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## **1 ARTICLE XXVIII**

### **1.1 Text of Article XXVIII**

#### **Article XXVIII**

##### *Definitions*

For the purpose of this Agreement:

- (a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;
- (c) "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;
- (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;
- (e) "sector" of a service means,
  - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
  - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (f) "service of another Member" means a service which is supplied,
  - (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or
  - (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;
- (g) "service supplier" means any person that supplies a service;<sup>12</sup>

*(footnote original)*<sup>12</sup> 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. Such treatment shall 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.

- (h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;
- (i) "service consumer" means any person that receives or uses a service;
- (j) "person" means either a natural person or a juridical person;
- (k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:
  - (i) is a national of that other Member; or
  - (ii) has the right of permanent residence in that other Member, in the case of a Member which:
    - 1. does not have nationals; or
    - 2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;
- (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;
- (m) "juridical person of another Member" means a juridical person which is either:
  - (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
  - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
    - 1. natural persons of that Member; or
    - 2. juridical persons of that other Member identified under subparagraph (i);
- (n) a juridical person is:
  - (i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
  - (ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
  - (iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;
  - (o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

## 1.2 Article XXVIII(a) ("measure")

1. The Appellate Body in *US – Gambling*, rejecting Antigua's claim that a "total prohibition" resulting from various US federal and state laws was *in itself* a measure, stated that:

"We are therefore of the view that the DSU and the GATS focus on 'measures' as the subject of challenge in WTO dispute settlement. To the extent that a Member's complaint centres on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the *measure* that is the source of the alleged effects."<sup>1</sup>

2. In *Argentina – Financial Services*, the Appellate Body made the following remarks with respect to the definition in Article XXVIII(a) of the GATS:

"[A]ccording to Article XXVIII(a), for the purpose of the GATS, the word 'measure' means 'any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'. The use of the word 'any' in the terms 'any measure' and 'any other form' suggests that Article XXVIII(a) contains no *a priori* exclusion of the type or form that a measure may take under the GATS, including under the Annex on Financial Services."<sup>2</sup>

## 1.3 Article XXVIII(b) ("supply of a service")

3. In *China – Publications and Audiovisual Products*, the Panel found that the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" extends to sound recordings distributed in non-physical form, through technologies such as the Internet. The Panel found support for its interpretation in the definition of "supply of a service" in Article XXVIII(b):

"The Panel recalls that a Member's Schedule, according to Article XX:2, is an integral part of the GATS, and the provisions of the GATS thus apply to the inscriptions in China's Schedule. In examining the definitions in Article XXVIII(b) of the GATS, we note that 'the supply of a service' is defined as including the 'production, *distribution*, marketing, sale and delivery of a service' (emphasis added). This definition makes clear that the activity of 'distribution' is included within the notion of the supply of a service. Since a 'service' is intangible and not itself a good (although the supply of a service may well involve goods), this definition suggests that the supply of a service listed in a Member's Schedule, unless otherwise specified, can cover the distribution of non-physical products, such as sound recordings delivered over the Internet. In our view, therefore Article XXVIII:(b) of the GATS is further support for the view that the supply of 'sound recording distribution services' that China has committed to in its Schedule applies, unless otherwise specified in its Schedule, to the distribution of the intangible content of sound recordings, and is not limited, as China argues, to the distribution of sound recordings as physical products."<sup>3</sup>

4. The Appellate Body agreed with the Panel's analysis, and stated that:

"The definition of 'supply of a service' in Article XXVIII(b) of the GATS would not in itself exclude the possibility of drafting a Schedule entry in a way that covers only the distribution of physical goods. However, the interpretative question in this dispute is whether China's entry has been formulated in such a way. It is clear that the term 'distribution' as used in Article XXVIII(b) of the GATS refers to the distribution of something intangible—services. We agree with the Panel that this is relevant context in interpreting the meaning of the term 'distribution' in China's entry 'Sound recording distribution services' in its GATS Schedule, and that Article XXVIII(b) of the GATS lends support to an interpretation of the term 'distribution' in the relevant entry in

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<sup>1</sup> Appellate Body Report, *US – Gambling*, para. 123.

