

服務貿易仲裁之首例：

國內規章複邊談判成果納入額外承諾之方式

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摘要

印度於去 (2024) 年 5 月 31 日，針對澳洲修改其服務貿易特定承諾表以納入國內規章複邊談判成果一事，向 WTO 提起仲裁。仲裁判斷駁回了印度多數主張，認為澳洲修改承諾表之方式並未損及印度原來在澳洲承諾表下得享之利益，故毋須對印度提供補償。作為 WTO 服貿爭端仲裁之首例，本仲裁判斷不僅涉及發展國內規章規範之複邊談判的多邊化方式，亦觸及鮮少被人討論的承諾表修改程序，故值得加以介紹。儘管仲裁判斷對國內規章複邊談判成果之多邊化並無太大影響，但得以讓含有完整成果的文件文號被保留下來，俾此種複邊談判多邊化的依據與做法未來可供參考，應仍有一定價值。

(取材資料：Peter Ungphakorn, *India Loses Challenge, Allowing Australia to Go Ahead with Services Commitment*, TRADE BLOG (Feb. 20, 2025), https://tradebetablog.wordpress.com/2025/02/04/india-australia-arbitration-services-plurilateral/?utm_source=substack&utm_medium=email; Devon Whittle, *WTO: Australia Successfully Defends Its Implementation of the Service Domestic Regulation Plurilateral in Its GATS Schedule*, TRADE NOTES (Feb. 20, 2025), <https://tradenotes.substack.com/p/wto-australia-successfully-defends>.)

前言

針對澳洲為落實「服務國內規章聯合倡議」(Joint Initiative on Services Domestic Regulation) 談判成果所進行之承諾表修改¹，印度於去 (2024) 年 5 月 31 日依《服務貿易總協定》(General Agreement on Trade in Services, 下稱 GATS) 第 21 條第 3 項 a 款之規定，對澳洲提起仲裁²。本仲裁判斷雖已於去年 11 月 22

¹ Joint Initiative on Services Domestic Regulation - Reference Paper on Services Domestic Regulation, INF/SDR/2 (Nov. 26, 2021) [hereinafter Reference Paper].

² General Agreement on Trade in Service, art. XXI:3(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 199 [hereinafter GATS]. (“If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration.”)

日完成³，但其內容直至今(2025)年2月4日才解密⁴。這是有關 GATS 承諾表修改的首件仲裁案，其涵蓋 GATS、複邊談判及鮮少為人所討論的認證程序，而具探討價值。

澳洲在本次仲裁中獲勝，意謂其修改承諾表時可僅引用服務之國內規章參考文件的文號⁵，而毋須像其他多數會員那樣屈從印度之要求，於自身承諾表複製參考文件之規範內容⁶。

壹、背景

在烏拉圭回合談判期間，各國意識到與資格要件、程序、技術標準及核照要件等有關的非數量限制及非歧視性措施可能會對服務貿易造成不利影響⁷，因此 GATS 第 6 條第 4 項要求會員在 WTO 成立後進行談判，以發展上述措施所需要的規範⁸。遺憾的是在杜哈回合啟動前雖曾取得一些進展，但有關國內規章的談判始終未能完成⁹。

於 2017 年第 11 屆部長會議 (11th Ministerial Conference)，59 個 WTO 會員決定：在國內規章的多邊談判之外，同步進行複邊談判¹⁰。上述複邊談判成功地於 2021 年 12 月 2 日完成，當時的完成宣言涵蓋此複邊談判所發展出來的規範¹¹，即所謂的「服務之國內規章參考文件（以下簡稱參考文件）」¹²。該宣言並明文成員有意依據 2000 年 4 月起即已適用之「特定承諾表修正或改善之認證程序」規定¹³，將參考文件的規範納入各自承諾表之額外承諾欄¹⁴。

³ Findings of the Arbitration, Australia's Intended Modification of Its Schedule of Specific Commitments under the General Agreement on Trade in Services, S/SECRET/13/ARB/F (Nov. 22, 2024) [hereinafter Findings of the Arbitration].

⁴ Catalogue Record for WTO Doc. S/SECRET/13/ARB/F, WORLD TRADE ORGANIZATION, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=311897&IsNotification=True (last visited Apr. 25, 2025) ("Derestricted on 04/02/2025.").

⁵ Reference Paper, *supra* note 1.

⁶ E.g., Schedule of Specific Commitments: Republic of Korea, GATS/SC/48/Suppl.4 (May 16, 2024).

⁷ *WTO Negotiations on Domestic Regulation Disciplines*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm (last visited Apr. 25, 2025).

⁸ GATS art. VI:4.

