Part IV of the GATS, titled "Progressive Liberalization". Such "progressive liberalization" is in the form of increased "general level of specific commitments" undertaken by Members under the GATS.²⁹ Article XXI enables WTO Members to adjust such specific commitments to new circumstances or policy considerations. Accordingly, the "benefits" envisaged under Article XXI:2(a) cannot be something unrelated to the "level of specific commitments" achieved through "progressive liberalization" and crystallised in Members' Schedules.

²⁷ GATS, fn. 13.

²⁸ GATS, Annex on Movement of Natural Persons Supplying Services Under the Agreement, para. 4.

²⁹ GATS, Art. XIX:4.

**C. INDIA MAKES NO CLAIM THAT AUSTRALIA'S PROPOSED MODIFICATION RESULTS
IN LEVELS OF COMMITMENTS THAT ARE LESS FAVOURABLE TO TRADE**

63. In the previous sections, Australia has demonstrated that the terms of reference of this Arbitration Body are to examine necessary compensatory adjustments (either proposed by the modifying Member or requested by affected Members) in the form of modifications to the modifying Member's Schedule of specific commitments. The Arbitration Body is further tasked with the mandate to determine whether such compensatory adjustments result in a balance of rights and obligations which maintain a general level of mutually advantageous commitments not less favourable to trade than provided in the existing Schedule of specific commitments of the modifying Member.

64. When assessed against the correct legal standard of paragraph 13 of S/L/80, India's request for purported "compensatory adjustment" does not engage this Arbitration Body's terms of reference.

1. India makes no relevant claim of loss

65. To begin with, India simply makes no claim that Australia's proposed modification results in general levels of specific commitments that are less favourable to trade than that reflected in its existing Schedule, such that any compensatory adjustments are "necessary" in the first place. As explained above, a compensatory adjustment is an alteration or modification in a manner that recompenses or offsets for *loss*. India makes no relevant claim of loss, such that there is *nothing to compensate*.

66. India's entire complaint is in fact unrelated to the Arbitration Body's terms of reference, and therefore falls outside the scope of the Arbitration Body's authority. The Arbitration Body has no basis upon which to consider India's complaint further.

67. In any event, as Australia demonstrates in Section IV, its proposed modification is trade liberalising and results in a general level of specific commitments in respect of all WTO Members that are *more* favourable to trade than that provided for in its existing GATS Schedule.

2. Australia's proposed modification is incapable of causing loss

68. In fact, Australia's proposed modification is simply not apt to lower the level of commitments that Australia already undertook in its existing Schedule of specific commitments.

69. According to the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (Scheduling Guidelines), WTO Members should articulate "levels of commitments" in sectors and subsectors inscribed in their Schedule of specific commitments, with respect to each mode of supply.³⁰ Such "levels of commitments" must be expressed in the form of "presence or absence of limitations to market access and national treatment", ranging from no commitment ("Unbound") to full commitment ("None").³¹ Accordingly, the "level of specific commitments" provided for in a Member's Schedule is measured by: (i) the sectors and subsectors inscribed; and (ii) the limitations (or absence thereof) inscribed for each mode of supply under the market access and national treatment columns.

70. To recall, Australia's proposed modification takes the form of "additional commitments" under Article XVIII of the GATS which explicitly envisages the scheduling of undertakings on licensing, qualifications and standards - among other matters - as additional commitments. The draft Schedule attached to the proposed modification makes an entry in the "additional commitments" column for "all sectors included in this Schedule". India does not contest the placement or the scope of that entry. It is evident that: (i) such entry cannot alter the sectors and subsectors covered under Australia's existing Schedule; and (ii) such entry cannot alter the limitations (or the absence thereof) already existing in Australia's Schedule. *By definition*, the additional commitments under Article XVIII of the GATS only cover measures distinct from those under Articles XVI and XVII.³² Accordingly, there is no conceivable way in which the level of Australia's existing Schedule of specific commitments can be impacted, let alone negatively impacted, by the proposed modification.

³⁰ Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, s. II.C.3 (S/L/92).

³¹ S/L/92, para. 41.

³² See also SDR JSI, s. II, para. 2.

71. As a result, Australia's proposed modification does not diminish the rights and obligations which are provided in Australia's existing Schedule. Those rights and obligations will remain intact and fully enforceable, just as they were prior to negotiations. The result of Australia's modification is to facilitate the exercise of existing rights, and to provide new enforceable rights to Members. Therefore, as a threshold issue, the Arbitration Body has no claim upon which to exercise its mandate.

**D. INDIA HAS FAILED TO REQUEST PROPER COMPENSATORY ADJUSTMENTS UNDER
PARAGRAPH 13 OF S/L/80 AND ARTICLE XXI:2 OF THE GATS**

72. A second and independent reason for which this Arbitration Body must find that the matter referred to it by India does not fall within its terms of reference is India's failure to request compensatory adjustments within the meaning of paragraph 13 of S/L/80 and Article XXI:2 of the GATS.

