

27 February 2013

Really Good Friends* – Meeting of 18 March 2013*Plurilateral Initiative on Trade in Services****Questionnaire by Switzerland on Standstill and Ratchet****Objective**

Since the RGF meeting in July 2012 a number of members of the RGF group have proposed to include a legal provision on standstill and ratchet while a number of other members, including Switzerland, have asked more explanations about the legal meaning, effect and functioning of such horizontal mechanisms. A better understanding of the implication and functioning of those concepts is needed for the on-going negotiation of the Agreement. Switzerland is asking those delegations having standstill and ratchet provisions in their free trade agreements to share their experience about the understanding of some concrete situations that might occur. It invites all delegations to share their views about the questions set out below.

Questions:Question 1

A measure providing a more liberal treatment is in place for a limited period of time defined from the outset:

In the absence of a reservation to the ratchet in a partner's schedule, can we assume that the partner will not be able to go back to the *status quo ante* upon termination of the set period of time, by virtue of the ratchet? Or, to the contrary, shall it be assumed that the set period of time is part of the "measure" and nothing impedes the partner to move backwards to the *status quo ante* in spite of the general ratchet obligation?

Question 2

A measure providing a more liberal treatment is in place subject to a possible reversal that is triggered if a specifically defined event occurs:

As long as the defined event does not occur, the liberal regime shall apply. In case the said event occurs, in the absence of a reservation to the ratchet in a partner's schedule, can we assume that the partner will not be able to go back to the *status quo ante*, by virtue of the ratchet? Or, to the contrary, shall it be assumed that that possibility is part of the "measure" and nothing impedes the partner to move backwards to the *status quo ante* in spite of the general ratchet obligation?

Question 3

A measure providing a more liberal treatment is in place while at the same time a review clause is attached to that measure, leaving open the possible outcomes of such future review:

In the absence of a reservation to the ratchet in a partner's schedule, can we assume that the partner will not be able to go back to the *status quo ante* in the course of the foreseen review, by virtue of the ratchet? Or, to the contrary, shall it be assumed that the fact of being subject to review is part of the "measure" and nothing impedes the partner to move backwards to the *status quo ante* in spite of the general ratchet obligation?

Question 4

A level of government delegates to a lower level of government the competence to introduce and enforce a given measure, but for some reason the lower level of government does not actually use that competence immediately:

On the one side a piece of law defines a measure, left up to another level, but on the other side no such action is undertaken in practice for some duration of time. How is the standstill and ratchet to be understood in such circumstance? Shall it be assumed that the fact of setting a measure for the purpose of delegating its introduction to another level is in itself defining the prevailing level of liberalization for the purpose of the standstill and ratchet? Or, to the contrary, shall it be assumed that due to the absence of action at the delegated level there is no any possibility to introduce the said measure by virtue of the standstill clause?

Question 5

A level of government competent for a particular sector delegates to a non-governmental body the competence to introduce and enforce a given measure, but for some reason the body does not actually use that competence:.

On the one side a piece of law defines a measure up to another level, but on the other side no such action is undertaken in practice. How is the standstill and ratchet to be understood in such circumstance? Shall it be assumed that the fact of setting a measure for the purpose of delegating its introduction to non-governmental body is in itself defining the prevailing level of liberalization for the purpose of the standstill and ratchet? Or, to the contrary, shall it be assumed that due to the absence of action by the delegated body there is no any possibility to introduce the said measure by virtue of the standstill clause?

Question 6

A law provides a discretionary competence to a particular authority to take decisions regarding individual suppliers:

Under that discretionary competence, the authority has the freedom to take whatever individual decision it considers appropriate. How is the standstill and ratchet to be understood in such circumstance? Shall it be assumed that the fact of granting a discretionary power is in itself defining the absence (i.e.: unbound) of liberalization for the purpose of the standstill and ratchet? Or, to the contrary, shall it be assumed that the bound obligation of the standstill shall be approached on the basis of the actual decisions taken, and that in case at some point of time decisions become more generous the ratchet would apply and thus reduce the amplitude of the discretionary competence?

