

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Services

ARTICLE XXXIV

Status of Branches as Services Suppliers

Note by the Secretariat

1. The question has been raised whether branches and representative offices are covered by the definition of service suppliers in Article XXXIV and, if they are not, what implications this may have for the supply of a service through commercial presence in the form of a branch or representative office.
2. The perceived problem is that while the provisions of the GATS are drafted in terms of the treatment to be accorded to "services and service suppliers", the definition of "service supplier" in Article XXXIV(g) is confined to persons (i.e. natural or juridical persons). This excludes branches and representative offices since they are not juridical persons. The implication is that branches and representative offices of foreign service suppliers would not be entitled to treatment as service suppliers, e.g. to national treatment in such matters as access to and use of basic telecoms services. However, branches and representative offices are recognised in XXXIV(d) as forms of "commercial presence" through which the supply of services can take place.
3. The relevant provisions in Article XXXIV are the following:
 - (d) "commercial presence" means any type of business or professional establishment, including through
 - (i) the constitution, acquisition or maintenance of a juridical person, or
 - (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.
 - (g) "service supplier" means any person that supplies a service;
 - (l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.
4. If the consequence of the definitions in Article XXXIV would be to deny GATS treatment to branches and representative offices, that was not the intention of the negotiators. The essential question to be decided is whether in fact the current drafting of the Agreement has that effect.

5. Article I:2(c) defines trade in services as the supply of a service:

- (a) ...
- (b) ...
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member
- (d) ...

6. According to Article XXXIV(g), service suppliers are "persons" in the legal sense, capable of assuming rights and incurring liabilities. In many countries branches or representative offices are not considered juridical persons in the legal sense. However, according to Article I:2(c) one of the modes through which services can be supplied is commercial presence, and commercial presence is defined in Article XXXIV(d) as including branches and representative offices. Therefore, although such a branch may not be a juridical person, it can be argued that the juridical person which the branch or the representative office represents would still be entitled to receive the treatment provided for service suppliers, through its commercial presence in the territory where the service is being supplied. Since Article I recognizes commercial presence (in forms other than juridical persons) as a mode through which a person may supply a service, it would seem anomalous to interpret the reference to "service suppliers" in Article I:2(c) to mean only those suppliers fully present as juridical persons in the territory where the service is being supplied: service suppliers meeting the criteria for GATS treatment are entitled to choose to supply the service through a branch or representative office and still to receive the benefits of the Agreement. The branch or representative office would be treated as part of the service supplier. In such a case, of course, the service supplier would receive GATS treatment only to the extent that it has commercial presence in the territory where the service is being supplied; the right to such treatment would not extend to other parts of that juridical person which exist outside the jurisdiction of the country hosting the branch or representative office. Furthermore, the treatment accorded to a service supplier which maintains commercial presence in the form of a branch or a representative office would not be the same as that accorded to other suppliers which are present in the form of juridical persons: since branches are not capable of assuming all the legal obligations of a juridical person it may be justified to apply special requirements to them, such as the requirement to put down a financial deposit. The basic obligation is that they should be given the same treatment as that given to "like" suppliers in similar situations.

7. If this interpretation is accepted there would be no need to introduce any changes to the text of the Agreement. However, participants may feel that it is desirable to provide greater security within the text for the GATS treatment of branches and representative offices. This could be achieved by adding an interpretative note to paragraph (g) of Article XXXIV making it clear that branches and representative offices of foreign service suppliers are for the purposes of this Agreement part of that supplier and are entitled to GATS treatment on that basis. Such an interpretative note could be along the following lines:

Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. However, such treatment shall only be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.