

COMMUNICATION FROM SWITZERLAND AND MEXICO

Proposal for Disciplines on Technical Standards in Services

Revision

The following communication, dated 27 October 2005, from the delegations of Switzerland and Mexico, is being circulated to the Members of the Working Party on Domestic Regulation. This document replaces Switzerland's previous communication S/WPDR/W/32.

Switzerland and Mexico reserve the right to revise, supplement or withdraw this 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 and Mexico consider 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 and Mexico intend 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 delegations of Japan.¹, and or any

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

other Draft Annex.² 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.³

4. There have been numerous discussions in the WPDR whether disciplines should be of horizontal application or be developed on a sectoral basis. Switzerland and Mexico are of the view that many of the issues to be addressed by the disciplines are sufficiently similar across services sectors that common building blocks can be developed. Yet, Switzerland and Mexico also acknowledge 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 and Mexico have paid particular attention to the fact that the elements they propose for disciplines on technical standards does 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:

- (a) Which kind of requirements should technical standards cover?
- (b) Should technical standards comprise mandatory and voluntary standards?
- (c) 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 and Mexico share the analysis by the WTO-Secretariat⁴ 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. It becomes therefore clear to us that voluntary standards, even if they are developed by non-governmental bodies to which no standardizing power has been formally delegated, may constitute

² For example: room document of 26 April by Brazil, Colombia, Dominican Republic, Peru and the Philippines.

³ 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.

⁴ 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.

important barriers to trade and should therefore retain our attention in the development of disciplines. Yet, governmental action in this regard is very limited.

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 and Mexico are 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 and Mexico are 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 Standards⁵

Definitions

1. For purposes of this Disciplines:

conformity assessment procedure means any procedure used, directly or indirectly, to determine that a technical standard is fulfilled, including *inter alia* inspection, evaluation, verification, monitoring, auditing, but does not mean an approval procedure;

services means those sectors in which the Members of the WTO undertake specific commitments, and

technical standard means measures which provide for common and repeated use, rules, guidelines or characteristics for services or related operating methods, including the relevant conformity assessment procedure.

General provisions

2. Where technical standards are prepared, adopted or applied by the central governments and authorities, the following disciplines shall apply.

3. In addition, Members shall take such reasonable measures as may be available to them to ensure that the regional and local governments and authorities, and non-governmental bodies in the exercise of power delegated by central, regional or local governments or authorities within their territories comply with the principles of these disciplines.

4. Recognising the role of business associations involved in the exercise of standard setting impacting trade even in the absence of delegated power by the competent governments and authorities, Members encourage these non-governmental bodies to adopt the principles set out in the Code of Good Practices, Annex III of the Agreement on Technical Barriers to Trade.

Basic Rights and Obligations

Right to Take Technical Standards

5. Each Member may, in accordance with these Disciplines, prepare, adopt, maintain or apply any technical standards, including any measure to ensure its enforcement or implementation. Such measures include those to prohibit the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures.

⁵ Wherever possible, language is based on existing WTO texts, in particular Article VI and the Annex on Telecommunications of the GATS, the Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64), the Agreement on Technical Barriers to Trade, the Japanese paper (JOB(03)/45/Rev.1), the Mexican submission (S/WPDR/W/30), the submission by the EU (S/WPDR/W/25) and the submission by Canada in the SPS committee (G/SPS/W/132/Rev.3).

Right to Regulate

6. Notwithstanding any other provision of these Disciplines, each Member may, in pursuing its national policy objectives, take the measures that it considers appropriate in accordance with paragraph 7 below.

Unnecessary Obstacles

7. No Member may prepare, adopt, maintain or apply any technical standards with a view to or with the effect of creating an unnecessary obstacle to trade between the Members. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a national policy objective, taking account of the risks non-fulfilment would create. Such 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.

8. Conformity assessment procedures will be considered not to create an unnecessary obstacle to trade if Members, not adopt or maintain any such procedure that is stricter, nor apply the procedure more strictly, than necessary to give it confidence that a service conforms with an applicable technical standard, taking into account the risks that non-conformity would create.

9. 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.

Use of International Standards

10. Each Member shall use, as a basis for its technical standards, relevant international standards or international standards whose completion is imminent, except where such standards would be an ineffective or inappropriate means to fulfil its national policy objectives, for example because of fundamental climatic, geographical, technological or infrastructural factors.

11. A Member's standards-related measure that conforms to an international standard shall be presumed to be consistent with these Disciplines.

12. Members recognize the role played by relevant international bodies (intergovernmental and non-governmental organisations) in establishing and promoting international best practices to ensure the efficient trade in services.

13. Whenever a technical standard is prepared, adopted or applied for one of the national policy objectives explicitly mentioned in paragraph 7, and is in accordance with relevant international standards of relevant international organizations⁶, it shall be presumed not to create an unnecessary obstacle to international trade.

Equivalency

14. Where feasible, and as long as the service is provided cross-border, each importing Member shall endeavour to treat a mandatory technical standard adopted or maintained by an exporting Party as equivalent to its own where the exporting Member, in cooperation with the importing Member,

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.

demonstrates to the satisfaction of the importing Member that its mandatory technical standard adequately fulfils the importing Member's national policy objectives.

15. The importing Member should, on request and to the extent possible, provide to the exporting Member its reasons for not treating a technical regulation as equivalent under paragraph 14.

Transparency

16. Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through enquiry and contact points, and in an easily accessible manner, where possible by electronic means:

- (a) the list of service activities subject to technical standards;
- (b) information on the technical standards;

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

18. Whenever a relevant international standard does not exist or the technical content of a proposed mandatory technical standard is not in accordance with the technical content of relevant international standards, and if the mandatory technical standard may have a *significant effect on trade* of other Members, Members shall:

- (c) 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;
- (d) notify other Members through the Secretariat of the sectors to be covered by the proposed mandatory technical standard. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- (e) 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.

Special and differential treatment for developing countries

19. 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.

20. 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.

21. 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.

22. 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.

Technical assistance

23. 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.

24. 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.

25. 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.

26. 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.]
