

COMMUNICATION FROM SWITZERLAND

Proposal for Disciplines on Technical Standards in Services

The following communication, dated 1 February 2005, from the delegation of Switzerland, is being circulated to the Members of the Working Party on Domestic Regulation. Switzerland reserves the right to revise, supplement or withdraw its proposal according to the results of further examinations.

1. The provision of services in many sectors is heavily affected by an array of domestic regulations. Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories as provided for in the preamble of the GATS, Switzerland considers the development of regulatory disciplines as an important element of the current negotiations. Therefore, disciplines need to strike a balance between the right of Members to adopt and implement domestic regulations deemed necessary to pursue legitimate policy objectives and ensuring that such measures do not constitute unnecessary barriers to trade in services. Provided that this balance can be found, establishing disciplines is in the interest of all Members alike.

2. In line with other WTO Agreements, it is neither the intention nor the purpose that these disciplines formulate the substance of any regulation. Domestic regulations shall be formulated and developed in response to changing legal, social and economic environments and differing circumstances in the territory of each Member.

3. The Working Party on Domestic Regulation (WPDR) has made important progress in recent times towards a deeper understanding of the scope of these disciplines and the balance to be achieved therein. With this contribution, Switzerland intends to complement other valuable contributions by Members to the Working Party. Our approach has been to present a comprehensive set of disciplines on technical standards, mindful of the fact that it contains common elements with disciplines that are or will be developed for licensing and qualification requirements and procedures. These elements for disciplines on technical standards have been developed with the intention that they integrate the Draft Annex on Domestic Regulation developed by the delegation of Japan.¹ They take into account the examples of regulatory measures to be addressed by disciplines under GATS Article VI:4 that have been submitted by Members.²

4. There have been numerous discussions in the WPDR whether disciplines should be of horizontal application or be developed on a sectoral basis. Switzerland is of the view that many of the

¹ See document Job(03)/45/Rev.1 *Communication from Japan, Draft Annex on Domestic regulation* of 2 May 2003.

² See document Job(02)/20/Rev.9 *Examples of measures to be addressed by disciplines under GATS Article VI:4, informal note by the Secretariat* of 16 November 2004.

issues to be addressed by the disciplines are sufficiently similar across services sectors that common building blocks can be developed. Yet, Switzerland also acknowledges the high diversity of services sectors and therefore can easily see the merits for focused sectoral complements where appropriate. Thus the two approaches should not be seen as mutually exclusive.

5. Switzerland has paid particular attention to the fact that the elements it proposes for disciplines on technical standards do not address measures subject to be scheduled under GATS Articles XVI and XVII. They are also intended to underpin GATS Articles II and III. This approach does not preclude work on the development of other regulatory principles that may be necessary.

6. Technical standards have been looked at under the development of disciplines for the accountancy sector. Hitherto, only two paragraphs are devoted to technical standards, the one making sure that such standards are prepared, adopted or applied only to fulfil the legitimate objective, and the other making reference to international standards. The accountancy sector certainly is one of the sectors where international standards play a recognized role. Yet, this is not the case for the time being for other services sectors. For this reason, Switzerland believes that more comprehensive disciplines are necessary.

7. One particular difficulty encountered during the work on disciplines on technical standards is that GATS Article VI:4 does not provide any definition of technical standards. In this regard three central questions needed to be answered:

- (i) Which kind of requirements should technical standards cover?
- (ii) Should technical standards comprise mandatory and voluntary standards?
- (iii) Should technical standards only cover standards prepared, adopted or applied by governmental authorities and non-governmental bodies to whom such authority has been delegated or should it also include non-governmental standardizing bodies?

8. Switzerland shares the analysis by the WTO-Secretariat³ that work carried out in the accountancy sector would suggest that standards in the area of trade in services apply not only to the technical characteristics of the service itself but also to the rules according to which the service must be performed.

9. The second and third question are closely linked. Professional associations play an important role in setting the state of the art of providing a service (which may become relevant in the settlement of disputes). Particularly professional services associations very often exercise a standard setting activity. We therefore consider that voluntary standards, even if they are developed by non-governmental bodies to which no standardizing power has been formally delegated, may constitute important barriers to trade and should be addressed in the disciplines. Nevertheless, there needs to be some degree of connection to governmental action; these links need not to be formal or concrete. It would be sufficient that governmental action is just generally authorizing certain private activities, where the question is the extent to which such activities are attributable to the government. We therefore understand that the disciplines on voluntary "private" standards are essentially considered for those technical standards that have a significant effect on trade of other Members. Moreover, some other distinction are made between mandatory and voluntary technical standards where deemed reasonable.