Question 7

A newly introduced more liberal rule is challenged to court under domestic procedures and, after some jurisdictional processes, is turned down e.g. by a supreme court, for any reasons:

If a partner has not taken a reservation to the ratchet in the corresponding sector is it correct to assume that the partner will not, by virtue of the ratchet, be allowed to return to the *status quo ante* in such circumstance?

Question 8

A party wishes to undertake a commitment being more liberal than the applicable legislation in force, and be bound by it in respect of the other treaty partner(s):

In GATS this can simply be done by undertaking the commitment, which applies irrespective of more restrictive contents or interpretations of the domestic legal regulatory framework. How can that be done in a schedule governed by a horizontal standstill clause?

Question 9

Some clarification is desired regarding the functioning of the ratchet:

In case a restriction set in the law is replaced by a reciprocity clause, what would be ratcheted exactly? Is the implicit offer to grant reciprocity the reference of the ratchet? Or does the effective material treatment applied at any given point of time by virtue of reciprocity constitute the reference of the ratchet? How far can such country move back (or not) towards or until the *status quo ante* in case its partners, to which its grants reciprocity, liberalize and then reverse their regime?

Question 10

Some clarification is desired regarding the functioning of the standstill and of the ratchet, illustrated by the following example:

Assume the *status quo ante* measure applicable in the tourism sector by country A provides that all hotels of three stars and above shall have at least 40 percent of their employees being nationals. Party A replaces that measure by a new one providing that all hotels of five stars and more shall have at least 70 percent of their employees being nationals. Later still, party A reverses the regulation and returns to the *status quo ante*, i.e. a 40 percent minimum for three star hotels and above.

At that point, based on the ratchet obligation taken by party A, party B challenges the return to the *status quo ante* arguing that the move to 5 stars and 70% was actually more liberal to its suppliers (including for three and four star hotels). Country A is inclined to follow that view. But then party C comes in and argues that for its suppliers the initial measure was more liberal and claims a right to have the *status quo ante* rule being applied to its suppliers by virtue of the standstill obligation, even though it failed to react immediately when the new regulation was introduced. Arguably, party C is a capital rich country whose suppliers are mainly affected by the more severe treatment of high class hotels; while party B is a poorer and labor richer country neighboring party A and thus was effectively better off if no nationality restriction was applied on middle class hotels. The question is, what is the obligation of party A?

Is it correct to assume, in view of the usual wording used to spell out the standstill and ratchet obligation in treaties that use such

horizontal clauses, that country A will have to apply the 3-stars / 40 % rule for the parties whose suppliers are better off with that one, and be obliged to apply the 5-stars / 70% rule to those parties whose suppliers are better off with that one?	
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Question 11

Some clarification is desired regarding the management of the standstill and of the ratchet:	
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Are there ways or mechanisms, in treaties containing generally applicable standstill and ratchet obligation, for a party to know ex ante from the other parties whether they would consider a contemplated new regulation as being more liberal or not, in order to see how many partners would likely consider the possible future rule as triggering a ratchet mechanism making the future rule irreversible to them, and how many would not?	
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Question 12**Some clarification is desired regarding the reference dates of the standstill and of the ratchet:**

We assume that whenever a standstill and ratchet obligation is placed horizontally in a treaty there is a need to define a date serving as reference point for both, especially for the standstill. How are these dates fixed? Is there only one date fixed and applicable to all parties whether they ratify immediately or accede at later stages, resulting in obliging later acceding countries to apply those obligation very retroactively? Or does every party have a different date according to its date of accession, resulting in consolidating different levels of liberalization among parties?

What should be the scenario in the context of the integration into the WTO? Should a same date apply to original RGF and to the non RGF GATS members corresponding to the date of the multilateralization? Or should the original RGF members carry over the original date, resulting in consolidating their level of liberalization at an older level than that of the non RGF GATS members?
