

COMMUNICATION FROM SWITZERLAND

The Relationship between “Old Commitments” and “New Commitments” of the GATS
and the Conclusion of the Doha Round Negotiations

The following communication, dated 9 November 2009, from the delegation of Switzerland is being circulated to the Members of the Committee on Specific Commitments.

I. INTRODUCTION

1. The objective of this paper is to create a common approach among Members on the relationship between “old commitments” and “new commitments”, with a view to facilitating the conclusion of the Doha Round services negotiations.

2. The main advantage of the approach presented in this paper is that it makes clear by excluding all possibility of doubt that the Doha round services negotiations are used for the purpose of Article XIX GATS only, namely the achievement of a higher level of liberalization of trade in services. The approach proposed is pragmatic and practical. It ensures that with the conclusion of the Doha round, a situation is created which guarantees a high degree of legal certainty and transparency with respect to specific commitments of Members.

II. “CURRENT INSTRUMENTS” AND “DOHA INSTRUMENTS”

3. As observed by the Secretariat in Document S/CSC/W/33 of 3 June 2002, “many Members have made changes to their original Uruguay Round or accession schedules of commitments.” These changes resulted chiefly from the extended negotiations on the movement of natural persons (1995), on maritime services (1996), on financial services (1995 and 1997) and on basic telecommunications (1997).¹ As a consequence of those changes, a large number of Members maintain GATS commitments in more than one single document.² In the following, the term “current instruments” refers to any instruments in which Members inscribed their specific commitments currently in force.

4. With the conclusion of the Doha Round, Members will inscribe specific commitments in another instrument. That instrument will hereinafter be referred to as “Doha instrument”.

¹ S/CSC/W/33 Para 2.

² S/CSC/W/33 Para 5.

III. THE “REPLACEMENT METHOD”

5. The replacement method, as described by the Secretariat in S/CSC/W/33, implies that the “Doha instrument” shall incorporate both “existing ‘unmodified’ commitments [set out in “current instruments” already] and ‘improved or new’ commitments resulting from the current [Doha round] negotiations”.³

6. It must be emphasized, however, that the replacement method does “not necessarily mean that existing schedules with commitments currently in force would be completely irrelevant in relation to the commitments they contain”. As explained by the Secretariat in S/CSC/W/33, the “scope of the ‘replacement’” still remains to be defined.⁴ Insofar, the term “replacement method” is somewhat misleading.

7. Hence, should Members favor the “replacement method”, they must then decide on the implication of this approach for the relationship between the “old commitments” currently in force and contained in “current instruments” and the “new commitments” inscribed in the “Doha schedule”. That said, it needs to be said that “replacement method” is not a concept of WTO law and should not be attributed too excessive a weight, beyond its practical value to facilitate the discussion among Members.

IV. ABSENCE OF MANDATE TO DETERIORATE SPECIFIC COMMITMENTS

8. In determining the extent to which “old commitments” in “current instruments” shall be replaced by “new commitments” in “Doha instruments”, it is clear that there is no mandate authorizing Members to define or to implement the “replacement method” in a manner that may allow to deteriorate their specific commitments currently in force and inscribed in “current instruments”.

9. First, the general mandate for all rounds of services negotiations, according to Article XIX GATS, is to achieve “a progressively higher level of liberalization”. The negotiations “shall be directed to the reduction or elimination of the adverse effect on trade in services of measures as a means of providing effective market access”. Almost the same language was used in Paragraph 1 of the Guidelines and Procedures for the Negotiations (S/L/93).⁵

10. Second, the mandate adopted for the Doha Round services negotiations too does not empower Members to deteriorate specific commitments currently in force and inscribed in “current instruments”.⁶

11. Under the GATS, a Member may well “modify or withdraw” its specific commitments currently in force, but it may only do so according to the procedure set out in Article XXI GATS.

12. Unless the procedure set out in Article XXI GATS has been duly observed, specific commitments currently in force contained in “current instruments” may thus be replaced by the specific commitments set out in “Doha instruments” only to the extent that such replacement does not undermine WTO Members’ specific commitments currently in force.⁷

³ S/CSC/W/33 Para 26.

⁴ S/CSC/W/33 Para 32.

⁵ S/CSC/W/33 Para 7.

⁶ S/CSC/W/33 Para 8.

⁷ S/CSC/W/33 Para 8.

V. LANGUAGE TO BE INCLUDED IN THE SIXTH PROTOCOL

13. The commitments inscribed in the “Doha instrument” will be incorporated into the GATS through a Protocol, namely the “Sixth Protocol”. All Members’ “Doha instruments” will be annexed to this Protocol. This approach is in accordance with past practice on the incorporation of specific commitments.⁸

14. It is desirable to clarify explicitly and confirm that no specific commitments currently in force may be deteriorated with the conclusion of the Doha Round services negotiations, and the Sixth Protocol should include a clear language in this respect.

15. A language on “Application of successive specific commitments relating to the same subject matter” should clarify the following issues or facts:

- (a) A Member’s specific commitments inscribed in the relevant instrument annexed to the Protocol supersede that Member’s specific commitments in force prior to the entry into force of the Protocol to the extent that they confirm, improve or add to the market access, national treatment and other rights that Member grants to other Members by virtue of specific commitments in force prior to the entry into force of the Protocol;
- (b) As a consequence, a Member’s specific commitments in force prior to the entry into force of the Protocol prevail to the extent that they accord more favorable market access, national treatment and other rights than those inscribed in the instrument annexed to the Protocol;
- (c) This is without prejudice to modification or withdrawal of specific commitments according to the procedure set out in Article XXI of the GATS.

VI. VERIFICATION EXERCISE

16. Switzerland is convinced that Members act in good faith and are cautious to avoid errors in their “Doha instrument” including deteriorations of specific commitments. Nonetheless, Switzerland supports the idea that an appropriate verification exercise should be carried out with a view to eliminating possible errors in Member’s final schedules.

17. In spite of the verification exercise, Switzerland finds it not safe enough to assume that the “Doha instruments” will not contain any errors, including specific commitments which accord, or may be construed to accord, treatment less favorable than that provided under “current instruments”. That is why Switzerland is of the view that the inclusion of an explicit language in the Sixth Protocol is important.

VII. HOW FAR MAY INTERPRETATION RULES HELP ?

18. Some have asked whether interpretation rules may help solve the issue described in this paper. Interpretation rules are fundamental to understand the meaning of a given legal provision, but only provided that the meaning is unclear or ambiguous. In the absence of any ambiguity there is no ground to resort to interpretation rules. For example, if the wording of a “new commitment” is unambiguous but that commitment actually accords a less favorable treatment than an “old commitment”, then interpretation rules may not help resolve the problem.

⁸ S/CSC/W/33 Para 6. S/CSC/W/55 Section I.

VIII. FOLLOW UP

19. Switzerland proposes to Members to consider the approach set out above with a view to find an agreement on a language on “Application of successive specific commitments relating to the same subject matter” to be included in the Sixth Protocol.