<sup>2</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.260.

<sup>3</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1209.

China's Schedule as covering the distribution of both tangible and intangible products."<sup>4</sup>

5. The Panel in *EU – Energy Package* outlined the difference between supply of a service (which falls within the scope of GATS) and supply of a good (under the scope of the GATT 1994) and forthwith rejected Russia's characterisation of supply of natural gas as a service. The Panel agreed with the European Union that the gas industry involved both trade in goods and services and it would be improper to rely on definition of a service which incorporates activities outside the scope of the GATS:

"[W]e cannot agree with Russia's proposition that the 'supply' of natural gas should be viewed as a service. We recall that the GATS applies to measures affecting 'trade in services', the latter being defined as 'the supply of a service' through any of the four modes defined in Article I:2(a) to (d). In turn, the 'supply of a service' includes 'the production, distribution, marketing, sale and delivery of a service' (GATS Article XXVIII (b)). Hence, the 'supply' of natural gas, namely the supply of a good, does not fall within the scope of the GATS.

As noted by the European Union, the gas industry does not involve only trade in services, it also involves trade in goods. The production of gas does not fall within the scope of the GATS and the sale of gas is not necessarily a service. In our view, it would be improper for a panel to rely on a definition of the services at issue which includes activities falling outside the scope of the GATS."<sup>5</sup>

#### 1.4 Article XXVIII(d) ("commercial presence")

6. The Panel in *Mexico – Telecoms* observed that the definition of a service supplied through commercial presence makes explicit the location of the service supplier, but, unlike other modes of supply, is silent with respect to any other territorial requirement. The Panel stated:

"The definition of services supplied through a commercial presence makes explicit the location of the service supplier. It provides that a service supplier has a commercial presence – any type of business or professional establishment – *in the territory* of any other Member. The definition is silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established (such as Mexico), but is delivered into the territory of any other Member (such as the United States)."<sup>6</sup>

7. The Panel in *China – Publications and Audiovisual Products* referred to the definition of "commercial presence" in Article XXVIII(d) in the context of interpreting and applying Article XVII:

"Article XXVIII (d) of the GATS defines 'commercial presence' as '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.' (emphasis added) Therefore for the purpose of Article XVII, and depending on the measures at issue, the term 'service suppliers of another Member' supplying a service through commercial presence includes entities that have established a commercial presence in the host Member and/or entities that seek to establish in the host Member."<sup>7</sup>

#### 1.5 Article XXVIII(e) ("sector")

8. The Panel in *US – Gambling* stated that:

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<sup>4</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 379.

<sup>5</sup> Panel Report, *EU – Energy Package*, para 7.268 – 7.269

<sup>6</sup> Panel Report, *Mexico – Telecoms*, para. 7.375.

<sup>7</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.974. See also Panel Report, *EU – Energy Package*, para 7.438 - 7.439.

"In our view, if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that fall within the scope of that sector or sub-sector. A Member does not fulfil its GATS obligations if it allows market access for only some of the services covered by a committed sector or sub-sector while prohibiting all others. If a Member wishes to restrict market access with respect to certain services falling within the scope of a sector or sub-sector, it should set out the restrictions or limitations on access in the appropriate place in the Member's schedule. Indeed, a specific commitment in a given sector or sub-sector is a guarantee that the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. Any other interpretation would make market access commitments under the GATS largely meaningless."<sup>8</sup>

9. With respect to the definition of "'sector' of a service" contained in Article XXVIII(e) of the GATS, the Appellate Body explained, in *US – Gambling*:

"[B]ecause a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."<sup>9</sup>

10. Along the same lines, the Panel in *China – Publications and Audiovisual Products* stated that:

"A description of a service sector in a GATS schedule does not need to enumerate every activity that is included within the scope of that service, and is not meant to do so. Article XXVIII(e) of the GATS defines 'sector' generally as 'the whole of that service sector, including all of its subsectors'. A service sector or subsector in a GATS schedule thus includes not only every service activity specifically named within it, but also any service activity that falls within the scope of the definition of that sector or subsector referred to in the schedule."<sup>10</sup>

