

# WORLD TRADE ORGANIZATION

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## **Interim Committee on Government Procurement Working Group on Statistical Reporting**

### THE DEFINITION OF NATIONALITY IN CERTAIN WTO AGREEMENTS

Note by the Secretariat

#### **I. INTRODUCTION**

1. Article XIX:5 of the Agreement on Government Procurement requires, to the extent that such information is available, each Party to provide statistics on the country of origin of products and services purchased by its entities. At the first meeting of the Working Group on Statistical Reporting, the question of how to define the country of origin of services for the purposes of statistical reporting was discussed. The view was expressed that the "nationality", i.e. the country of, the service supplier might be employed as a basis for defining the origin of a service for statistical reporting purposes.<sup>1</sup> The Secretariat was requested to prepare a short paper on the way in which the question of "nationality" was defined in the various WTO Agreements and, to the extent possible, in other international economic agreements. This note is an attempt to respond to this request.

2. The note examines those WTO Agreements where obligations relate to the way in which persons of other Members should be treated and looks at how such persons of other Members are defined. The note also considers how this matter has been treated under other public international commercial law. The main question that arises in these contexts is not how to define the nationality of "natural persons", but how to define the nationality of "legal persons", especially companies. This issue is often referred to as that of "corporate nationality", which can be understood as a shorthand way of referring to situations where companies are deemed to have a sufficiently close link to other Member States to be eligible to benefit from the treatment required by the international law in question to be given to the persons, or "nationals", of those Member States. This issue arises in the GATS and the TRIPS Agreement of the WTO, but also in many other fields of international commercial law, including investment treaties, treaties of friendship, commerce and navigation, diplomatic protection and regional arrangements - in fact in any treaty or other arrangement where the benefits accrue to the legal persons of Member States.

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<sup>1</sup>The point was also made that the question of the definition of the supplier of another Party was of a significance broader than that of statistical reporting only, since the obligations in the Agreement require certain treatment to be given to the suppliers of other Parties, whether of goods or of services. It might also be noted that the use of "national ownership" of the winning supplier as a proxy for determining the origin of goods has been discussed in a paper submitted by the European Communities (GPR/W/125 dated 1 April 1993).

## II. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

3. The GATS sets out the treatment that must be given by WTO Members to the services and service suppliers of other WTO Members. The need to define what is the service supplier of another Member arises not only because such persons are direct beneficiaries of the Agreement but also because, in certain situations, the services of another Member are defined in terms of the "nationality" of the service supplier. Subparagraph (f)(ii) of Article XXVIII of the GATS defines, in the case of the supply of a service through commercial presence<sup>2</sup> or through the presence of natural persons, a service of another Member as being a service which is supplied by a service supplier of that other Member.

### Who is a service supplier of another Member?

4. The GATS contains detailed rules on how to determine who is the service supplier of another Member. As regards companies, the essential criteria used in the GATS for determining when a company is to be considered a company of another Member appear to be the criteria of place of legal constitution (combined with substantive business operations), or (in case of supply through commercial presence) ownership or control. The relevant specific rules of the GATS are summarized below.

5. First of all, the Services Agreement defines as a service supplier any person, natural or juridical, that supplies a service (subparagraphs (g) and (j) of Article XXVIII).

### Natural person of another Member

6. Subparagraph (k) defines as a "*natural person of another Member*", 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 either:

- is a national of that other Member; or
- in the case of certain Members, has the right of permanent residence in that other Member.

The complete text of subparagraph (k) of Article XXVIII is contained in Annex 1.

### Juridical persons of another Member

7. Subparagraph (l) of Article XXVIII determines that a "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or government-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

8. Under Subparagraph (m) of Article XXVIII, a juridical person is considered "of" another Member if it is either:

- (i) constituted or otherwise organized under the law of that other Member and engaged in substantive business operations in the territory of that Member or any other Member; or

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<sup>2</sup>Commercial presence is defined in the GATS 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 of the purpose of supplying a service.

- (ii) in case of supply of a service through commercial presence, owned or controlled by natural or juridical persons of that other Member as defined under (i) above.
9. Subparagraph (n) defines a juridical person as being one that is:
- "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;
  - "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.<sup>3</sup>

The complete text of subparagraphs (m) and (n) of Article XXVIII are contained in Annex 1.

