

**Committee on Trade in Financial Services**

ISSUES CONCERNING THE ADOPTION OF A PROTOCOL  
TO CONCLUDE THE FINANCIAL SERVICES NEGOTIATIONS

Note by the Secretariat

The purpose of this note is to assist delegations in considering specific issues concerning the adoption of a protocol to conclude the financial services negotiations. It is circulated in response to a request made at the meeting of the Committee on 10 April 1997.

*The need for a protocol*

At the end of a negotiation, it has been standard practice for the negotiating parties to sign a protocol to legalize the results of the negotiations. This has been the case for the post-Uruguay Round negotiations in services under the General Agreement on Trade in Services (GATS).<sup>1</sup> Changes to the Schedules of Specific Commitments (Schedules) and/or Lists of Article II (MFN) Exemptions (Lists) agreed as a result of the negotiations are annexed to the text of a protocol. Since the Schedules and Lists form an integral part of the GATS, such changes would need to be made through a formal procedure under the GATS. As the legal basis for making those changes, the GATS and subsequent decisions by the Council for Trade in Services have provided for the possibility of a Member to modify or withdraw its specific commitments or to list MFN exemptions during a certain period when negotiations are expected to take place for a specific sector or a mode of supply.<sup>2</sup> This right of a Member to modify, withdraw or list can be exercised unilaterally.<sup>3</sup>

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<sup>1</sup> The following protocols have been adopted under the GATS:

- Second Protocol to the General Agreement on Trade in Services, done on 6 October 1995 (financial services) (S/L/11 of 24 July 1995)
- Third Protocol to the General Agreement on Trade in Services, done on 6 October 1995 (movement of natural persons) (S/L/12 of 24 July 1995)
- Fourth Protocol to the General Agreement on Trade in Services, done on 15 April 1997 (basic telecommunications) (S/L/20 of 30 April 1996)

The First Protocol was originally drafted for the Schedules of least-developed country Members resulting from the Uruguay Round. However, this protocol was never adopted, as a different procedure was followed for the annexation of those Schedules to the GATS.

<sup>2</sup> For financial services, see the Second Annex on Financial Services to the GATS and the Second Decision on Financial Services adopted by the Council for Trade in Services on 21 July 1995 (S/L/9 of 24 July 1995).

<sup>3</sup> Three Members modified their Schedules and Lists in June 1995 in exercise of their rights under the Second Annex on Financial Services.

However, when the negotiations result in an agreed set of commitments, a protocol is adopted as a legal instrument certifying the changes agreed. The practical need for adopting a protocol certifying the results of a negotiation arises from the need to ensure that the agreed changes enter into force simultaneously with the protocol; i.e. any changes in the commitments or MFN exemptions of a Member do not enter into force unless the changes of other Members enter into force at the same time. It ensures the conditionality of the entry into force of the agreed commitments. It can therefore be said that the protocol is a means through which the balance between the negotiated commitments and MFN exemptions is maintained at the conclusion of a negotiation.

### ***Principal elements of a protocol***

The principal elements which would need to be included in a protocol concluding negotiations on specific commitments and MFN exemptions under the GATS are the following:

- A preamble indicating the Members concerned and the content of the agreement resulting from the negotiations; i.e. which Members have agreed on which texts, typically a set of Schedules of Specific Commitments (Schedules) and Lists of Article II (MFN) Exemptions (Lists) annexed to the protocol, having regard to the relevant legal instruments;
- A description of how the annexed Schedules and Lists relate to earlier Schedules or Lists; i.e. whether the new Schedules and Lists replace, supplement or modify all or part of the previously existing Schedules and Lists;
- The procedure for the acceptance of the protocol; in particular, until which date the protocol will be open for acceptance;
- An indication of when the protocol shall enter into force, whether the entry into force is subject to any conditions, and the procedure to be followed in case such conditions are not fulfilled;
- Other procedural matters; such as the designation of a depositary for the protocol, usually the Director-General of the WTO, and references to the prompt distribution of certified copies and notifications of acceptances. Reference is also made to the registration of the protocol in accordance with the Charter of the United Nations;
- The date and the place the protocol was done.

A discussion of selected issues follows.

### ***Relation between the old and new commitments***

There are several possible ways in which the new commitments can relate to the new commitments. Schedules and Lists annexed to the protocol can either replace, supplement or modify all or part of the previously existing Schedules and Lists. This relation between the old and new commitments needs to be made absolutely clear. Normally the protocol will specify how the annexed Schedules and Lists relate to the existing Schedules or Lists, but if the situation varies between Members or between entries in a Member's Schedule, it needs to be specified in the annexed Schedules and Lists themselves.

The most unambiguous and straightforward way to do this would be for the Members concerned to *replace* the entire sections on a particular service in their existing Schedules and Lists. If this is the case, it becomes unnecessary to indicate on each individual Schedule or List the fact it is a replacement. There will also be no need to refer to the old Schedule or List when one needs to identify

the commitment of a Member for a particular service when the protocol enters into force. An alternative approach would be to annex to the protocol only the additions or modifications to the specific entries in the existing Schedules and Lists. Although this may result in a smaller volume of text, it would make it more difficult to identify and interpret the commitments.

***Special procedures in the case of non-acceptance by Members***

Typically, a protocol enters into force on a specified date provided it has been accepted by all Members concerned; i.e. by all Members having annexed their commitments to the protocol. However, it has been the case that some Members were not able to formally accept the protocol in the specified time due to procedural delays or other difficulties arising in the domestic ratification process. It has become customary, therefore, to add special provisions which apply in the event that not all Members were able to accept the protocol; for example, it may be stipulated that those Members which have accepted the protocol by the specified date may decide, within a specified period, on its entry into force.