73. As Australia noted earlier,³³ the term "compensatory adjustments", properly interpreted, must take the form of proposed modifications to Australia's Schedule of commitments. They must seek to offset modifications (or withdrawals) that are less favourable to trade than the levels of commitments provided for in Schedules of specific commitments prior to the proposed modification. It is well understood that compensation takes the form of more liberal bindings elsewhere in a modifying Member's Schedule.³⁴

74. Rather than requesting compensatory adjustments in the form of more liberal commitments in Australia's existing Schedule, India in effect requests that this Arbitration Body re-draft Australia's proposed modification in a manner that offsets purported "losses" to the multilateral framework of the WTO. These types of requests, and the alleged losses that India claims, do not fall within the purview of this Arbitration Body.

75. Each of India's three requests are an action in relation to Australia's proposed modification itself. Under paragraph 13 of S/L/80, the Arbitration Body's task is expressly directed at balancing rights and obligations which maintains a general level of mutually

³³ See above paras. 35-41.

³⁴ See for example, World Trade Organization, *A Handbook on the GATS Agreement* (Cambridge University Press, 2005), pp. 17-18. See also World Trade Organization, *GATS - Fact and Fiction* (Geneva, 2001), p. 13: "On request, 'compensation' may need to be negotiated with Members whose trade is affected. This does not mean monetary compensation, as some have alleged, but merely the replacement of the commitment withdrawn by another of equivalent value. This process is similar to the renegotiation of tariff bindings under the GATT, which has been in use for 50 years."

advantageous commitments not less favourable to trade than what existed before. This means that the proposed modification should remain intact and unchanged by the Arbitration Body. This conclusion is supported by the concept of "compensation", which is directed at *offsetting*, rather than removing or rolling-back the cause.

76. Indeed, the operation of Article XXI of the GATS is premised on a Member's right to modify its Schedule at its own will, provided that any necessary compensation adjustment is made *elsewhere* in a modifying Member's Schedule. India's purported requests for compensatory adjustments are not, in fact, compensatory adjustments *at all*.

77. Finally, India's argument that "prior practice" in negotiations on modifications supports its definition of compensatory adjustments, is without merit.³⁵ India's submission is speculation. It invents "hypothetical scenario[s]" based on incomplete information from selected past negotiations - and improperly seeks to rely on them as fact.³⁶ In any event, matters raised or even agreed during negotiations cannot expand the ordinary meaning of the term "compensatory adjustment/s" under Article XXI of the GATS or the Arbitration Body's terms of reference. Such matters are not, in fact, proof of the definition of a "compensatory adjustments".

**E. INDIA'S CLAIMS OF VIOLATION OF THE GATS AND ITS OBJECTIVES FALL OUTSIDE
THE ARBITRATION BODY'S TERMS OF REFERENCE**

78. As Australia has established above, India's broad interpretation of the Arbitration Body's terms of reference impermissibly expands the Arbitration Body's jurisdiction far beyond that which has been explicitly provided for in paragraph 13 of S/L/80. More concerning than that, however, is India's invitation for this Arbitration Body to encroach upon the jurisdiction that Members have exclusively reserved for panels and the Appellate Body in dispute settlement proceedings under the DSU.

79. Australia notes that India claims no less than *six* times in its written submission that Australia's proposed modification "violates" or "breaches" provisions of the GATS and its

³⁵ India's written submission, s. II.D.

³⁶ See for example, India's written submission, para. 94.

objectives.³⁷ In fact, claims of "violation" or "inconsistency" appear to underpin all of India's grounds for compensatory adjustments.

80. These claims demonstrate that, although India wrongly accuses Australia of not adhering to "the negotiated structure and text of the WTO agreements",³⁸ it is India that has disregarded the negotiated structure and text of the WTO agreements by basing its request for compensatory adjustment on alleged *violations* of the GATS and its objectives.

1. Panels and the Appellate Body have exclusive jurisdiction to examine alleged violations of the covered agreements

81. In this regard, Australia observes that the dispute settlement system of the WTO, as governed by the DSU, has compulsory and *exclusive* jurisdiction to make findings regarding violations of the obligations set forth in the covered agreements and of their objectives. This arises directly from Article 23(1) of the DSU, which provides that:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to, and abide by, the rules and procedures of this Understanding.* (emphasis added)

82. Article 23(2)(a) of the DSU further reinforces the exclusive jurisdiction of panels and the Appellate Body under the DSU. It makes clear that Members shall:

[N]ot make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, *except through recourse to dispute settlement in accordance with the rules and procedures of [the DSU], and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.* (emphasis added)

83. In *US/Canada – Continued Suspension*, the Appellate Body confirmed that Article 23 of the DSU "establishes the WTO dispute settlement system as the exclusive forum for the resolution of [...] disputes" regarding claims that "a violation has occurred, benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded".³⁹

³⁷ India's written submission, paras. 82, 97, 110, 113, 117 and 123.

³⁸ India's written submission, para. 66.

³⁹ Appellate Body Reports, *Canada – Continued Suspension*, para. 371; *US – Continued Suspension*, para. 371.

84. Similarly, the panel in *US — Section 301 Trade Act* noted that Article 23 "imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency [...] Members have to have recourse to the DSU dispute settlement system *to the exclusion of any other system*" (emphasis added).⁴⁰

2. The jurisdiction of the Arbitration Body does not overlap with that of panels and the Appellate Body

85. There is nothing in the DSU, the GATS or S/L/80 that suggests that there is any overlap in the jurisdiction of panels and the Appellate Body, and the jurisdiction of an arbitration body established pursuant to Article XXI:3(a) of the GATS.

