

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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Special Distribution

Group of Negotiations on Services

DEFINITIONS

Note by the Secretariat

Revision

At its meeting on 17-20 May 1988, the Group of Negotiations on Services requested the Secretariat to revise the background note on the element of definitions (MTN.GNS/W/38). In response to this request the attached document is circulated.

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## DEFINITIONS

### 1. Introduction

Because of the complex and heterogeneous nature of services, and the many different ways and means by which services can be provided to consumers in a foreign country, it would appear that there is no existing definition of trade in services that serves the purpose of the Uruguay Round. Nor, for that matter, does it appear that there is an existing definition which is considered satisfactory for national accounting purposes or balance of payments purposes.

### 2. Views concerning the need for a definition

There are differing opinions on the extent to which it is necessary to have an agreed definition of trade in services for work to progress in the Group of Negotiations on Services (GNS). One view is that it is important to agree on a definition to determine the exact scope of the concepts and principles to be agreed, as well as to ascertain the balance of advantages that would emerge from the expansion of trade in services. Agreement on definition is considered a precondition for negotiating a multilateral framework. The point has also been made, for example, that there is a need to agree on how trade in services may be defined, in order to determine the relevance of various concepts (such as national treatment, transparency, etc.) before specific application may be given to such concepts in different service sectors.

Another view is that a definition for trade in services does not have to be decided on for the negotiations to proceed. Instead of negotiating a detailed definition of trade in services, it is preferable to assume the broadest possible interpretation at the outset, and then clarify definition and coverage as the negotiations proceed.

### 3. Approaches

The differing views concerning the need for a definition have a parallel in the difference of views regarding the approaches to a definition. Thus, a number of participants would wish to establish a general definition in terms of certain characteristics of trade in services. This definition would then determine what transactions would be covered or left out in the various sectors. Other participants would want to treat the definition of trade in services as covering those transactions or activities in various sectors that would need to be included in the light of the negotiating interests of the various participants. This point will be dealt with in greater detail in part 3(c) of this paper.

Discussions in the GNS indicate that there are different possibilities for grouping service activities according to certain common characteristics to arrive at a definition of trade in services for the purpose of the negotiations.

#### (a) Cross-Border Sales of Services where the service itself crosses the border

The traditional understanding of international trade in goods has concentrated on the notion of the product being sold across a national frontier. Under this approach, trade in services should be defined to include only cross-border sales of services where the service itself crosses the border, and only the direct sale of services by enterprises or individuals residing in one country to enterprises or individuals residing in another country would be included. Accordingly, services transactions between enterprises or individuals residing or established in the same country would be considered domestic transactions and not qualify for inclusion under the definition of trade in services.

The following points have been made:

- (i) Part II of the Punta del Este Declaration allows only this interpretation of the negotiating mandate. The negotiations are aimed at "trade in services" and "trade" means international trade and not internal trade. The notion of national borders which is crucial to such trade cannot be overlooked;
- (ii) any effort to include investment, production or distribution of services within the borders of the importing country by the exporting country is confusing the notion of trade in services with investment matters (which are dealt with later in this paper);
- (iii) definition of trade in services should encompass free access of skilled and unskilled workers from developing countries into developed countries' markets for services. All labour and labour-intensive services which could be traded across borders should be included.
- (iv) definition of trade in services should apply to any service or labour activity across national borders to provide satisfaction to the needs of the recipient or consumer other than the satisfaction provided by physical goods, or to furnish input for a producer of goods and/or services other than physical inputs.

The following points would require consideration:

- (i) would a distinction be made between those services which could be incorporated in goods (e.g. a computer program written on to a disc) and those which are disembodied from the goods (e.g. a computer program transmitted via a telephone cable); does a cross-border definition of trade in services envisage including

those services which are embodied in goods? How can trade in services embodied in goods be distinguished from trade in goods?

- (ii) can labour flows be subsumed under a definition of trade in services when trade in services is defined to include only cross-border services transactions where the service itself crosses the border?
  - (iii) it has been pointed out that in view of the non-storable nature of services, the provision of a service may often require the supplier of the service and the purchaser to be present when the service is delivered. Would a definition of trade in services that includes only cross-border sales of services (where the service itself crosses the border) envisage the possibility of any presence of the producer in the importing country for the purpose of selling the service?
  - (iv) if only cross-border trade would be covered, what would be the implications in terms of the treatment of the various service sectors?
- (b) Sales of services which include factor flows across the border and where the service itself does not necessarily cross the border

Under this approach a definition of trade in services could also include those services that do not necessarily cross the frontier and where often the movement across borders of factors of production (e.g. labour, capital, know-how) or consumers is required for a transaction to take place. This would mean that a definition of trade in services would provide the possibility of including the production and sale of services by non-residents in the country of the producer or consumer even if no cross-border transaction is involved. Such an approach would also have to consider some form of presence of the producer of a service in the country of the consumer, for example, commercial presence or establishment.

