

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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DEFINITIONS IN THE DRAFT GENERAL AGREEMENT
ON TRADE IN SERVICES

Note by the Secretariat

1. At the meeting of the Group of Negotiations on Services beginning 10 July 1991, the Secretariat was asked by participants to prepare a note to clarify the definitions of terms contained in the draft General Agreement on Trade in Services (MTN.TNC/W/35/Rev.1). This note has been prepared in response to that request. While legal definitions were first discussed last year in the lawyers' group, the texts contained in draft Article XXXIV did not benefit from detailed consideration in the GNS.

2. Legal definitions are concerned with determining the scope of obligations, and are important in building a workable GATS. They do not, however, in themselves create rights and obligations. In the context of the GATS, it is also true that many of the obligations to which the definitions in this note refer apply only when a party has chosen to include a relevant sector in its schedule, and are subject to any conditions it may have placed therein.

3. This note discusses terms already defined in the GATS. Other terms might need defining at a later date depending on the final wording of the agreement. The key definitions of the agreement are contained in Articles I and XXXIV of the GATS as follows:

"Measures by Parties affecting trade in services"

Art. I:1 "This Agreement applies to **measures by Parties affecting trade in services**"

4. This important provision determines the scope of the GATS. Its full meaning is clarified through the definition of each of its elements: measures, by Parties, affecting, trade in services.

"Measures"

Art. XXXIV(a) "measure includes any measure by a Party, whether in the form of a law, regulation, administrative action, rule, procedure, decision or any other form"

5. The GATS does not define analytically the term "measure", due to the great variety of types of government action intended to be covered by this

term. The GATS provides only a non-exhaustive list of general forms which measures might take.

6. GATT panels have refined the meaning of the term "measure", referring particularly to the degree of obligation contained in a government norm or action. They have found that a norm, regulating government action, that is not obligatory but merely permissive under the law of that jurisdiction, does not constitute a measure (BISD 34S/136 at paragraph 5.2.9). Thus a law authorizing, but not requiring, a government to take a certain action is not a measure. Likewise, a treaty obligation that is not enforceable in a party's domestic law would not be a "measure". On the other hand a government norm, regulating private behaviour, which only recommends a certain course of action may constitute a measure if the recommended action is accompanied by a government incentive or disincentive, and that government intervention was essential for the operation of the scheme (BISD 35S/116 at paragraph 109). A measure can, of course, consist of either an act or, if there is a duty to act, an omission to act.

"By Parties"

- Art. I:3(a) "measures by Parties means measures taken by:
- (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of governmental powers [or in the grant of governmental benefits]"

7. The GATS includes within its scope all measures resulting from the exercise of public authority, at whatever level of government, and whether this power has been delegated or not. As in the GATT, actions taken by private persons or associations, if in the exercise of public authority, could constitute measures (BISD 36S/93 at paragraphs 12.8, 12.9).

"Services"

- Art. I:3(b) "services includes any service in any sector [except services supplied in the exercise of governmental functions]."

8. The term "service" is not directly defined in the GATS, reflecting the lack of a generally-accepted economic definition. The term is however defined to include all service sectors, with the possible exception, not yet agreed, of government functions. It should be noted that the GATT also does not define the analogous term of "product" or "goods".

"Trade in services"

- Art. I:2 "trade in services is defined as the supply of a service:

- (a) from the territory of one Party into the territory of any other Party;
- (b) in the territory of one Party to the service consumer of any other Party;
- (c) by natural persons of one Party in the territory of any other Party; and
- (d) through the [commercial] presence of [service providing entities] [juridical persons] of one Party in the territory of any other Party [, the provision of service being for a limited duration and a specified purpose]"

9. This definition ensures that the GATS applies only to the supply of services with an international element. This is achieved by listing, from the point of view of the territorial jurisdiction of a party, the different foreign elements which might be present: the service itself, the service consumer, or the service provider - the last being either a physical or a legal presence.