86. The DSU makes no reference to the arbitration procedure established under Article XXI:3(a) of the GATS, the terms of reference of which are provided for in paragraph 13 of S/L/80.⁴¹ In turn, neither Article XXI of the GATS nor S/L/80 make reference to the DSU, other than the instruction in paragraph 11 of S/L/80 that the "*Rules of conduct* for the understanding on rules and procedures governing the settlement of disputes" shall apply when a matter is referred to arbitration under Article XXI:3(a) of the GATS.⁴²

87. It follows that the jurisdiction of an arbitration body established under Article XXI:3(a) of the GATS, on the one hand, and that of panels and the Appellate Body (and the DSB) under the DSU, on the other hand, are separate, distinct and do not overlap.

88. The jurisdiction of an arbitration body established under Article XXI:3(a) is governed by the terms of reference in paragraph 13 of S/L/80 *only*. Nothing in the terms of reference provided for in paragraph 13 of S/L/80 suggests that the Arbitration Body shares a jurisdiction with panels and the Appellate Body to determine whether a modifying Member acts inconsistently with its GATS obligations or impedes the attainment of the objective of the GATS. Such overlap of jurisdiction would be irreconcilable with the *exclusivity* of jurisdiction

⁴⁰ Panel Report, *US — Section 301 Trade Act*, para. 7.43.

⁴¹ There are three distinct arbitration procedures under the DSU: (i) arbitration under Article 21.3 regarding the reasonable period of time for implementation of DSB recommendations and rulings; (ii) arbitration under Article 22.6 concerning the level of concessions or other obligations that may be suspended in response to a Member's failure to implement DSB recommendations and rulings; and (iii) arbitration under Article 25, as an alternative to other modes of dispute settlement under the DSU, based on the mutual agreement of the parties including the procedures to be followed.

⁴² Emphasis added.

that Article 23 of the DSU confers on panels and the Appellate Body to examine alleged violations of the covered agreements.

3. The Arbitration Body's terms of reference have been carefully delineated by Members to ensure that it does not encroach on the jurisdiction exclusively reserved for panels, the Appellate Body and the DSB

89. For completeness, Australia notes the exclusive jurisdiction that Members have accorded to panels, the Appellate Body and the DSB also explains why the terms of reference in paragraph 3 of S/L/80 are carefully circumscribed in the manner that they are. Those terms of reference have been carefully crafted to ensure that an arbitration body does not encroach upon the exclusive jurisdiction conferred on panels and the Appellate Body.

90. It is instructive in this regard that the terms of reference in S/L/80 envisage an arbitration body engaging in a rather mechanical task of: (i) examining compensatory adjustments offered or requested; 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 Schedules of specific commitments prior to the negotiations. Nothing in the nature of the task given to an arbitration body under paragraph 13 of S/L/80 requires it to clarify provisions of any covered agreement, including the GATS, to engage in an interpretative exercise that is not directly connected with its mandate, and to examine and make findings on whether provisions of the GATS have been violated by a modifying Member.

91. In contrast, provisions of the DSU *expressly* impose obligations on panels and the Appellate Body in executing their mandates to "clarify the existing provisions" of the covered agreements under Article 3.2 of the DSU. Further, Article 11 of the DSU *expressly* imposes on panels the obligation to examine "the applicability of and conformity with the relevant covered agreements". Paragraph 13 of S/L/80 imposes none of these obligations on arbitration bodies, rather it simply requires an arbitration body to take "into account any agreement reached" between the modifying Member and any affected Member in negotiations pursuant to paragraph 4 of S/L/80.

92. In sum, India's claims that Australia has violated obligations and objectives under the covered agreements fall outside of the Arbitration Body's terms of reference. Australia urges

the Arbitration Body to reject India's invitation to exceed its jurisdiction and encroach upon the jurisdiction that Members have reserved exclusively for panels and the Appellate Body under the DSU.

F. CONCLUSION AND REQUEST FOR FINDINGS

93. For the foregoing reasons, Australia respectfully requests that the Arbitration Body preliminarily determine that India's purported request for compensatory adjustments falls outside the Arbitration Body's terms of reference under paragraph 13 of S/L/80.

IV. AUSTRALIA'S PROPOSED MODIFICATION IS TRADE LIBERALISING AND THEREFORE INDIA'S REQUEST FOR COMPENSATORY ADJUSTMENT CANNOT BE NECESSARY

94. As set out above, India's request for compensatory adjustments falls outside of this Arbitration Body's terms of reference because *inter alia* it fails to address the preliminary, threshold condition that Australia's proposed modification results in levels of commitment that are less favourable to trade than that provided in Australia's existing Schedule.

95. Setting aside these arguments, Australia submits there is a *separate* and *independent* reason why India's request is not of the nature that would render a compensatory adjustment "necessary" within the meaning of Article XXI:2(a) of the GATS. As explained above, a "compensatory adjustment" is an alteration or modification in a manner that recompenses or offsets for *loss*. India has not, and cannot, establish any loss because the proposed modification is conclusively and irrefutably trade liberalising. Therefore, the Arbitration Body need not engage in any further analysis, in order to make a finding that no compensatory adjustment is necessary.

