

Really Good Friends – Meeting of 17 February 2014

Trade in Services Agreement (TISA)

Submission by Switzerland:

Commitment Related Provisions in Sectoral or Modal Disciplines

I Introduction

The purpose of this submission is to identify and discuss commitment related provisions (CRPs) in the various proposals for sectoral, modal or horizontal benchmarks or standards. CRPs are provisions which have a direct relationship with the schedules of commitments. Parts II and III address the questions of overlaps, balance and transparency between benchmarks or standards established in sectoral, modal or horizontal proposals and the schedules of commitments. The fourth part summarizes the findings and formulates suggestions how to achieve consistency across the various types of disciplines.

II Questions of overlaps

The different papers on sectoral or modal benchmarks or standards which are currently under discussion contain commitment related provisions in sectors and modes to a various extent. A large number of these provisions contain strong commitment language. Inevitably the questions arise about the overlaps that might occur between the content of the provisions and the related scheduled commitments. This also raises the question of legal certainty. What should prevail: the benchmark or standard in the sectoral or modal paper, or the commitment in the schedule? Is it conceivable to have provisions in sectoral or modal papers, which prevail over the schedules and others that do not? In the case where the sectoral or modal discipline would override the schedule, this would create an incentive for Parties to carve out whole sectors or to block the adoption of the discipline. Where sectoral or modal benchmarks or standards prevail over schedules, it will be difficult to have a clear picture about the effective commitments a Party has undertaken in a specific sector, because the schedule of commitments does not provide all the information related to commitments in a particular sector.

The following examples show how the same provisions are handled differently in terms of the level of commitment throughout the annexes:

In the annex on professional services foreign shareholding requirements are mentioned in the form of a prescription not to limit participation of foreign capital and effective control in supplying services through commercial presence (article 5). The draft text on electronic commerce and telecommunication services includes different proposals with more subtle formulations like "shall endeavour" or "should allow full participation" (article 1 of the general provisions).

There might be overlaps between the annex and the schedule of commitments. On one hand some annexes refer to services and commitments as defined in the schedules but on the other hand they contain binding provisions:

An example is the case of the annexes on professional services (scope article) and on international maritime services (article on non-discriminatory market access). The annex on international maritime services has a mixed approach that for one provision the schedule prevails over the annex (article on non-discriminatory market access) and for another the annex prevails over the schedule (article on access to services). Even if this case corresponds to the maritime model practice in the WTO, in a context with a large number of annexes the agreement becomes less and less transparent.

Another issue is the overlap within an annex where a provision addresses a specific issue where another provision already covers this issue in a broader context:

The annex on professional services contains a provision on "cross-border trade" which calls for a full commitment in mode 1. In the same annex there is a provision called "local presence" where no party may require a services supplier of another party to establish or maintain a representative office for the cross-border supply of professional services. The second provision on local presence is a subset already contained in the first provision on cross-border trade, to the extent that enforcing the former makes the latter obsolete.

III Questions of balance and transparency

TiSA Participants should work to balance benchmarks or standards in the sectoral or modal disciplines across the sectors and modes to address the membership's interests. The question is how to ensure an unbiased approach for these benchmarks or standards?

IV Proposals

- To ensure legal certainty, the legal language of the CRPs shall be harmonized within and across the disciplines to avoid different interpretations.

- To secure consistency and transparency the CRPs have to be fully reflected in the schedules of commitments. Either the schedules shall always prevail over the CRPs in the disciplines, or vice versa.
- In particular, if sectoral or modal disciplines contain liberalization commitments, these have to be balanced to address the interests and sensitivities of the whole membership. In this context we should recall the objectives provided in the Annex C of the Hong Kong ministerial decision (WT/MIN(05)/DEC).
- If a unified approach to all CRPs is not practicable, the possibility of flexible disciplines as dealt with by the WTO's Financial Services Understanding should be considered.