⁹ 關於 WTO 發展國內規章規範之談判歷程，請參考：曾泓霖，透過採納良好管制實務以促進服務貿易：服務之國內規章參考文件，經貿法訊，328 期，頁 1-7，2024 年 4 月 25 日，

<https://tradelaw.nccu.edu.tw/epaper/no328/1.pdf>。

¹⁰ Joint Ministerial Statement on Services Domestic Regulation, WTO Doc. WT/MIN(17)/61 (Dec. 13, 2017).

¹¹ Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WTO Doc. WT/L/1129 (Dec. 2, 2021) [hereinafter Declaration].

¹² Reference Paper, *supra* note 1.

¹³ Council for Trade in Services, *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, WTO Doc. S/L/84, (Apr. 18, 2000).

¹⁴ Declaration, *supra* note 11, at 2.

為履行上述宣言，許多參與成員一開始僅引用參考文件之文號，但在印度及南非反對後，遂改採複製參考文件之規範內容至其承諾表的方式¹⁵。印度也在歐盟的協調下，不再杯葛以此種方式修改之承諾表的認證¹⁶。惟澳洲仍堅持原本方式，遂導致印度對其提起以下進一步說明之仲裁¹⁷。

圖一 複製參考文件之規範至承諾表之方式（以韓國為例）

SCHEDULE OF SPECIFIC COMMITMENTS - REPUBLIC OF KOREA

Modes of Supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE			The Republic of Korea undertakes as additional commitments the attached "Disciplines on Services Domestic Regulation" for all sectors included in this schedule, except financial services.
II. SECTOR SPECIFIC COMMITMENTS			
7. FINANCIAL SERVICES			The Republic of Korea undertakes as additional commitments the attached "Alternative Disciplines on Services Domestic Regulation for Financial Services" for financial services sectors included in this schedule.

GATS/SC/48/Suppl.4

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DISCIPLINES ON SERVICES DOMESTIC REGULATION

Scope of the Disciplines

- These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services.
- These disciplines do not apply to any terms, limitations, conditions, or qualifications set out in a Member's Schedule pursuant to Articles XVI or XVII of the Agreement.
- For the purpose of these disciplines, "authorization" means the permission to supply a service, resulting from a procedure to which an applicant must adhere in order to demonstrate compliance with licensing requirements, qualification requirements, or technical standards.

Submission of Applications

- Each Member shall, to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorization. If a service is within the jurisdiction of multiple competent authorities, multiple applications for authorization may be required.

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資料來源：Schedule of Specific Commitments - Republic of Korea, WTO Doc. GATS/SC/48/Suppl.4 (May 16, 2024).

¹⁵ Peter Ungphakorn, *India Loses Challenge, Allowing Australia to Go Ahead with Services Commitment*, TRADE BLOG (Feb. 20, 2025), https://tradebetablog.wordpress.com/2025/02/04/india-australia-arbitration-services-plurilateral/?utm_source=substack&utm_medium=email.

¹⁶ Hannah Monika, *WTO Plurilateral Effort on Services Regulation Enters into Force*, INSIDE U.S. TRADE DAILY REPORT, Feb. 27, 2024.

¹⁷ Findings of the Arbitration, ¶ 1.5.

圖二 僅引用參考文件文號之方式 (以澳洲為代表)

ATTACHMENT			
SCHEDULE OF SPECIFIC COMMITMENTS – AUSTRALIA			
Modes of Supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
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.

資料來源：Schedule of Specific Commitments - Australia, WTO Doc. GATS/SC/6/Suppl.5 (Feb. 4, 2025).

貳、爭議重點

(一) 僅引用文號是否造成問題

印度主張，採取引用其他文件之方式無法合理傳達承諾的實質內容，並可能導致參考文件之未來修訂被自動納入¹⁸。對此，仲裁小組並不認同，因為文號 INF/SDR/2 已清楚表明文件是在特定時點所建立¹⁹，若該文件之後有任何增補，導致澳洲承諾表有所變更，澳洲仍必須依照 GATS 第 21 條完成新的修訂程序，變更方能生效²⁰。

其次，印度主張，引用參考文件將產生兩套體制，其一為針對參考文件之規範，另一則係針對澳洲之既有特定承諾，兩者間若有衝突，可能無法有效化解²¹。然而，印度並未指出任何可能衝突的具體情況²²；且仲裁小組也認同澳洲的觀點，

¹⁸ *Id.* ¶ 3.32.

¹⁹ *Id.* ¶¶ 3.33, 3.36 (“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. According to Australia, there [‘]cannot be any uncertainty[’] regarding what is the referenced document... 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.”).

²⁰ *Id.* ¶ 3.37 (“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.”).

²¹ *Id.* ¶ 3.38.

²² *Id.* ¶ 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.”).