1. The proposed modification is trade liberalising

96. Costs in trade in services are almost double those in trade in goods.⁴³ Service suppliers which are required to establish a commercial presence in the host economy incur a range of regulatory costs and require authorisations, licenses and approvals. Regulatory frameworks which lack transparency and predictability can result in a greater burden on

⁴³ WTO and OECD – SDR in the WTO, (Exhibit AUS-6).

service suppliers. The provisions of the SDR JSI seek to mitigate the unintended trade-restrictive effects of measures relating to licensing requirements and procedures, qualification requirements and procedures and technical standards.⁴⁴ The focus of the SDR JSI is to enhance and facilitate trade in services by ensuring that opportunities created by market access and national treatment commitments are not undermined by authorisation procedures.⁴⁵

97. Australia's proposed modification enhances transparency, certainty and regulatory quality. Those modifications reduce impediments to trade which stem from qualifications, standards or licencing matters – ultimately decreasing the regulatory burden and red-tape for service providers.⁴⁶ Furthermore, the proposed modification is projected to have a positive impact on trade. Detailed research from the WTO "[e]mploying state-of-the-art tools in trade policy evaluation",⁴⁷ projects expected *global* trade costs reductions of about 127 billion USD⁴⁸ upon the implementation of the disciplines in the SDR JSI by participants in that initiative. Earlier projections put that figure at around 150 billion USD. Further, "[g]lobal exports are projected to increase by 0.8% (207 billion USD) and global income by 0.3% (302 billion USD)."⁴⁹ Non-participants such as India also stand to benefit, in terms of projected macroeconomic and trade effects, due to the non-discriminatory nature of the SDR JSI.⁵⁰ Extrapolating these figures to Australia's proposal, it is clear that the modification will be trade liberalising. In simple terms, the proposed modification creates conditions which are more favourable to trade than previously existed. This is indisputable.

98. Even if a WTO Member chooses not to participate in the SDR JSI, participating WTO Members are to apply its provisions on an MFN basis, meaning that services suppliers from all WTO Members will be able to equally benefit from their implementation by

⁴⁴ SDR JSI, s. II, Art. 1.

⁴⁵ World Trade Organization, "Services Domestic Regulation – Good Regulatory Practice for Service Markets Enters WTO Rules Book", available at: https://www.wto.org/english/tratop_e/serv_e/sdr_factsheet_feb24_e.pdf (accessed 23 September 2024), p. 2.

⁴⁶ See for example, SDR JSI, s. II, Arts. 4-10.

⁴⁷ Roger Yu So and Eddy Bekkers, "The Trade Effects of A New Agreement on Services Domestic Regulation", available at: https://www.wto.org/english/res_e/reser_e/ersd202402_e.pdf, (accessed 23 September 2024), p. 33.

⁴⁸ Roger Yu So and Eddy Bekkers, "The Trade Effects of A New Agreement on Services Domestic Regulation", available at: https://www.wto.org/english/res_e/reser_e/ersd202402_e.pdf, (accessed 23 September 2024), p. 34.

⁴⁹ WTO and OECD – SDR in the WTO, (Exhibit AUS-6), p. 1.

⁵⁰ Roger Yu So and Eddy Bekkers, "The Trade Effects of A New Agreement on Services Domestic Regulation", available at: https://www.wto.org/english/res_e/reser_e/ersd202402_e.pdf, (accessed 23 September 2024), p. 34.

participating Members – regardless of whether their home country participated in the initiative.⁵¹ At the same time, no obligations are imposed on non-participants.

99. Finally, and as noted by the WTO Secretariat, Australia's proposed modification is "aligned with international instruments of good regulatory practice, such as the OECD Recommendation on Regulatory Policy and Governance, the APEC-OECD Integrated Checklist on Regulatory Reform, and the World Bank Global Indicators on Regulatory Governance."⁵² Again, all WTO Members will receive the benefits of Australia's enhanced obligations in this regard.

2. India has failed to establish that Australia's proposed modification results in commitment levels that are less favourable to trade

100. India has not, and cannot, refute that Australia's proposed modification is trade liberalising. It has neither argued, nor demonstrated, that Australia's proposed modification results in levels of commitment that are less favourable to trade than that provided in Australia's existing Schedule, such that compensatory adjustments are necessary. In the absence of any demonstration that Australia's proposed modification reduces the level of commitments in Australia's existing Schedule, India has failed to establish that any compensatory adjustments are "necessary" within the meaning of Article XXI:2(a) of the GATS.

3. Conclusion and request for findings

101. For the reasons set out above, because the proposed modification is trade liberalising and India has failed to demonstrate otherwise, this Arbitration Body must find that no compensatory adjustments are necessary.

V. ALTERNATIVELY, INDIA FAILS TO DEMONSTRATE THAT AUSTRALIA'S PROPOSED MODIFICATION AFFECTS ANY BENEFITS UNDER THE GATS

102. In the previous sections, Australia has explained that India has failed to present any relevant matter within the jurisdiction of this Arbitration Body. The nature of Australia's

⁵¹ World Trade Organization, "Services Domestic Regulation – Good Regulatory Practice for Service Markets Enters WTO Rules Book", available at: https://www.wto.org/english/tratop_e/serv_e/sdr_factsheet_feb24_e.pdf (accessed 23 September 2024), p. 2.