This would avoid a situation in which a delay in the acceptance of a Member (or a small number of Members) prevents the protocol from entering into force. In this formulation, the Members having accepted the protocol could also opt not to let the protocol enter into force, if the non-acceptance of a Member (or Members) is felt significant enough to justify this.

Normally, Members which were not able to ratify the protocol in time will no longer be able to formally accept the protocol once the deadline for acceptance has passed. However, it would be possible for such Members to undertake the commitments inscribed in the new Schedule and/or List if they constitute an improvement to the previously existing Schedule and/or List. This should be done in the form of a formal notification by the Members in question to all Members.<sup>4</sup> If the new Schedule contains modifications or withdrawals of commitments which adversely affect other Members, the procedures of Article XXI (Modification of Schedules) of the GATS would normally apply.

***Status of Members maintaining their existing commitments***

The "Members concerned" as referred to in a protocol are the Members which have attached their new commitments to the protocol, and those commitments enter into force when the protocol enters into force. If a Member does not sign a protocol, the previously existing Schedule and List of that Member stays in force regardless of the status of the protocol. With the entry into force of the protocol, parties to the protocol assume the new obligations vis-à-vis *all* the Members of the WTO under the GATS. Therefore, a Member which is not a signatory to the protocol will have the same rights as a signatory to the protocol with respect to the commitments of all signatories to a protocol. As mentioned above, being a signatory to a protocol only ensures that the new commitments enter

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<sup>4</sup> It was never the intention of Article XXI of the GATS to apply an onerous procedure when a Member intended to modify its Schedule in a manner beneficial to other Members. In the early years of the GATT, a method of modification or rectification of schedules was applied whereby a notification of the proposed modification was circulated with the advice that provided no objections were lodged within a specified period -usually thirty days -the modifications would become effective at the close of the period. (WTO, *Guide to GATT Law and Practice*, Geneva 1995, pp 1005-6.) Subsequently, a procedure of Certification was established, whereby a draft containing changes in the Schedules is communicated to all the contracting parties. Provided that no objection has been raised by a contracting party within three months, the draft shall become a Certification. (See *Procedures for Modification and Rectification of Schedules of Tariff Concessions*, Decision of 26 March 1980, BISD 27S/25.) This procedure was also employed in the implementation of the Ministerial Declaration on Trade in Information Technology Products. (See *Implementation of the Ministerial Declaration on Trade in Information Technology Products*, Communication to the Chairman of the Council for Trade in Goods, G/L/160 of 2 April 1997.)

into force simultaneously; this is important when the improvements made are conditional upon other parties to the protocol making the agreed improvements to their commitments.

It would therefore be redundant for a Member maintaining its existing commitments to sign the protocol; in this case signature would have no effect on the commitments of the Member in question, which would continue to be valid even if the protocol failed to enter into force.

One possible shortcoming of non-modifying Members signing a protocol may be to increase the risk associated with ratification or other domestic procedures for accepting the protocol, in the sense that the larger the number of Members needing to go through domestic ratification procedures the larger must be the danger that some will have been unable to complete the process by the agreed date.

The question may arise as to whether a Member not modifying its existing commitments might nevertheless find advantage in attaching them to the protocol, in order to make it clear that they are to be regarded as part of the results of the current negotiation and that they will not, or not necessarily, be maintained if the protocol fails to enter into force. (It cannot be assumed that if the protocol failed to enter into force, all existing commitments, dating from past negotiations, would be maintained.) However, to attach existing commitments to the protocol would not be enough to secure their withdrawal in the event of failure of the protocol; it would be necessary to withdraw them before the end of the current negotiation or to signify formally that they would be withdrawn if the protocol did not enter into force.

These procedures would seem to create unnecessary complications and risks. A much more simple way of protecting the position of Members wanting to retain the right to reconsider their existing commitments in the event of failure of the protocol to enter into force would be to follow the procedure used at the time of the financial services negotiations in 1995. In that case the Council for Trade in Services took a decision ("the Decision on Commitments in Financial Services") which allowed a Member to modify or withdraw all or part of its commitments and to list MFN exemptions during a period of 60 days after 1 August 1996 *if the Second Protocol did not enter into force*<sup>5</sup>. In other words, this Decision extended until the end of the ratification period the same rights Members enjoyed during the negotiating period itself: this is logical, since it is only at the end of the ratification period that there can be certainty as to whether the results of the negotiation will be implemented.

### ***Verification of Schedules and Lists***

It has been the rule after each service negotiation to enter the date on which the verification process was finalized as the date on which the protocol was done. This is because the protocol becomes ready for formal acceptance only when verification is completed. It should therefore be borne in mind that there needs to be a sufficient interval between the conclusion of the negotiations and the date of the opening of the protocol for acceptance, so that adequate time is allocated to technical verification.<sup>6</sup>

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<sup>5</sup>Decision adopted by the Council for Trade in Services on 21 July 1995, in S/L/8 of 24 July 1995. Since the Second Protocol entered into force on 1 September 1996, this condition was not fulfilled. See the Communication from Members which have accepted the Second Protocol to the GATS in S/L/25 of 30 July 1996.

<sup>6</sup>In 1995, the period available for the verification of the Schedules and Lists was a little over two months, from 28 July to 6 October. The period for ratification was initially until 30 June 1996, which was subsequently extended until 30 November 1996. (See the Decision on Acceptance of the Second and Third Protocols to the GATS, adopted by the Council on 30 July 1996, in S/L/28 of 30 July 1996.)