MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Group of Negotiations on Services

ISSUES RELATING TO THE SCOPE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES

Note by the Secretariat

1. At the informal meeting of the GNS on 1 October 1993, the Chairman invited delegations who may have questions relating to the scope of the General Agreement on Trade in Services (GATS), and which they consider to require examination, to communicate them to the secretariat. This note is prepared at the request of delegations in an attempt to synthesize the questions received so far and provide for a basis for a focused discussion of the main issues involved.

2. The questions raised by delegations were concerned with whether certain types of measures fall within the scope of the GATS, and consequently whether Members would be bound by their obligations under the Agreement with respect to these measures. The types of measures referred to in this regard are the following:

(a) Measures relating to social security; including those pursuant to bilateral agreements on the avoidance of double contributions to, and/or double benefits from social security systems.

(b) Measures relating to judicial and administrative assistance between government authorities, including those pursuant to international agreements on such matters.

(c) Measures relating to the settlement of disputes pursuant to bilateral investment protection agreements.

(d) Measures relating to the entry and stay of natural persons, including those pursuant to international agreements on labour mobility.

(e) Measures relating to the entry and temporary stay of natural persons pursuant to bilateral agreements on:

- entry and temporary stay of agricultural workers on seasonal basis;
- working holidays and young workers programmes;
- programmes for the exchange of University professors and school teachers;
- cultural affairs.

3. The main provisions of the GATS concerned with defining the scope of the Agreement in terms of the measures it covers are:

Paragraph 1 of Article I which states:

"This Agreement applies to measures by Members affecting trade in services".

Paragraph (a) of Article XXXIV which states:

"'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;"

Paragraph (c) of Article XXXIV which states:

"'measures by Members affecting trade in services' include measures in respect of

(i) the purchase, payment or use of a service,

(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;".

It should be noted that, as a general approach, all the above mentioned provisions are formulated in an inclusive and not in an exclusive fashion, which could be seen as an indication that the intent of the negotiators was to widely cover any measure which affects trade in services.

(a) Measures relating to social security

4. These are measures which generally determine the conditions under which a natural person may have access to the social security system of a certain country. Very often countries do not grant foreigners access to their social security system on the same terms as their nationals, nor do they grant all foreigners access to the system on the same terms. For example, the nationals of a country with which a bilateral social security agreement exists are granted access to the system on terms different from those applied to nationals of a country with which there is no such agreement. The issue is whether such differences in treatment would be considered discrimination within the meaning of the GATS.

5. In examining this issue, the following questions may be relevant:

(a) Do the measures in question relate to the supply of social security services or to the access to and use of such services? If it is the former, and the service is not supplied on a commercial basis nor in competition with one or more service suppliers, then it would be considered a service supplied in the exercise of governmental authority according to Article I:3(b) and would be outside the scope of the Agreement. It appears that we should be concerned with measures relating to the access to and use of social security services by natural persons of other Members who are temporarily present in the territory of a Member for the purpose of supplying a service. The question to be considered is whether

conditions which do not apply to nationals, should inscribe such limitations of national treatment in their schedules.

(b) The answer to this question depends in the first instance on whether such measures would be considered "measures affecting trade in services" according to Article XXXIV:(c)(iii). If lack of access to the social security system put a person temporarily present in the country to supply a service at a competitive disadvantage, trade in services would presumably be affected. In such cases there may be discrimination within the meaning of Article II if its is between different foreign persons or within the meaning of Article XVII if it is between foreigners and nationals.

6. If it is agreed that trade could be affected by differential treatment of foreigners in the matter of social security benefits, and that such discrimination is not covered by the exclusion in Article I:3(b) of services supplied in the exercise of governmental authority, and if it remains the case that many or most governments intend to maintain such discrimination, a decision is needed on how to proceed. For example, should such situations be covered by scheduling measures inconsistent with Article XVII and seeking exemptions for those inconsistent with Article II, or should more generic solutions be sought?

(b) Measures relating to judicial and administrative assistance

7. Mutual assistance between governments in judicial and administrative matters is often needed in situations where there are transnational elements involved in administrative or judicial proceedings. It often involves the obtaining, by a government, of information (whether factual or on laws and regulations) or evidence which is in the possession of a foreign authority and falls within the jurisdiction of another state. Such assistance could be extended on the basis of an agreement or on an ad hoc basis (reciprocity being expected). Furthermore, there are many bilateral and multilateral agreements in different fields of international relations which contain special clauses establishing obligations to render such assistance.

8. Questions were raised as to whether such measures of mutual assistance could result in actual discrimination between GATS Members. It could be argued that where such assistance is given on a matter directly related to trade in services (e.g. laws or regulations affecting services activities or factual information on a particular service supplier) and is extended only to some Members and not others, there could be potential discrimination within the meaning of Article II.

9. The GATS, as many other international agreements do, contains certain obligations on Members to provide such assistance which is considered necessary for the operation of the Agreement. These obligations are established by the following provisions:

- Paragraph 4 of Article III, which requires each Member to respond promptly to all requests for specific information, by any other Member, on any of its measures.

- Paragraph 3 of Article VII, which provides for the obtaining of specific information concerning the operations of a monopoly supplier.

- Paragraph 2 of Article IX, which provides for the obtaining of information on business practices.

- Paragraph 1 of Article XXII, which has a very wide scope of co-operation between governments of Members and could potentially cover any kind of request for information from one government of a Member to another.