⁵² World Trade Organization, "Services Domestic Regulation – Rationale, Potential Economic Benefits, Practice in Regional Trade Agreements", available at: https://www.wto.org/english/news_e/news20_e/sdr_factsheet_nov20_e.pdf (accessed 23 September 2024).

proposed modification renders India incapable of doing so. Australia has further explained that, properly interpreted, the term "compensatory adjustment/s" within the meaning of paragraph 13 of S/L/80 and Article XXI:2(a) of the GATS must take the form of proposed modifications to Australia's Schedule of commitments, such that the purported compensatory adjustments requested by India have no basis. Further, Australia has demonstrated that India's requests seek to offset purported violations of the GATS and of its objectives, such that WTO panels and the Appellate Body retain exclusive jurisdiction to adjudicate those claims. Finally, Australia has established that in any event, any compensatory adjustment is not "necessary" because the balance of rights and obligations resulting from Australia's proposed modification maintains a general level of mutually advantageous commitments that is *more* favourable to trade than that provided in Australia's existing Schedule of commitments. There is *in fact*, no relevant loss to India.

103. Notwithstanding, in the unlikely event that this Arbitration Body were to agree with India that the term "benefit [...] under this Agreement " in Article XXI:2(a) of the GATS effectively operates to broaden the mandate of this Arbitration Body to include interests such as "clarity and specificity in GATS commitments", "the structural consistency of the GATS multilateral framework", and the "single undertaking architecture of the WTO", Australia submits that India has nonetheless failed to establish that Australia's proposed modification negatively affects any such benefits, such that any compensatory adjustment is "necessary". In this context, Australia engages with some of India's arguments below, strictly on an *arguendo* basis.

104. As a starting point, as discussed above, India's attempt to include interests such as "the structural consistency of the GATS multilateral framework", and the "single undertaking architecture of the WTO" should be dismissed outright. India appears to suggest that because the GATS is a multilateral agreement listed in Annex 1B of the Marrakesh Agreement, this *ipso facto* vests this Arbitration Body with jurisdiction to assess conformity of the SDR JSI negotiations with Articles III:2, IX, and X of the Marrakesh Agreement.

105. This extreme position of course is a *non-sequitur*. The "benefits" that pursuant to Article XXI:2(a) must be "affected" by a proposed modification in a Member's schedule of specific commitments must derive *from the GATS itself*, and not from the manner in which the GATS sits within the overall architecture of the covered agreements.

106. The *only* purported "benefit" under the GATS that India claims has been "affected" by Australia's proposed modification is the requirement for clarity and specificity in Australia's GATS Schedule. Accordingly, for the sake of completeness Australia proceeds to demonstrate, that its proposed modification to its schedule of specific GATS commitments is sufficiently specific and clear.

1. Australia's proposed modification is both specific and clear

(a) Australia's proposed modification of additional commitments under Article XVIII of the GATS is in conformity with the Scheduling Guidelines

107. Australia's proposed modification relates to additional commitments that Australia intends to undertake under Article XVIII of the GATS. Such commitments, according to Article XVIII, "shall be inscribed in a Member's Schedule". Article XX of the GATS provides guidance on how Members shall "set out" specific commitments, including those undertaken under Article XVIII, in the form of a "schedule". Specifically, the Member shall, "with respect to sectors where such commitments are undertaken", "specify [...] undertakings relating to additional commitments".⁵³

108. WTO Members adopted Scheduling Guidelines to assist Members in preparing offers, requests and national schedules of specific commitments. In particular, it explains "how specific commitments should be set out in Schedules in order to achieve *precision* and *clarity*".⁵⁴ It provides guidance on: (i) *what* information to enter on a Schedule; and (ii) *how* to enter such information.

109. With respect to *what* to enter for additional commitments under Article XVIII, the Scheduling Guidelines provide that these commitments are with respect to "measures affecting trade in services not subject to scheduling under Articles XVI and XVII", and "can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are

⁵³ GATS, Art. XX:1(c).

⁵⁴ S/L/92, para. 1. (emphasis added)

consistent with Article VI"; and that they are expressed "in the form of undertakings, not limitations."⁵⁵

110. With respect to *how* to enter commitments, the Scheduling Guidelines set out three main steps involved in the scheduling process: (i) describing committed sectors and sub-sectors; (ii) treating the modes of supply; and (iii) recording commitments with respect to horizontal commitments, sector-specific commitments and levels of commitments.⁵⁶ While the Scheduling Guidelines provide detailed examples on how to specify commitments under Articles XVI and XVII, there is, by contrast, little guidance relating to Article XVIII. This is understandable because commitments under Articles XVI and XVII are in the form of "limitations"⁵⁷ or "conditions and qualifications"⁵⁸ (i.e. what is *not* committed), while commitments under Article XVIII are expressed in the form of "undertakings" (i.e. what *is* committed).⁵⁹ In other words, WTO Members have wide discretion on how to record additional commitments in their Schedules, provided that the commitments take the form of "undertakings".