This broader interpretation of trade in services (i.e. compared with the cross-border flows definition) would expand the spectrum of international service transactions that might be included in the definition of trade in services. It has been suggested that one way of pursuing this approach would be to define trade in services by looking at the various ways in which services could be produced, provided to foreign consumers, and paid for. Eleven types of such transactions have been presented to the GNS. These include pure cross-border sales of services where the production of the service is entirely in the exporting country by residents of the exporting country and the service and payment for the service cross frontiers. They also include those services activities which are entirely produced in the importing country by the exporting country and where the payment for the service does not cross the frontier. Intermediate cases include those instances where production of the service is partly in the exporting country and partly in the importing country through some form of permanent commercial presence. In this latter case, consumption of the service is in the importing country and payment for the service crosses the frontier.

Pursuing this approach would also mean that participants would have to try to reach agreement on a list of all possible types of services transactions and then decide on the transactions which they consider to qualify for inclusion under a definition of trade in services.

The following points have been made:

- (i) the definition of trade in services should include all those transactions which are necessary to achieve effective market access in certain service sectors; effective market access requires sometimes commercial presence; there are different types of commercial presence: from temporary presence of individuals and production facilities to more permanent presence, including establishment.

- (ii) to ensure a more efficient delivery of a service that could be sold across the border, it is sometimes necessary for the supplier to have a physical presence in the importing country;
- (iii) for a variety of reasons, the authorities in the importing country may require the physical presence of the foreign supplier;
- (iv) such an interpretation would enable the inclusion of services that require resources to move across the border, which under the appropriate conditions could contribute to economic growth and development of developing countries (e.g. finance, technology, human skills).
- (v) for the above reasons, only a sufficiently broad definition of trade in services would ensure that the objectives of Part II of the Punta del Este Declaration - namely, expansion of trade, economic growth, and development of developing countries - are fully met.
- (vi) if right of establishment is to be considered for inclusion in the multilateral framework, its counterpart the right of residence for providers of labour would also have to be examined.

The definition of trade in services that extends beyond the cross-border movement of a service to the movement of producers (or of factors of production) and consumers across borders could be broader or narrower depending, inter alia, on the links established between such movement and the specific activities resulting from it.

The following points would require consideration:

- (i) in what circumstances can considerations related to service activities where factors of production move across borders be

treated as issues involving international trade rather than investment? Is a distinction between trade in services and investment in services meaningful?

(ii) is it possible to identify service activities as involving trade in services on the basis of certain criteria relating to the movement of the factors of production involved? For example, where the service involved is provided by a foreign supplier and the presence of the foreign supplier is:

(a) temporary,

(b) necessary for ensuring the efficient supply of the service, or

(c) required for the delivery of the service in terms of the domestic laws and regulations of the importing country.

(iii) in this context, is it possible to make a distinction between commercial presence and establishment; commercial presence implying arrangements for licencing, business representation etc.; establishment implying the setting up of a branch or subsidiary for carrying out service activities on a continuing basis? Would the duration of the presence influence such a distinction?

(iv) in order to qualify as trade in services, to what extent is it necessary for a service transaction to be linked to a payment across the border? Should service activities in which cross-border payments are tied to the transaction performed be treated differently to those involving a transfer of profits and dividends from branches or subsidiaries from the country of consumption to the parent firm? What would be the trade element in a service transaction if no cross-border payment is involved?



(v) if service activities resulting from the cross-border movement of factors of production are to be included, would movements of personnel or labour also be included? Should such movement cover the provision of both skilled and unskilled labour? If so, does this have to be tied to particular projects or to the performance of particular activities?

(vi) should there be a time element concerning labour flows and flows of capital?

(c) Defining trade in services by agreement on coverage

As suggested above (see introduction to section 3 of this paper), the question of definition of trade in services has also been approached as a matter of agreeing on the list of transactions and sectors to which the definition of trade in services would apply.

Those supporting this approach would argue that this would allow the measures or barriers which are seen by participants as impeding trade in services in specific service sectors to be addressed in a concrete way without being constrained by an a priori need to define the scope of the trade. It has also been suggested that under this approach, the list of transactions to be covered need not necessarily be the same for all sectors, so that for some sectors, only the cross-border sales of services may be dealt with while in others, additional transactions could also be dealt with.

On the other hand, the point has been made that this approach would largely reflect the relative negotiating strength of different participants and might result in a non-neutral outcome.

The discussion on this question suggests that there is a linkage between the definition of trade in services and sectoral coverage which means, on the one hand, that it is difficult to come to a clear agreement

on the sectors to be covered without some understanding of the general characteristics of the transactions which participants have in mind, and on the other hand, it is likewise difficult to arrive at a final understanding with respect to a definition without taking some account of the sectoral interests involved. In this context, it should be noted that the operation of certain factors may differ from sector-to-sector, for example, the implications of a foreign presence to produce services in a certain country may differ depending on the sector concerned.