10. Given these provisions for different forms of assistance between Members, which are necessary for the operation of the Agreement, could it be argued that the scope for discrimination that may result from bilateral agreements would probably be limited? This means that the existing footnote to Article II, which in itself is a recognition that such agreements could result in discrimination, could be expected to cover only a limited range of cases where such assistance may go beyond what is provided for under the GATS and result in actual discrimination. Any such cases of discrimination would be effectively exempted by the footnote. On this analysis there would be no need for further action in respect of these measures.

11. It should be noted, however, that the legal drafting group has not concluded the examination of that footnote. The relevant paragraph of the record of the group on this matter states:

> "The need for, and content of, this footnote remains in question. One suggestion was that it is not necessary because the measures referred to in the footnote were outside the scope of the Agreement. Another suggestion was that whether the foregoing is true or whether measures taken under other types of horizontal agreements might need to be cited has not yet been adequately discussed".

(c) Measures relating to the settlement of disputes pursuant to bilateral investment protection agreements:

12. Such measures usually provide for procedures (e.g. binding arbitration) through which a private investor who is the national, or an enterprise, of one party to an investment agreement could settle any dispute that may arise with the government of the host country, which is the other party to the agreement. In the absence of such an agreement between the country of the investor and the host country, the investor would have no other choice but to bring the dispute before the host country's domestic courts, a process which could take a much longer time to settle the dispute. The issue then is whether such measures which provide for a special, and presumably more efficient dispute settlement procedures, could result in more favourable treatment to some Members of the GATS and not others.

13. It should be noted in that respect that Article VI of GATS contains an obligation on Members to establish procedures in which service suppliers could individually pursue certain cases. The relevant part of paragraph 2 of that Article states:

> "(a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services."

A relevant question to examine in that respect is the extent to which procedures provided for under bilateral agreements would allow an investor of a country which has an investment agreement with the host country to enforce a GATS right in a more efficient manner than would be possible under GATS procedures and thereby accord him more favourable treatment than other GATS Members.

(d) Measures relating to the entry and stay of natural persons

14. Paragraph 2 of the Annex on Movement of Natural Persons Supplying Services Under the Agreement states:

> "The Agreement shall not apply to Measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis."

The aim of this paragraph is to exclude from the scope of the GATS certain measures which do not relate to the entry and temporary stay of natural persons supplying services. It refers specifically to two categories of measures for that exclusion:

(a) Measures affecting natural persons seeking access to the employment market of a Member.

(b) Measures regarding citizenship, residence or employment on a permanent basis.

15. Questions were raised with respect to how to identify such measures within the domestic regulatory systems of Members. That involves the identification of cases where a person is seeking access to the employment market, and how that would be distinguished from the case of entry and temporary stay for the purpose of supplying a service. Could such a distinction be made, for example, on the basis of whether that person has, at the point of entry, a contract for the supply of a service or an employment engagement with a service supplier which is supplying a service in the receiving country? Also, how should the distinction be made between situations of permanent employment and those of temporary employment? For example, would an open ended employment engagement be considered permanent even though it may formally be subject to renewal procedures?

16. A more general question is; whether such clarifications should emerge from a common understanding between participants or whether each Member would state its own understanding regarding such distinctions in the horizontal part of its schedule of commitments, bearing in mind that the contents of schedules apply only where specific commitments are undertaken?

(e) Measures relating to the entry and temporary stay of natural persons pursuant to certain bilateral agreements

17. Questions were raised concerning bilateral agreements which clearly involve entry and "temporary stay" of natural persons, which may or may not involve the supply of a service. Agreements referred to in this context are agreements on:

- Entry and temporary stay of Agricultural workers on a seasonal basis for periods of approximately three months.

- Working holidays and young workers programmes, which aim at providing University and college students with the opportunity of living and working in another country for periods that usually do not exceed six months. Employment in such cases is not limited to any particular types of work. Young workers programmes are very similar although they may involve a narrower range of

- Programmes for the exchange of university professors and school teachers, which are conducted on a reciprocal basis, and through which professors and teachers spend a certain time (normally a year or two) teaching in another country during which they continue to be paid by their original employer. The primary objective of such programmes is cultural in nature and not commercial.

- Cultural affairs, which are quite broad in scope and seek to promote exchanges of professors, researchers, students, artists and other persons engaged in cultural, scientific and technical activities. More often such arguments are in the form of memoranda of understanding where the commitments are expressed in rather loose terms. Also the activities in which such persons are involved are usually supported by governments and not economically viable on their own.

18. As a general consideration it should be noted that such agreements cover many activities that go beyond trade in services as such. Therefore a relevant question for examination would be the extent to which those agreements actually involve movement of persons for the purpose of supplying a service covered by the GATS. Where they do, it would be necessary to determine the extent to which measures taken pursuant to them result in actual discrimination.

19. It is likely to be impossible to generalize as to whether such measures fall within the scope of the GATS. In many cases they go well beyond trade in services; in others it may be hard to see any relevance to services. If any such measures are found to be "affecting trade in services" according to paragraphs (a) and (b) of Article XXXIV, then they will fall within the scope of GATS, and if they involve discrimination an MFN exemption would be necessary to maintain them. In general, however, it is undesirable that MFN exemptions should be taken unless there is some real need - a clear likelihood of discrimination through a measure affecting trade in services. Exemptions taken merely in case a measure with no evident relation to trade in services may later prove to need such cover are undesirable because they imply that the measures concerned <u>are</u> covered by the Agreement and because other Members may feel obliged to protect themselves by taking similar prudential though probably unnecessary exemptions.

20. In any case, it should be noted that, where an exemption from MFN is sought, it must be expressed in terms of the actual measure that a Member takes and not merely by reference to the law, agreement or arrangement pursuant to which the measure is taken.