³ See document S/WPPS/W/9 *The relevance of the disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI:4 of the General Agreement on Trade in Services*, note by the Secretariat of 11 September 1996.

10. Members will realise that the WTO Agreement on Technical Barriers to Trade (TBT) has been a valuable source of inspiration for the development of disciplines on technical standards, while taking into account the differences that exist between trade in goods and trade in services. This has been the more evident as the TBT and the disciplines to be developed under GATS Article VI:4 pursue the same objective of striking a balance between the right to regulate and not creating unnecessary barriers to trade. Switzerland is of the view that despite some difficulties with this Agreement since its adoption, it has shown to be effective. Lessons learnt have been reflected in the proposed elements for disciplines on technical standards. This link to the TBT could be made even stronger by making e.g. an explicit reference to the provisions in the TBT with regards to Members' obligation to notify technical regulations and extending them to technical standards in services, instead of the proposed language of paragraph 26.

11. Members will also realise that particular emphasis has been put on the role international standards can play towards achieving the objectives set out in GATS Article VI:4. Attention is also paid to potential difficulties some developing countries may face to comply with these disciplines.

12. Taking into account the progress made in understanding the scope of the disciplines, the objective of this communication is to go beyond general considerations on technical standards and to engage in detailed discussions. Switzerland is of the view that this objective is best met when submitting concrete text to the Members of the WPDR, as divergences of view can sometimes only be detected at a certain level of details. We suggest to invite the WPDR to consider the elements for disciplines on technical standards in order to aliment further discussion.

GATS Article VI:4. Technical Standards

ELEMENTS FOR DISCIPLINES ON TECHNICAL STANDARDS⁴

General provisions

13. For the purpose of these disciplines, technical standards are measures by Members, whether they are mandatory or voluntary if not otherwise specified, are defined as requirements, which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. [S/WPPS/W/9 §4]

14. Where technical standards, prepared, adopted or applied by the federal, sub-federal authority or non-governmental body in the exercise of powers delegated by them, affect the provision of a service in a sector where specific commitments are undertaken, the following disciplines shall apply. [EU §18 modified; Japan §29] Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories comply with the principles of these disciplines. [TBT 4.1 adapted]⁴

15. Members shall ensure that governmental technical standards are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in services. They should also make every effort that non-governmental standardizing bodies do not apply technical standards creating such barriers to trade. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate national policy objective⁵, taking account of the risks non-fulfilment would create. Such legitimate national policy objectives are, *inter alia*: the protection of human health or safety, animal or plant life or health; the protection of public morals and the maintenance of public order; national security requirements; the access to essential services; the quality of the service; professional competence; the integrity of the profession; or the prevention of deceptive and fraudulent practices. Requirements should be based on objective and transparent criteria. [GATS VI:4, XIV, TBT 2.2, AD §2]⁴.

16. Prior to the adoption of a mandatory technical standard, the competent authorities should demonstrate in a regulatory impact assessment the technical, economic and legal viability of such standard and its effects on trade. [Mexico §11 (c)]⁴

17. Technical standards shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. [TBT 2.3]⁴

18. Nothing shall prevent a Member or other competent authorities from carrying out reasonable conformity checks with technical standards during and after the supply of a service. [TBT 5.3 adapted]⁴

⁴ Wherever possible, language is based on existing WTO texts, in particular Article VI and the Annex on Telecommunications of the GATS (hereafter GATS VI and AT, respectively), the Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64, hereafter AD), the Agreement on Technical Barriers to Trade (hereafter TBT), the Japanese paper (Job(03)/45/Rev.1, hereafter Japan), the Mexican submission (S/WPDR/W/30, hereafter Mexico), the submission by the EU (S/WPDR/W/25, hereafter EU) and the submission by Canada in the SPS committee (G/SPS/W/132/Rev.3, hereafter SPS Canada).

⁵ The term "legitimate national policy objective" makes reference on the one hand to the preamble of the GATS stipulating the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet the national policy objectives, and on the other hand to the use of "legitimate objectives" as codified in the TBT-Agreement (and the Accounting Disciplines).

Equivalency

19. For the supply of a service from the territory of one Member into the territory of any other Member, where both Member's technical standards are developed with a view to achieving the same legitimate national policy objectives, a person providing services who has the right or has been authorised to provide a service may do this on the same terms as those imposed by the home country Member on its own services suppliers. Where aspects of these objectives are not met, the Member can set additional requirements.

