

*Really Good Friends – Meeting of 29 April 2013***Trade in Services Agreement (TISA)****Submission by Switzerland:****Chapter on Dispute Settlement Procedures****Objective**

The following submission, dated 11. April 2013, from the delegation of Switzerland is being circulated to the Members of the *Really Good Friends* with the aim of contributing to discussions on a dispute settlement procedure in the framework of the Trade in Services Agreement (TISA). Such provisions could form part of a future Trade in Services Agreement (TISA).

In previous meetings, Switzerland expressed the desire that the TISA should rely on the existing rules and procedures of the WTO dispute settlement mechanism. The reason for that preference is to ease future multilateralization of the TISA.

Comments on the Swiss proposal

It is the *leitmotiv* of the Swiss proposal to facilitate the later multilateralization of the TISA. Therefore, the proposal follows to the outmost extent possible the structure and the content of the WTO Dispute Settlement Understanding (DSU).

The Parties to the TISA (as long as the agreement remains plurilateral in nature) will not be in a position to oblige the existing organs of the WTO to act on behalf of the TISA. Therefore, there is a need to set up an institutional structure for the dispute settlement procedures' Chapter. *However, the question of how to frame this institutional structure will depend on the institutional structure of the TISA itself.* Therefore, the institutional structure outlined in this proposal serves as a basis for the discussions on the dispute settlement procedures of the TISA only.

The proposal foresees a cloning of some of the organs existing under the DSU:

<i>the role the DSU accords to the...</i>	<i>...is accorded under this proposal to the...</i>
DSB	Joint Committee
Director-General of the WTO and/or the Chairperson of the DSB	Chairperson of the Joint Committee
Secretariat of the WTO	Secretariat assisting the Chairperson of the Joint Committee
Appellate Body	--

It has to be stressed again that the Swiss proposal does not aim to address the institutional structure of the TISA. The proposal is therefore without prejudice to Switzerland's future positions on questions like: Should there be a Joint Committee in the TISA? Who would be the right person to act the way the proposal foresees the Chairperson of the Joint Committee to act? Should the Parties to the TISA aim to get consent of all WTO Members to let the Director-General of the WTO, the Chairperson of the DSB as well as the Appellate Body of the WTO act in the framework of the dispute settlement procedures' Chapter of the TISA in the same way as they act in the framework of the DSU?

Irrespective of the solutions to be found for the institutional structure of the TISA, and in view of facilitating its later multilateralization, *the emergence of two sets of jurisprudence, one by the organs of the WTO, and a parallel one by a procedure established under the TISA, is to be avoided by all possible means.* Therefore, the proposal:

- i. states that the consultation and dispute settlement procedures under the TISA serve to clarify the provisions of the TISA in accordance to the jurisprudence adopted by the DSB as well as with customary rules of interpretation of public international law (Para. 3 of Art. 2);
- ii. stipulates that all solutions to matters formally raised under the dispute settlement mechanism of the TISA are to be consistent with the TISA as well as with WTO law and shall not nullify or impair *benefits* accruing to any Party of the TISA, nor impede the attainment of any objective of the TISA nor of WTO law (Para. 4 of Art. 2);
- iii. aims at avoiding any premature recourse to the dispute settlement mechanism of the TISA by obliging panels *to defer* to the jurisprudence adopted by the DSB in their final reports (Para. 2 of Art. 11); and
- iv. does not foresee a clone of the Appellate Body (Para. 2 of Art. 15).

Furthermore, the proposal foresees:

- i. concerning the suspension of concessions, that the Parties shall first have to examine such a suspension in the same sector(s), and if it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), that they may seek to suspend concessions or other obligations in other sectors (Para. 3 of Art. 20). "Sector(s)" means the sector(s) identified in the current "Services Sectoral Classification List". This language does on the one hand not limit the suspension of concessions to the preferential treatment accorded by the TISA. It does on the other hand exclude cross-retaliation i.e. the suspension of concessions accorded under any other agreement than the TISA or the GATS;
- ii. that panels shall be composed of individuals well-qualified in trade in services (including persons who have served as WTO panelists and persons who have their name included into the indicative list of the Secretariat of the WTO) without establishing an additional indicative list of panelists for the TISA (Para. 2 of Art. 7); and
- iii. that panelists' expenses, including travel and subsistence allowances, shall be borne by the Parties to the dispute in equal shares (Para. 3 of Art. 7).