111. Australia's proposed modification to inscribe additional commitments is consistent with the requirements set out in Articles XVIII and XX:1 of the GATS and the recommendations contained in the Scheduling Guidelines. It takes the form of a Schedule, as attached to S/SECRET/13. The Schedule clearly identifies the sectors and sub-sectors where the additional commitments are undertaken through the entry "all sectors included in this Schedule" in the "Sector or Sub-sector" column. In the "additional commitments" column, Australia commits to "undertake[] as additional commitments the disciplines contained in Section II of document INF/SDR/2 for all sectors included in this Schedule". INF/SDR/2 is the symbol of a WTO document. According to the WTO Document Nomenclature, such symbol is "a unique identifier of a WTO official document".⁶⁰ By referring to a specific section of a unique WTO official document properly stored in the WTO documentation system, Australia's entry leaves no ambiguity as to the content of the commitments it intends to undertake, as such content is fixed at the point in time when the document was established, i.e. 26 November 2021.

⁵⁵ S/L/92, para. 19.

⁵⁶ S/L/92, para. 22.

⁵⁷ GATS, Arts. XVI:2, XX:1(a).

⁵⁸ GATS, Arts. XVII:1, XX:1(b).

⁵⁹ GATS, Art. XX:1(c); S/L/92, para. 19.

⁶⁰ WTO Document Nomenclature, (Exhibit AUS-7).

(b) The cross-reference to INF/SDR/2 provides certainty

112. Australia understands that India does not have any issue with respect to the *substance* of the additional commitments that Australia intends to undertake. What India disagrees with is the form in which Australia intends to record such commitments, as set out in Australia's draft Schedule.⁶¹ Specifically, India asserts that the cross-reference that Australia makes in the draft Schedule "does not reasonably communicate the substance of the commitments being undertaken with any certitude and may not have legal implications under the GATS".⁶² India also argues that the practice of cross-referencing is "contrary to the requirement of clarity and specificity".⁶³

113. As noted above, Australia refers to INF/SDR/2 in the "additional commitments" column of its draft Schedule. INF/SDR/2, as "a unique identifier of a WTO official document",⁶⁴ by definition only refers to one document in the WTO documentation system. There cannot be any uncertainty as to what the referenced document is, or how to find its content. Australia further specifies that only Section II of INF/SDR/2 applies, leaving no ambiguity as to the scope of the additional commitments it intends to undertake.

114. India's assertion that such cross-referencing "may not have legal implications under the GATS" has no merit. As discussed above, there is no specific guidance as to how to record additional commitments in Members' Schedules of specific commitments, provided that such commitments are "with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII"⁶⁵ and "taken in the form of undertakings".⁶⁶ Nothing in the legal text of the GATS nor the Scheduling Guidelines prevents Members from using cross-references in their Schedules.

115. The only caveat contained in the Scheduling Guidelines regarding the use of cross-references relates to "domestic laws of general application which constitute limitations"

⁶¹ This is confirmed by the fact that India has, to date, withdrawn its objections to the proposed modifications of 32 WTO Members, even if the *content* (but not the *form*) of those proposed modifications is identical to that proposed by Australia. In any event, Australia recalls that India has *also* accepted the form in which Australia intends to record these commitments. Timor-Leste used the exact same language as that proposed by Australia in its Schedule of specific commitments: "Timor-Leste undertakes as additional commitments the disciplines contained in Section II of document INF/SDR/2 for all services sectors included in this schedule". No WTO Member, including India, objected to the accession of Timor-Leste to the WTO.

⁶² India's written submission, para. 100. (footnote omitted)

⁶³ India's written submission, para. 100.

⁶⁴ WTO Document Nomenclature, (Exhibit AUS-7).

⁶⁵ GATS, Art. XVIII.

⁶⁶ S/L/92, para. 19. See also GATS Art. XX:1(c).

under Article XVI or XVII.⁶⁷ The Scheduling Guidelines caution that, in this scenario, if the Member concerned wishes to maintain the limitations, it should "describe the measures concisely" instead of using "general references to laws and regulations".⁶⁸ This is because general references to domestic laws and regulations without specifying the content would create difficulty for other Members to: (i) locate the relevant laws and regulations; and (ii) discern from the laws and regulations elements that constitute limitations within the meaning of Articles XVI and/or XVII. Against this background, the Scheduling Guidelines caution that "such references would not have legal implications under the GATS".⁶⁹ However, the cross-reference employed by Australia in its proposed modification is not of the type cautioned against in the Scheduling Guidelines (unspecified "general reference"). As discussed above, there is no uncertainty regarding where to find the referenced document; nor does there exist any uncertainty as to what additional commitments Australia intends to undertake.⁷⁰

(c) India's purported concerns are hypothetical

116. India also highlights a few hypothetical concerns, including the possibility of creating inconsistency with Australia's existing commitments, adding to or diminishing the rights and/or obligations of other WTO Members.

117. First, India is purportedly concerned that the cross-reference would cause "disjunction" between the disciplines set out in INF/SDR/2 and Australia's existing commitments. To illustrate the legal consequence of the alleged "disjunction", India argues that if any conflict arises between the rights and obligations prevailing in existing commitments and those established by the disciplines in INF/SDR/2, it would be "unclear" how the conflict would be resolved.⁷¹ This is not the case.