即本次修改是關於 GATS 第 18 條的額外承諾，與澳洲既有的市場開放（GATS 第 16 條）及國民待遇（GATS 第 17 條）承諾必定有所區別²³。

第三，印度主張參考文件的文字——特別是以不同的方式使用「會員」一詞——可能被解讀為創設了其他 WTO 會員的新承諾²⁴，或使澳洲之新承諾對參與國內規章複邊談判之成員相較其他 WTO 會員更為優惠，進而違反最惠國待遇原則²⁵。仲裁小組並不認同這樣的論點，指出額外承諾僅拘束有填寫此部分承諾之會員，且最惠國待遇屬於一般義務，並不能透過 GATS 承諾表加以修改²⁶。此外，澳洲也向印度提出不影響權益之解釋信函以釐清其額外承諾是對所有其他 WTO 會員一體適用，即恪遵最惠國待遇原則²⁷。因此，仲裁小組最終認定該修改具有足夠的明確性²⁸。

（二）是否有損印度利益而需補償

印度還主張澳洲此舉損害其在 GATS 下之利益²⁹。仲裁小組表示，判斷本次修改是否會降低承諾水準而必須對印度補償，應基於澳洲特定承諾表於修改前後的比較結果³⁰。

關於印度主張 GATS 多邊架構之體系一致性與單一認諾 (Single Undertaking) 原則受到影響的問題³¹，仲裁小組認為根本不是 GATS 第 21 條有關承諾表之修改規定中所謂的「受影響之 GATS 利益」，故非本仲裁案之審理範圍³²。至於印

²³ *Id.* ¶ 3.41 (“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.”).

²⁴ *Id.* ¶ 3.43 (“First, India argues that these references could be read as creating new commitments binding on all Members, and not just Australia.”).

²⁵ *Id.* (“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.”)

²⁶ *Id.* ¶ 3.45.

²⁷ *Id.* ¶ 3.49 (“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...The 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...”).

²⁸ *Id.* ¶ 3.51.

²⁹ *Id.* ¶ 2.1.

³⁰ *Id.* ¶ 3.2 (b).

³¹ *Id.* ¶ 3.30 (“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.”); 單一認諾原則係指任何談判成果都屬於整體談判中不可分割之一部分，包含協定及承諾，會員只能選擇一體接受或不接受，而不能單獨接受或不接受其中某幾項議題，可參見：*How the Negotiations are Organized*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (last visited Apr. 25, 2025).

³² *Id.*

度所謂不夠明確之主張，根據先前對於僅引用文號之分析，仲裁小組已確認澳洲的修改內容足夠清楚，得以讓小組將其承諾水準與修改前之承諾水準（即澳洲既有之承諾表）進行比較³³。

最後，由於印度未能指出澳洲於本次修改之額外承諾如何與澳洲既有之承諾表相互衝突³⁴；也未能提供任何具體事例說明本次修正將降低澳洲原有之承諾水準，以致印度受到較先前為差之待遇³⁵，據此，仲裁小組認定澳洲毋須補償³⁶。

參、結論

允許僅引用文號而不需複製參考文件規範內容，具有以下好處：首先是簡單；比較重要的是，被參與成員援引且適用於所有參與成員之參考文件內容可以完整地在單一文件中被看見。對於在本仲裁結果出爐前所為之額外承諾修改，都必須透過逐一查閱各參與成員修改之個別承諾表，方得以看到該具法律拘束效果之參考文件內容，且是呈割裂狀態；同時，尚無法看見參考文件第一節（關於規範發展之依據、複邊談判之背景、納入各自承諾表額外承諾之義務、開發中國家及低度開發國家得享之過渡期、以及鼓勵技術協助與能力建構等條文）³⁷，對於參考文件內容之完整掌握，自是不利。

在獲得有利仲裁結果後，澳洲於今年 2 月 4 日，即於 45 日內無其他會員異議之情況下，完成其承諾表修改之認證程序³⁸。完成認證程序表示修改內容對澳洲正式生效。同時，剩下 10 餘尚未完成程序之參與成員（包括我國）³⁹、以及未來擬加入此倡議之 WTO 會員皆可利用澳洲之修改方式，以更簡單的方法修改承諾表以承諾遵循國內規章規範。

³³ *Id.* ¶ 3.51.

³⁴ *Id.* ¶ 3.53.

³⁵ *Id.* ¶ 3.56.

³⁶ *Id.*

³⁷ Reference Paper, *supra* note 1.

³⁸ WTO Doc. S/L/84, *supra* note 13 (“The draft schedule containing the modifications shall enter into force upon the conclusion of a period of 45 days from the date of its circulation by the Secretariat, or on a later date specified or to be specified by the modifying Member, provided no objection has been raised by any other Member. At the end of the 45-day period, if no objection has been raised, the Secretariat shall issue a communication to all Members to the effect that the certification procedure has been concluded, indicating the date of entry into force of the modifications.”).

³⁹ Peter Ungphakorn, *supra* note 15.