International standards and the relation to international organizations and agreements

20. Where technical standards are required and relevant international standards exist or the completion is imminent, Members shall use them or the relevant parts of them, as a basis for their technical standards, except when such international standards or relevant part would be an ineffective or inappropriate means for the fulfilment of the legitimate national policy objective pursued, for instance because of infant institutional development or fundamental technological problems. [TBT 2.4 adapted]⁴.

21. Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards for the practice of relevant services trades and professions, and undertake to promote such standards through the work of relevant international organizations⁶. [GATS VII:5; AT 7(a)]⁴

22. Members recognize the role played by relevant international bodies (intergovernmental and non-governmental organizations) in establishing and promoting international best practices to ensure the efficient trade in services. [GATS AT 7(b) adapted]⁴

23. Whenever a technical standard is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 3, and is in accordance with relevant international standards of relevant international organizations⁷, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. [TBT 2.5]⁴

Transparency

24. In cases of mandatory technical standards, Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points, and in an easily accessible manner, where possible by electronic means: [AD §4; EU §12]⁴

- (i) the list of service activities subject to technical standards; [EU §12(b); AD §4(a)]⁴
- (ii) information on the technical standards; [AD §4(c)]⁴
- (iii) information on the relevant findings of the regulatory impact assessment of mandatory technical standards. [Mexico §11 (c)]⁴

⁶ The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

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25. The list of services and a summary of the information required under (ii) and (iii) shall be made available in one of the WTO languages.

26. In cases, where technical standards are voluntary but can reasonably be considered as building state of the art, the obligations of article 12 (i) and (ii) shall also apply.

27. Whenever a relevant international standard does not exist or the technical content of a proposed technical standard is not in accordance with the technical content of relevant international standards, and if the technical standard may have a *significant effect on trade* of other Members, Members shall: [TBT 2.9; Japan 29; Mexico §11]⁴

- (i) publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical standard; [TBT 2.9.1]⁴
- (ii) notify other Members through the Secretariat of the sectors to be covered by the proposed technical standard, together with information on regulatory impact assessment. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account; [TBT 2.9.2]⁴
- (iii) without discrimination, allow at least 60 days for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account. [TBT 2.9.4; SPS Canada Step 1]⁴

Fees

28. Fees for acquiring the texts of technical standards shall be in relation to effective costs and shall not represent an indirect protection to services providers that are members of a non-governmental standardization body.

Special and differential treatment for developing countries

29. Developing countries may request special and differential treatment in cases where international standards entail high compliance costs and result in policies and institutions that are ill suited to a Member's legal and institutional development level. Members therefore recognize that in this case developing country Members should not be expected to use international standards as a basis for their technical standards, which are not appropriate to their development, financial and trade needs. [second sentence: TBT 12.4]⁴

30. Members shall take such reasonable measures as may be available to them to ensure that relevant international organizations are organised and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members. [TBT 12.5]⁴

31. It is recognized that developing country Members may face special problems, including lacking institutional capacities, in the field of preparation and application of technical standards. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations in respect to technical standards under these disciplines. Accordingly, with a view to ensuring that developing country Members are able to comply with these disciplines, the Council for Trade in Services is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from these obligations. [TBT 12.8]⁴

32. Where the appropriate fulfilment of the legitimate national policy objective allows scope for the phased introduction of the new technical standard, longer time-frames for compliance should be accorded on the supply of services of interest to developing country Members so as to maintain opportunities for their exports. [SPS 10.2]⁴

Technical assistance

33. If, following the entry into force of a new technical standard, an exporting developing country Member identifies significant difficulties which its services suppliers face in complying with the new regulation, it may request an opportunity to discuss its difficulties with the importing Member to attempt to resolve the issue of concern. The discussions may lead the importing Member to examine whether and how the identified problem could best be addressed – as for example through technical assistance – to take into account the special needs of the interested exporting developing country Member. [SPS Canada Step 6]⁴

34. Members shall, if requested, take such reasonable measures as may be available to them to advise developing country Members, on the preparation of technical standards. [TBT 11.1]⁴

35. Members shall, if requested, take such reasonable measures as may be available to them to arrange for technical assistance to developing country Members to establish or strengthen institutional capacity to prepare, adopt or apply technical standards.

36. Members shall make every effort to ensure participation in relevant international bodies (intergovernmental and non-governmental organizations) by the standard setting bodies of developing countries.
