

## **TECHNICAL ASPECTS OF REQUESTS AND OFFERS**

### **Summary of presentation by the Secretariat**

The request to address this subject came from some delegations at a meeting of the Special Session of the Services Council. This presentation is mainly based on previous experience and will try to highlight the technical aspects of the process of submitting requests and offers in the context of negotiations. It must not be seen as pre-empting any alternative course of action participants might wish to take.

This presentation addresses mainly three aspects of both requests and offers. That is, the content, the format in which requests and offers may be submitted and finally the process through which requests and offers could be exchanged.

In Paragraph 15 of the Doha Declaration, Ministers agreed that participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003. The word "initial" is of course indicative of the reality of the negotiating process being a succession of requests and offers. These dates only mark the start of the process. However, this must not in any way reduce the importance of those dates. They represent a political commitment by Ministers. It is important to keep in mind that when each Participant submits an initial request it does not have to be exhaustive and a Participant does not necessarily have to think of every conceivable item it wishes to request of other participants. In order to meet the dates, it might be necessary to avoid seeking perfection which might cause delays.

## **REQUESTS**

### **A. Content**

There are possibly four types of contents in a request, which are not mutually exclusive. Such a request may be addressed to a group of participants or to an individual participant.

- (i) The first is that a participant may request of another the addition of sectors that are not included in its schedule.
- (ii) The second type is requesting the removal of existing limitations or reducing its level of restrictiveness (e.g. in sector x there may be a foreign equity limitation of 49 per cent, a request may be pointed at the removal of that limitation or improving it by raising the 49 per cent to say 75 per cent). A request may also be directed at an "unbound" entry, with a view to establishing a binding, be it with or without limitations. Such requests always relate to commitments on market access (Article XVI) and/or national treatment (Article XVII).
- (iii) There may also be requests for additional commitments (Article XVIII), which may relate to matters not falling within the scope of Articles XVI and XVII, i.e. the type of commitments contained in the Reference Paper on regulatory principles in basic telecommunications. A number of such requests have been actually exchanged during the Uruguay Round and corresponding commitments were undertaken.

- (iv) Finally, a request may also relate to the removal of MFN exemptions. Paragraph 6 of the Annex on MFN Exemptions foresees that existing exemptions will be subject to negotiations in successive rounds of negotiations. Participants may expect to receive or wish to make requests for the removal of specific MFN exemptions. Or, if it is eventually agreed, and this is still subject to consultations and discussion in the Services Council, participants may ask for the reduction of the scope and/or level of an MFN exemption, not necessarily with a view to its complete termination but to bring it into more the conformity with the MFN obligation.

B. Format

So often a request is presented in the format of a simple letter, in which a participant would state what it requests of another. Out of the four types of requests mentioned previously, additional commitments under Article XVIII might require a higher level of technical specificity. The scheduling of commitments under Articles XVI and XVII (Market Access and National Treatment) is basically the removal of limitations. There is a definition in both Articles of what is a market access and a national treatment commitment. So, if a Participant wishes to undertake a full commitment on either, it would simply need to inscribe "none" in its schedule, indicating that there are no limitations. The substance of the commitment is defined in the Articles themselves.

However, when it comes to additional commitments under Article XVIII, there is no definition in the Article of what the legal undertaking would be. It merely provides a framework for Participants to ask of each other, and inscribe in their schedules, legal commitments that relate to any matter which is not covered by market access and national treatment. Article XVIII has proven to be very helpful on several occasions, including the negotiations on basic telecommunications where it helped those participants who were interested in ensuring that the liberalization of telecommunications is effective. It contains commitments on matters that were not even conceived within the GATS itself, such as an obligation to establish an independent regulator. That is not covered by market access, national treatment or any provision in the GATS. It also contains commitments on how to ensure competition, how to ensure interconnection on a reasonable and non-discriminatory basis. If a request is made of a participant to undertake certain obligations that are not defined in the GATS then there would be a need to describe carefully, in accurate legal terms what is being requested. That is the element of requests may have some technical aspects to it that would require careful preparation.

C. Process

The exchange of requests as a process has traditionally been purely bilateral. It is simply a process of letters being addressed from the requesting participants to their negotiating partners. The Secretariat does not normally have a role to play. In the Uruguay Round there was a suggestion, at some stage, that when a request is sent to a participant, a copy should also be sent to the Secretariat for its records. That was followed for some time but then subsequently abandoned and the process turned into a purely bilateral exercise. The exercise of preparing and submitting requests is not very complicated from a technical point of view. Once the requests are received participants may wish to start consulting with each other.