Finally, Switzerland's proposal does not aim to double the current discussion in the Special Session of the WTO Dispute Settlement Body (DSB) on the Review of the WTO Dispute Settlement Understanding (DSU). Once these negotiations will come to an end, the Chapter on the dispute settlement procedures of the TISA will have to be adapted accordingly. Therefore, the proposal is without prejudice to the views expressed and the positions taken by Switzerland in the current DSU Review.

Proposed Chapter

Chapter [X]: Consultations and Dispute Settlement

Article 1

Administration

- (1) The Joint Committee shall have the authority to establish panels, adopt their reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations.
- (2) Where this Chapter provides for the Joint Committee to take a decision, it shall do so by consensus. The Joint Committee shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Party to this Agreement, present at the meeting of the Joint Committee when the decision is taken, formally objects to the proposed decision.

Article 2

General Provisions

- (1) A Party to this Agreement considering that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of the Agreement is being impeded as the result of
 - (a) a failure of another Party to this Agreement to carry out its obligations under this Agreement, or
 - (b) the application by another Party to this Agreement of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - (c) the existence of any other situation,

may proceed according the rules and procedures laid down in this Chapter.

- (2) Paragraphs 4, 6, 7, 8 and 10 of Article 3 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.
- (3) The Parties to this Agreement recognize that the consultation and dispute settlement procedures of this Chapter serves to clarify the provisions of this Agreement in accordance with the jurisprudence adopted by the Dispute Settlement Body of the WTO as well as with customary rules of interpretation of public international law. Recommendations and rulings of the Joint Committee cannot add to or diminish the rights and obligations provided in this Agreement.
- (4) All solutions to matters formally raised under this Chapter, shall be consistent with this Agreement and with WTO law and shall not nullify or impair benefits accruing to any Party of this Agreement, nor impede the attainment of any objective of this Agreement nor of WTO law.

Article 3

Consultations

(1) Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Article 4 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement, and reference to the 'DSB' as reference to the Joint Committee.

(2) Whenever a Party to this Agreement other than the consulting parties considers that it has a substantial trade interest in consultations being held such Party may notify the consulting parties and the Joint Committee, within 10 days after the date of the request for consultations, of its desire to be joined in consultations. Such Party shall be joined in the consultations, provided that the Party to this Agreement to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. If the request to be joined in consultations is not accepted, the applicant Party shall be free to request consultations according to this Article.

Article 4

Good Offices, Conciliation and Mediation

Paragraphs 1, 2, 3, 4 and 5 of Article 5 of the DSU shall apply *mutatis mutandis*.

Article 5

Establishment of Panels

Article 6 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.

Article 6

Terms of Reference of Panels

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in the Agreement on Trade in Services, the matter referred to the Joint Committee by (name of the Party to this Agreement) in document ... and to make such findings as will assist the Joint Committee in making the recommendations or in giving the rulings provided for in that agreement."

Article 7

Composition of Panels

(1) Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Article 8 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee, reference to the 'Director-General' as reference to the Chairperson of the Joint Committee, and reference to the 'Secretariat' as reference to the secretariat assisting the Chairperson of the Joint Committee.

(2) Panels shall be composed of governmental and/or non-governmental individuals well-qualified in trade in services, including persons who have served as WTO panelists, who have presented a case to a WTO panel, who have their name included into the indicative list of the Secretariat of the WTO according to Paragraph 4 to Article 8 of the DSU, who are representative of a Party to this Agreement or who have taught or published on international trade law or policy.

(3) Panelists' expenses, including travel and subsistence allowances, shall be borne by the parties to the dispute in equal shares.

Article 8

Procedures for Multiple Complainants

Article 9 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.

Article 9

Third Parties

Article 10 of the DSU shall apply *mutatis mutandis*. Reference to 'Member' shall be understood as reference to a Party to this Agreement, and reference to the 'DSB' as reference to the Joint Committee.

Article 10

Function of Panels

Article 11 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.

Article 11

Panel Procedures

(1) Article 12 of the DSU as well as Appendix 3 to the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.

(2) In their final reports Panels shall defer to the jurisprudence adopted by the Dispute Settlement Body of the WTO.

Article 12

Right to Seek Information

Article 13 of the DSU as well as Appendix 4 to the DSU shall apply *mutatis mutandis*. Reference to 'Member' shall be understood as reference to a Party to this Agreement.

