

COMMUNICATION FROM SWITZERLAND

On the importance of improving the scheduling of GATS commitments

The following communication, dated 31 August 2004, from the delegation of Switzerland is being circulated to the Members of the Council for Trade in Services.

I. BACKGROUND AND RATIONALE

1. The schedules of all Members together are very extensive. They contain about 7000 commitments and cover varied sectors and types of measures. This paper addresses the issue of transparency of GATS schedules, i.e. the importance of drafting schedules in a clear, unequivocal and explicit way, taking account of existing GATS material developed for that purpose. In a statement in the Council for Trade in Services, the delegation of Hong Kong, China had referred to the 3 c's: clarity, certainty, comparability.

2. Members will benefit from clearer schedules in many respects. The prime benefit is to allow Members to know better the obligations of their trade partners and their own obligations. An enhanced readability of offers will make the negotiating processes more efficient. Transparency thereby eases the progressive liberalization of services trade. In particular, it will ease comparability between offers and facilitate Request/Offer negotiations. Especially Members having restrained negotiating resources would profit by this. Better transparency and less ambiguity will ease legal interpretation of schedules, and as a consequence reduce the occurrence and complexity of legal disputes and make dispute settlement easier.

3. National consultation processes show that already now schedules are perceived by Members' industry as extraordinarily complex and not always easy to understand. Ultimate beneficiaries of GATS commitments are Members' individual service providers, natural or legal persons. In order to ensure that they are aware of the rights derived from GATS it is essential that the schedules are easy to read, to interpret and to compare. At present, schedules do not perform very well on this score. Readability of commitments is most important for small and medium-sized enterprises, as these may not have legal staff. Similarly, readability of commitments is crucial for developing countries' service providers. They also often lack legal resources and therefore rely on comprehensible and legally certain schedules. Commitments should be drafted clearly enough to allow laypersons to understand their meaning.

4. A major added value of GATS commitments is legal certainty and transparency for the operators, bearing in mind that in some cases commitments happen in fact to merely bind an already existing level of liberalization. The advantages of legal certainty and transparency are not to be

underestimated as of a cosmetic nature only. Studies show that long term economic growth is promoted by a stable institutional environment such as the rule of law and, as part of it, legal certainty and transparency. Hence, similar to the benefits of liberal trade regimes, legal certainty and transparency matter in promoting investments and in improving conditions for long term economic growth world-wide.

5. Benefits of clearly drafted schedules are thus overwhelming. This explains why Members have put a lot of resources into developing adequate transparency standards, in particular in the Scheduling Guidelines¹. These Guidelines have a central role to play in the GATS. Members must be more aware of them and actually use them. The Guidelines partly draw on and reaffirm the wording of GATS Article XX, which is the key GATS provision regarding scheduling. The importance of this provision must be underscored. Further to that, over a decade of GATS practice Members have developed some commonly used terms and concepts that are very helpful to ease drafting, reading and interpretation of schedules.

6. Proper scheduling must make sure that the potential of increased legal certainty and transparency is effectively achieved during the present Round. Having a deadline for improved offers, it is now time to agree on recognizing the benefits and objectives of further improvement of the scheduling of commitments. The recommendations adopted by the General Council on 1 August 2004 reaffirms that Members shall strive to ensure a high quality of offers.² Though that pertains primarily to the substantial quality of offers, their formal quality is also of crucial importance.

II. IMPROVING TRANSPARENCY OF SCHEDULES

7. In order to improve transparency of schedules, Members are urged to observe the following general recommendations:

- (a) Make the schedules unequivocal, avoid anything that could be ambiguous.
- (b) Apply the Scheduling Guidelines as well as GATS Art. XX. Recognize their central role in the present Request/Offer negotiations.
- (c) Make the schedules comparable by using customary or commonly agreed terms, phrases, headings and classifications.
- (d) Make the schedules self-explaining by describing measures adequately.
- (e) Follow technical discussions in the Committee of Specific Commitments on scheduling issues and take note of its conclusions especially in the Request/Offer process.
- (f) Make schedules user friendly, clear enough for non-GATS-experts to understand them. The advantage, also in terms of user-friendliness, of having clean (full) commitments shall be recognized.

8. The lists below illustrate means to improve transparency of schedules when describing sectors and sub-sectors and when recording commitments. They rely heavily on the Scheduling Guidelines. These illustrative lists are not exhaustive and are not intended to be a technical analysis of all

¹ Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 23 March 2001, Document S/L/92.

² Annex C to the General Council Decision of 1 August 2004, WT/L/579 of 2 August 2004.

transparency problems possibly arising in schedules. In fact, possible impediments to transparency of schedules are virtually innumerable. Thus transparency should be borne in mind as a general aim as well.

A. ON HOW TO DESCRIBE COMMITTED SECTORS AND SUB-SECTORS

- (a) Follow the W/120-classification. An alternative classification should be used only on the basis of a broad acceptance among Members.
- (b) In particular, use the exact sector headings of W/120-classification. In this vein, make systematic reference to CPC. If the scope (i.e. heading in the 1st column) of a committed sector or sub-sector shall deliberately deviate from W/120, make such deviation visible by spelling it out clearly (e.g. if a sector is committed only partly).
- (c) Commitments in the financial sector shall be scheduled according to the classification of the GATS Annex on Financial Services.

B. ON HOW TO RECORD COMMITMENTS

- (a) Commitments must be spelled out clearly. Therefore, commitments must not be made by a mere reference to a given national legal provision, or to “relevant national laws”. Instead, commitments must be entered consistent with Art. XX:1 (a) and (b), i.e. by spelling out any “terms, limitations and conditions” on market access and any “conditions and qualifications” on national treatment.
- (b) Consistent with GATS Art. XX, commitments in the MA and NT columns shall only relate to actual Article XVI and XVII measures.
- (c) Limitations on Market Access or National Treatment shall not be inscribed in the column for additional commitments. This column is reserved for additional commitments other than MA or NT.
- (d) Commitments must be specific. Any ENTs or LMTs maintained in schedules must specify the criteria applied. Such criteria must be transparent, predictable and objective. The same holds whenever a commitment makes market access subject to an authorization or a license or any other form of approval.
- (e) Measures inscribed in schedules are specific limitations to *full* Market Access or National Treatment. To enhance the user-friendliness of schedules, it should be clarified by inscribing “None, except the measure” instead of “The measure” only.
- (f) In sectors where the borderline between service provision under Modes 1 and 2 is hazy, that blur can be overcome by undertaking the same commitment for both modes.
- (g) In modes 1 and 2, use the sentence "Unbound due to lack of technical feasibility" only in the exceptional cases where none of the activities described in CPC can possibly be provided under these modes.

III. NEGOTIATING PROPOSALS

9. Transparency of schedules has a value in itself that benefits all Members and their service providers. Hence the goal of transparent schedules shall be pursued by all Members. In the

preparation of their revised offers, which should be tabled by May 2005, Members shall strive to ensure not only a high quality in the substance, but also a drafting of high formal and technical quality.

10. Members shall strive to follow the list of general recommendations above. In particular, Members shall take due account of the Scheduling Guidelines S/L/92 and of GATS Art. XX. Members may use the lists above as a tool for bilateral requests and offers negotiations, e.g. for pointing out possible improvements of schedules within the bilateral negotiations.

11. Members may suggest amendments to the lists above and discuss further means to foster transparency of schedules in appropriate bodies and informal groupings, in accordance with their existing working methods, mandates or procedures.