11. According to the Panel in *China – Electronic Payment Services*, the definition of "sector of a service" in Article XXVIII(e) of the GATS and the findings of the Panel in *China – Publications and Audiovisual Services* "confirm that a 'sector' may include 'any service activity that falls within the scope of the definition of that sector', whether or not these activities are explicitly enumerated in the definition of that sector or subsector."<sup>11</sup> That Panel further found that:

[T]he classification under a single subsector of a service made up of a combination of different services is not incompatible with the principle of mutual exclusivity if these services, when combined together, result in a distinct service that is supplied and consumed as such. Moreover, the mere fact that separate suppliers provide one particular component of a service does not in itself imply that that component should be classified as a distinct service, or that the component is not part of an integrated service. In our view, what is relevant in relation to the classification of an integrated service is not whether it is supplied by a single supplier or by several suppliers, but rather whether the component services, when combined together, result in a new and distinct service, the integrated service."<sup>12</sup>

12. In *EU – Energy Package*, the Panel took issue with Russia's broad definition of "supply services" particularly that "supply" and "supply services" are encompassed within the meaning and scope of the terms "pipeline transport services". The Panel noted that pursuant to the principle of mutual exclusivity of sectors, a service cannot fall under two different sectors. The panel further noted that while the concept of "sector" is essential for market access and national treatment obligations, it is also relevant for other GATS provisions and certain WTO obligations:

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<sup>8</sup> Panel Report, *US – Gambling*, para. 6.289. See also Appellate Body Report, *US – Gambling*, para. 180.

<sup>9</sup> See also Appellate Body Report, *US – Gambling*, para. 180.

<sup>10</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1014.

<sup>11</sup> Panel Report, *China – Electronic Payment Services*, para. 7.179, referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.1014.

<sup>12</sup> Panel Report, *China – Electronic Payment Services*, para. 7.188.

"The importance of the concept of 'sector' under the GATS is obvious for Members' obligations on market access (GATS Article XVI) and national treatment (GATS Article XVII) because these provisions apply in service sectors as listed by each Member in its GATS Schedule. However, as indicated by the definition of "sector' of a service' in GATS Article XXVIII(e), the relevance of the concept of 'sector' is not limited to Members' specific commitments. The application of other GATS provisions is also premised on the identification of sectors, as is the application of certain other WTO obligations. By clustering all services related to natural gas under the notion of 'supply services', the latter being in turn meant to be included under the terms 'pipeline transport services', Russia's proposed definition leads to an artificially broad construction of the latter terms and cannot be reconciled with the principle of mutual exclusivity of sectors and sub-sectors."<sup>13</sup>

#### **1.6 Article XXVIII(m) ("juridical person of another Member")**

13. In *EC – Bananas III*, the Panel referred to the definition contained in Article XXVIII(m) for the purpose of clarifying the concept of "commercial presence" in Article I:2(c) of the GATS, and observed:

"As a result, suppliers which are commercially present within the EC territory and owned or controlled by, for example, Del Monte Mexico would be entitled to benefit from GATS rights because it would not matter under Article XXVIII(m) of GATS whether Del Monte Mexico was owned or controlled by natural or juridical persons of Jordan, i.e. a WTO non-Member, as long as Del Monte Mexico was incorporated in Mexico and engaged in substantive business operations in the territory of Mexico or any other Member."<sup>14</sup>

14. In *EU – Energy Package*, the Panel interpreted the meaning of 'controlled' under Article XXVIII(n)(ii) of the GATS and noted that a juridical person is controlled by persons of a member if such persons have the power to name a majority of directors and emphasized that such an assessment is undertaken on a case-by-case basis.<sup>15</sup>

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<sup>13</sup> Panel Report, *EU – Energy Package*, para 7.274

<sup>14</sup> Panel Report, *EC – Bananas III*, para. 7.218 and fn 493.

<sup>15</sup> Panel Report, *EU – Energy Package*, para 7.470.