Article 13

Confidentiality

Article 14 of the DSU shall apply *mutatis mutandis*.

Article 14

Interim Review Stage

Article 15 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement.

Article 15

Adoption of Panel Reports

- (1) Paragraph 1, 2 and 3 as well as the footnote to Paragraph 4 of Article 16 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement, and reference to the 'DSB' as reference to the Joint Committee.
- (2) The parties to the dispute shall accept the Panel's decision as final. Within 60 days after the date of circulation of the panel report to the Parties to this Agreement, the report shall be adopted at a meeting of the Joint Committee unless the Joint Committee decides by consensus not to adopt the report. All Parties to this Agreement have the right to express their views on a panel report.

Article 16

Communications with the Panel

Article 18 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement.

Article 17

Panel Recommendations

Where a Panel concludes that a measure is inconsistent with this Agreement, it shall recommend that the party to the dispute to which the panel recommendations are directed bring the measure into conformity with this Agreement. In addition to its recommendations, the panel may suggest ways in which this party to the dispute could implement the recommendations.

Article 18

Time-frame for Decisions of the Joint Committee

Article 20 of the DSU shall apply *mutatis mutandis*. Reference to the 'DSB' shall be understood as reference to the Joint Committee.

Article 19

Surveillance of Implementation of Recommendations and Rulings

Article 21 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement, reference to the 'DSB' as reference to the Joint Committee, and reference to the 'Director-General' as reference to the Chairperson of the Joint Committee.

Article 20

Compensation and the Suspension of Concessions

(1) Paragraphs 1, 2, 4, 5, 6, 7, 8 and 9 of Article 22 of the DSU shall apply *mutatis mutandis*. Reference to 'Member concerned' shall be understood as reference to 'party of the dispute concerned', reference to the 'DSB' as reference to the Joint Committee, and reference to the 'Director-General' as reference to the Chairperson of the Joint Committee.

(2) "Paragraph 3(b) or (c)" in Paragraph 6 of Article 22 of the DSU shall be read as "Paragraph 3 (b) of Article 20 of the Chapter of the Agreement on Trade in Services on Consultations and Dispute Settlement".

(3) In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the Panel has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors;

(c) in applying the above principles, that party shall take into account:

(i) the trade in the sector under which the Panel has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(d) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraph (b), it shall state the reasons therefor in its request to the Joint Committee;

(e) for purposes of this Paragraph, "sector(s)" means the sector(s) identified in the current "Services Sectoral Classification List".

Article 21

Strengthening of the Multilateral System

- (1) Article 23 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement, and reference to the 'DSB' as reference to the Joint Committee.
- (2) "Article 21" in Paragraph 2(b) and "Article 22" in Paragraph 2(c) of Article 23 of the DSU shall be read as "Article 19 of the Chapter on Consultations and Dispute Settlement of the Agreement on Trade in Services " and "Article 20 of the Chapter on Consultations and Dispute Settlement of the Agreement on Trade in Services", respectively.

Article 22

Special Procedures Involving Least-Developed Parties to this Agreement

Article 24 of the DSU shall apply *mutatis mutandis*. Reference to 'least-developed country Member' or 'least-developed country Members' shall be understood as reference to a least-developed Party to this Agreement or the least-developed Parties to this Agreement, reference to 'Members' as reference to the Parties to this Agreement, reference to the 'DSB' as reference to the Joint Committee, and reference to the 'Director-General or the Chairman of the DSB' in as reference to the Chairperson of the Joint Committee.

Article 23

Arbitration

- (1) Article 25 of the DSU shall apply *mutatis mutandis*. Reference to 'Members' shall be understood as reference to the Parties to this Agreement, and reference to the 'DSB' as reference to the Joint Committee.
- (2) "Article 21 and 22 of this Understanding" in Paragraph 4 of Article 25 of the DSU shall be read as "Article 19 and 20 of the Chapter on Consultations and Dispute Settlement of the Agreement on Trade in Services".

Article 24

Article 26 of the DSU shall apply *mutatis mutandis*. Reference to 'Member' shall be understood as reference to a Party to this Agreement, reference to 'provisions of paragraph 1(b) of Article XXIII of GATT 1994' as reference to Paragraph 1(b) of Article 2 of this Chapter, and reference to 'provisions of paragraph 1(c) of Article XXIII of the GATT 1994' as reference to Paragraph 1(c) of Article 2 of this Chapter.