## **OFFERS**

A. Content

In terms of content, offers would normally address the same four types previously mentioned in relation to requests, that is: (i) the addition of new sectors; (ii) the removal of existing limitations or the introduction of bindings in modes which have so far been unbound; (iii) the undertaking of additional commitments under Article XVIII; and finally (iv) the termination of MFN Exemptions.

A participant would submit an offer in response to all the requests that it had received, but would not necessarily have to address each and every element contained in those requests in its initial offer.

B. Format

Unlike a request, which is usually presented in the form of a letter, an offer is normally presented in the form of a draft schedule of commitments. Therefore offers do require considerable technical preparation. In the Uruguay Round, there were no preexisting schedules of commitments. Participants started the process with the submission of offers, which were subsequently followed by requests, and the process continued. In this round, offers will be submitted against the backdrop of preexisting schedules. Therefore the relationship between offers (eventually new commitments) and old schedules will raise important technical questions, the most important of which is whether participants would in the end submit new commitments in separate schedules to supplement the old ones or would they submit complete revised schedules containing all commitments, old and new. For the sake of clarity and legal certainty, it seems that the latter might be the best way to proceed, particularly given that existing commitments may also be subject to clarification and technical improvement in the light of the revised scheduling Guidelines (S/L/92). In which case, it might be more efficient if participants were to start the process of revising existing schedules with the submission of initial offers. In other words, an initial offer would be submitted on the basis of the old schedule to which newly offered commitments would be added. Such additions may be clearly indicated through the use of different techniques such as the use of strike out and bold, italics or any other preferred method. However, it must be noted that such a revised schedule would only constitute a negotiating document with no legal status. In other words it would not have any binding effect on the participant submitting it and would be treated as a working documents.

Participants may wish to use this opportunity to introduce other technical refinements to their old commitments in accordance with any conclusions that may be reached in the interim on other issues raised by Participants such as the distinction between modes 1 and 2 or issues raised in relation to Articles XVI, XVII and XX:2 of the GATS. So, if the final objective from these negotiations is to arrive at one clean revised schedule for each Participant containing all its commitments (old and new), it might be advisable to start pursuing that objective as early as possible, preferably starting with the initial offers to be submitted by 30 March 2003.

As mentioned earlier these will only be initial offers; the rest of the negotiations, almost two years that will ensue, would be a succession of requests and offers and offers will be subject to several revisions as a result of the negotiations. That is the phase in which the Secretariat is more in a position to help, particularly with the legal and technical questions relating to the preparation of offers and draft schedules. This will no doubt require a lot of preparation in the capitals and as well as consultation in Geneva, with negotiating partners and possibly with the Secretariat.

C. Process

While requests are addressed bilaterally to negotiating partners, offers are traditionally circulated multilaterally. This is not only useful from a transparency point of view but also from a functional point of view. In an offer, a participant is actually responding to all the requests that it has received. That offer would also be open to consultations and negotiation by all negotiating partners, not only those who have made requests to the participant concerned but also any other participant in the negotiations. Offers in effect are a signal of the real start of the advanced stage of bilateral negotiations. That is when negotiators will come to Geneva and have each time a long schedule of bilaterals with other delegations and the whole place becomes like a "beehive". Delegations will spend less time in Council Meetings and more time negotiating with each other. The process really enters a new phase with the submission of those offers.

The submission of offers could also trigger submission of further requests and then the process continues and becomes a succession of requests and offers. As an off-shoot from that process,

in bilateral negotiations certain substantive issues might arise and require further multilateral discussion, including certain regulatory issues raised in requests and offers relating to additional commitments (Article XVIII). For example, a group of participants might decide that the best way to deal with is through the development of a reference paper like in the case of basic telecommunications. The exercise of preparing and drafting a reference paper is essentially a multilateral one. It sometimes engages those who are interested in the issues or negotiating on a particular sector. Of course, once such a reference paper is adopted or agreed upon, it does not take legal effect until a Participant actually incorporates it in its schedule.

This is a brief description of how this process takes place and what are the technical aspects that might need to be kept in mind. This presentation does not really address the substantive content of requests or orders. It would not be appropriate for the Secretariat to advise on which sectors to focus on, what would be the limitations in other participants' schedules that might be removed etc. This presentation addresses only the technical aspects of the documentation as well as how the process itself normally takes place.

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