118. Contrary to India's assertion, the cross-reference used in Australia's draft Schedule, in fact, *connects* the disciplines set out in INF/SDR/2, on the one hand, and Australia's existing

⁶⁷ S/L/92, para. 38.

⁶⁸ S/L/92, para. 38.

⁶⁹ S/L/92, para. 38. The article that India cites in its submission also refers the same guidance in the Scheduling Guidelines with respect to "non-specified licensing requirements". See Rudolf Adlung, Peter Morrison, Martin Roy, Weiwei Zhang, "Fog in GATS Commitments – Boon or Bane?", *World Trade Review*, 12(01), 2013, pages 1-27, (Exhibit IND-31), p. 16.

⁷⁰ For completeness, Australia observes that the INF/SDR/2 document is available both to all WTO Members and the general public through the WTO documents system. Any hypothetical revision of this document would constitute a new different WTO document.

⁷¹ India's written submission, para. 99.

Schedule, on the other hand. By referring to "Section II of document INF/SDR/2" in the "additional commitments" column of Australia's Schedule, Australia makes clear that it intends to undertake the commitments set out in Section II of INF/SDR/2 in all sectors and subsectors where Australia has made specific commitments in its existing Schedule.

119. The "conflict" that India envisages between the disciplines under INF/SDR/2 and Australia's existing commitments simply cannot arise. To recall, additional commitments under Article XVIII are "with respect to measures [...] *not subject to* scheduling under Articles XVI and XVII" (emphasis added). Due to the different scopes of coverage, Australia's proposed additional commitments under Article XVIII cannot create any conflict with the commitments that Australia has already undertaken under Articles XVI and XVII. With respect to Australia's existing additional commitments in telecommunication services⁷² and legal services,⁷³ the commitments contained in Section II of INF/SDR/2 relate to *different* aspects of domestic regulation. They only add to the existing additional commitments in the relevant sectors and sub-sectors. Again, no conflict can arise in this situation and there is nothing that requires conciliation, let alone the need to modify the proposed new commitments.

120. Even if, in the future, Australia indeed needs to modify the additional commitments contained in its proposed modification, there is no ambiguity that the procedures that apply would be those under the GATS, including S/L/80 and S/L/84. This is because, by virtue of cross-referencing, the disciplines contained in INF/SDR/2 become part of Australia's Schedule of specific commitments and, consequently, "an integral part" of the GATS.⁷⁴ This means that the plurilateral approach through which INF/SDR/2 was negotiated and the relevant decision-making procedures pertaining to this approach is *irrelevant* to the additional commitments sought to be undertaken by Australia through the proposed modification. India's assertion that "if the document INF/SDR/2 is inserted as an additional commitment, any identified inconsistency could only be resolved once the non-WTO document itself undergoes revision, pursuant to meetings between the [SDR JSI] participants" simply has no legal basis.

⁷² Australia's Schedule of specific commitments, GATS/SC/6/Suppl.3.

⁷³ Australia's Schedule of specific commitments, GATS/SC/6, p.7.

⁷⁴ GATS, Art. XX:3.

121. Second, India attempts to use some concrete examples to illustrate how Australia's proposed modification might create "substantial and damaging ambiguity".⁷⁵ These examples relate to the use of "Member", "other Members", "professional body of Members", and "all Members of the WTO" in Section II of INF/SDR/2. As Australia sets out below, these concerns are based on India's ill-construed understanding of WTO Members' obligations under the GATS.

122. The first example relates to the use of "a Member" in paragraph 8 of Section II of INF/SDR/2.⁷⁶ The full sentence reads "[t]he competent authorities of a Member shall ensure that authorization, once granted, enters into effect without undue delay, subject to applicable terms and conditions" (footnote omitted). India is concerned that "a Member" would be interpreted as "all WTO Members", such that paragraph 8 would "create a new commitment binding all WTO Members". This is not the case.

123. Australia's proposed additional commitments are made under Article XVIII, Part III of the GATS. They are "specific commitments" that Australia undertakes and are binding upon Australia only. As provided by 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 by virtue of their Schedule of specific commitments under Part III of the GATS.

124. The second example concerns the use of "Members" and "relevant Members" in paragraphs 11 and 14-17 of Section II of INF/SDR/2.⁷⁷ The relevant sentence in paragraph 11 reads, "[w]here professional bodies of Members are mutually interested in establishing dialogues on issues relating to recognition of professional qualifications, licensing or registration, the relevant Members should consider supporting the dialogue of those bodies where requested and appropriate". India is concerned that "Members" would be interpreted as "[SDR JSI] Members" and "relevant Members" would be interpreted as "[SDR JSI] Members", such that it would create discrimination against non-[SDR JSI] Members thereby

⁷⁵ India's written submission, para. 101.

⁷⁶ India's written submission, para. 103.

⁷⁷ India's written submission, paras. 104, 106.