10. The question of what constitutes a "commercial presence" is dealt with in a separate definition.

"Supply"

Art. XXXIV(b) "supply of a service includes the production, distribution, marketing, sale and delivery of a service"

11. The notion of "supply" is intended to encompass the whole range of activities necessary to produce and deliver a service. The definition is illustrative, not comprehensive. The use of the term "supply", in place of "delivery" in prior versions of the text, suggests a wider range of activities than the word delivery.

"Affecting"

Art. XXXIV(c) "measures by Parties affecting the supply of a service include measures in respect of:

- (i) the purchase, payment, or use of a service;
- (ii) the access to and use of distribution and transportation systems and public telecommunications transport networks in connection with the supply of a service; and

- (iii) the commercial presence of natural and juridical persons of a Party supplying a service in the territory of another Party"

12. This definition supplements that of supply of a service. It specifies that measures dealing with the consumer side of the transaction (purchase, payment and use), transportation and communication, as well as constraints on physical or juridical presence, are within the scope of the agreement. The term "affecting" has been interpreted in Article III of the GATT to mean an effect on the competitive relationship between like products, not on the subsequent trade volumes in those products (BISD 36S/345 at paragraph 5.11; BISD 34S/136 at paragraph 5.19).

"Natural person"

Art. XXXIV(d) "natural person of any other Party means any natural person who is a national of a Party under the law of that Party or, in the case of a Party to which Article XXVIII:3(b) applies, natural persons with the right of permanent residence in the territory of that Party"

13. Since states have differing criteria for defining their nationals which are physical persons, the definition refers to the laws of the granting state. The definition in its second part takes into account parties to the GATS which are not states in international law. The most closely equivalent criterion of permanent residency is applied in this case.

"Juridical person"

Art. XXXIV(e) "juridical person of any other Party means:

- (i) any entity legally constituted under the law applicable in the territory of another Party and any partnership or association organized under such law, whether constituted or organized for profit or not and whether privately-owned or governmentally-owned; and
- (ii) any entity legally constituted or organized under the law applicable in the territory of a Party that is owned or controlled by natural persons identified in paragraph (d) {i.e.. a natural person} or entities identified in paragraph (e)(i) {juridical persons}

14. This definition provides an origin rule for juridical persons: they attach either to the place where they are constituted or to the place where persons controlling them are constituted or are nationals. The concept of "control" is not easily defined and in the end depends on factors constituting effective control under the condition of a particular legal system.

15. Given parties' differing legal systems, the forms which a juridical person might take cannot be exhaustively defined. In order to cover all common forms of business structure, the definition covers those entities, such as partnerships, which do not have full juridical personality.

16. The situation of the "shell" company is dealt with in the GATS through the denial of benefits clause (Article XXXI). Benefits of the agreement can thus be denied an entity controlled by persons from a non-Party, even if the entity is incorporated in a Party, if the entity has no other substantial link to that Party.

"Commercial presence"

Art. XXXIV(h) "commercial presence means any type of business or professional presence within the territory of a Party for the purpose of supplying a service, whether through incorporation, the acquisition of existing enterprises, the creation of wholly- or partially-owned subsidiaries, joint ventures, partnerships, branches, representative offices, or otherwise."

17. This definition attempts to cover all legal forms in which a service provider can be "present" in a market. It does not deal with the issue of length of stay, which should be specified in the scope provision in Article I.

"Service provider"

Art. XXXIV(f) "service provider" of another Party means any natural or juridical person of a Party that supplies a service, including any natural person of another Party employed by such a person

18. This definition extends the notion of service provider to include employees of persons supplying a service, provided such employees are nationals of any Party.

"Service consumer"

Art. XXXIV(g) "service consumer of another Party means any natural or juridical person of a Party that receives or uses a service"

19. This definition is not symmetrical to that of a service provider. In particular, it does not include employees of a service consumer, and does not link consumption of a service to payment.