"imping[ing] upon the most-favoured nation treatment principle".⁷⁸ India's concern relating to paragraphs 14 to 17 is of the same nature.⁷⁹

125. India is, again, incorrect. The MFN principle, as enshrined in Article II of the GATS, applies to "any measure covered by [the GATS]" unless an exemption is scheduled according to Article II:2 upon the entry into force of the GATS (or for Members that acceded to the WTO after 1995, the date of acceptance). No WTO Member can qualify the application of MFN through their Schedules of specific commitments under Part III of the GATS. Accordingly, India's imagined interpretation of "Members" as "[SDR JSI] Members" and "other Members" as "other [SDR JSI] Members" in the relevant paragraphs of INF/SDR/2 is entirely self-serving and cannot be viable under the GATS.

VI. REQUEST FOR FINDINGS

126. For the reasons set out above, Australia respectfully requests that the Arbitration Body find that India's requests for purported "compensatory adjustments" fall outside of its terms of reference.

127. Second and in the alternative, should the Arbitration Body proceed with its examination, Australia respectfully requests that the Arbitration Body find that no compensatory adjustments are necessary.

⁷⁸ India's written submissions, paras. 104-106.

⁷⁹ India's written submission, para. 105.

ANNEX A Summary of SDR JSI

Section	Summary of provision
Section I	Section I establishes the general objectives of the DR JSI.
Section II <i>Scope of the Disciplines (Articles 1-3)</i>	These articles establish the scope of the disciplines in the DR JSI.
<i>Submission of Applications (Article 4)</i>	This article requires each Member to avoid, to the extent practicable, requiring an applicant to approach multiple authorities for an authorisation to supply a service.
<i>Application Timeframes (Article 5)</i>	This article requires each Member, to the extent practicable, to ensure there is opportunity to apply for authorisation to supply a service throughout the year, or if there is a specific period to apply, there is a reasonable period during which applications can be made.
<i>Electronic Applications and Acceptance of Copies (Article 6)</i>	This article requires each Member to ensure its competent authorities endeavour to accept applications in electronic format, and to accept copies of documents.
<i>Processing of Applications (Articles 7 and 8)</i>	<p>These articles require each Member to ensure its competent authorities provide applicants for the authorisation to supply a service with:</p> <ul style="list-style-type: none"> • to the extent practicable, indicative timelines for processing applications (Article 7 (a)) • the status of an application, upon request (Article 7 (b)) • to the extent practicable, information on the completeness of an application without undue delay (Article 7 (c)) • if an application is considered complete, to the extent possible, the outcome of the application and ensure that the processing is completed within a reasonable period (Article 7 (d)) • if an application is considered incomplete, to the extent practicable, notification of the incomplete status, what additional information is required (upon request) and an opportunity to complete the application (Article 7 (e)) • if an application is rejected, to the extent possible, the reasons for the rejection and details regarding procedures for resubmission, and (Article 7 (f)) • where an application is successful, authorisation is granted without undue delay. (Article 8)
<i>Fees (Article 9)</i>	This article requires each Member to ensure fees charged by competent authorities for the authorisation to supply a service are reasonable, transparent, and not trade restrictive.
<i>Assessment of Qualifications (Article 10)</i>	This article requires each Member to ensure access to any required examinations for authorisations are scheduled at reasonably frequent intervals, allow reasonable periods of time for applicants to request an examination and are encouraged, where practicable to accept/conduct examinations electronically.
<i>Recognition (Article 11)</i>	This article requires each Member to consider supporting the dialogue of professional bodies on issues relating to recognition of professional qualifications, licensing, or registration, where requested and appropriate.

Section	Summary of provision
<i>Independence (Article 12)</i>	This article requires each Member to ensure that the decisions of competent authorities with respect to the supply of a service are reached and administered in a way that is independent of any supplier of that service.
<i>Publication and Information Available (Article 13)</i>	This article requires each Member to publish or make publicly available information necessary for prospective service suppliers to comply with authorisation requirements and procedures.
<i>Opportunity to Comment and Information before Entry into Force (Articles 14-19)</i>	These articles require each Member, to the extent practicable, publish laws and regulations relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services. To the extent practicable, interested persons and other Members should have reasonable opportunity to comment and there should be a reasonable time before entry into force.
<i>Enquiry Points (Article 20)</i>	This article requires each Member to maintain or establish appropriate mechanisms for responding to enquiries from those seeking to supply a service.
<i>Technical Standards (Article 21)</i>	This article requires each Member to encourage its competent authorities to develop technical standards using an open and transparent process.
<i>Development of Measures (Article 22)</i>	This article requires each Member to ensure that measures relating to the authorisation of a service are based on objective and transparent criteria, have impartial and adequate procedures, the procedures to not in themselves unjustifiably prevent the fulfilment of requirements and that such measures do not discriminate between men and women.
Section III <i>Alternative Disciplines on Services Domestic Regulation for Financial Services</i>	<p>This section provides an alternative set of disciplines on services domestic regulation for financial services. The disciplines are the same as those in Section II with the following exceptions:</p> <ul style="list-style-type: none"> • Section III does not include an article on <i>submission of applications, recognition and technical standards</i> • The articles on <i>fees</i> and <i>publication and information available</i> in Section III differ to the articles in Section II in the following ways: <ul style="list-style-type: none"> ○ In Section III, <i>fees</i>: this article requires each Member to ensure its competent authorities provide applicants with a schedule/information of how fees are determined ○ In Section III, <i>publication and information available</i>: unlike in Section II, this article does not include fees, technical standards or indicative timeframes as information to be published or made available.