### III. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS AGREEMENT)

10. The TRIPS Agreement requires certain treatment to be given to the "nationals" of other Members. The term "nationals" is understood to include not only persons who have the nationality of TRIPS Members but also certain other persons who have a close attachment to TRIPS Members and are therefore assimilated to "nationals". The persons who are to be considered nationals of TRIPS Members and therefore beneficiaries of the TRIPS Agreement are defined in Article 1.3 of the Agreement. This is done by reference to the criteria that have been developed for determining eligibility for protection in the different areas of intellectual property in the pre-existing international conventions. Article 1.3 of the Agreement stipulates as follows:

"... the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in respect of Integrated Circuits, were all Members of the WTO members of those Conventions".

11. The criteria used under the TRIPS Agreement for the purposes of determining which persons should be considered beneficiaries, are set out in Annex 2 of this note.

### IV. OTHER INTERNATIONAL ECONOMIC AGREEMENTS

#### *General situation*

12. As mentioned in the Introduction, the question of corporate nationality arises in many areas of international public commercial law, as well as in national or municipal law. The following summary

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<sup>3</sup>It is also of interest that subparagraph (n) of Article XXVIII of the GATS contains a definition of when two persons can be considered "affiliated" with each other since the concept of affiliation is also used in Article III:2(a) of the Agreement on Government Procurement: "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure (a) that its entities shall not treat a locally-established supplier less favourable than another locally-established supplier on the basis of degree of foreign affiliation or ownership." Under subparagraph (n) of the GATS a juridical person is considered "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.

of the present situation regarding the criteria for determining corporate nationality is reproduced from an article by Professor Fatouros in the Encyclopedia of International Public Law<sup>4</sup>:

"In municipal as well as in international law, three principal criteria have been used to determine the nationality of corporations. A corporation is deemed to have the nationality of: (a) The place of its incorporation, i.e. the State according to the laws of which the corporation is formed. This test is applied by countries where the Anglo-American common law system prevails and by a few others. (b) The place of its seat (*siège social*), i.e. the State where the centre of its management is located. This test is applied by the civil law countries in continental Europe and elsewhere. Emphasis on the formal aspect of this test, viz. on the corporation's statutory seat, brings it in operation closer to the incorporation test since a corporation's statutory seat is frequently located in the State of incorporation. In many cases, however, where the statutory seat is seen as not corresponding to the actual location of corporate administration, the "real" seat (*siège social réel*) is used as the criterion of nationality. With respect to transnational enterprises or groups of companies, it has been suggested that the enterprise's centre of decision-making provides a more appropriate test. (c) The State of nationality of controlling shareholders. This test was introduced during wartime to determine the enemy character of property. First applied during World War I, it was largely abandoned in the inter-war period and then revived during World War II. The test was originally based solely on share ownership, but has been extended to cover the nationality of principal corporate officers, the exercise of controlling influence through means other than shareholding and the presence of substantial though not necessarily controlling interests. After the war, the test was retained in many countries in specific legislative measures involving the economic regulation of foreign trade and investment for political or economic purposes.

"Singly or in combination, the three tests are common in international treaty practice. There is an infinite number of variations in formulation, corresponding to particular circumstances and needs as perceived by the contracting parties. Treaties dealing generally with trade and investment, particularly treaties of establishment or treaties of friendship, commerce and navigation, tend to adopt the tests of incorporation and seat, while instruments or provisions directed at the protection of nationals usually add some version of the control test. In post-war treaties of friendship, commerce and navigation of the United States, for example, the general definition of the companies considered as "companies of the Parties" utilizes the incorporation test, but the contracting parties are allowed to deny the advantages of the treaty to such companies when they are controlled by third-country nationals, while the control test is explicitly used in other provisions."

*North American Free Trade Agreement (NAFTA)*

13. In a number of Parts of the NAFTA, rights and obligations relate to the nationality of persons (juridical or natural) of other Parties. These include the Parts on Government Procurement, Investment, Services and Intellectual Property. Each part includes an Article on definitions. There is also a General Chapter on Definitions.

14. In the General Chapter on definitions,

- "person of a Party" is defined as a national, or an enterprise of a Party;

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<sup>4</sup>A.A. Fatouros, "National Legal Persons in International Law", in R. Bernhardt (ed), Encyclopedia of Public International Law, Volume 10 (1987), pages 299-306, published by "North Holland"

- "national" is defined as a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1 of the NAFTA (Annex 201.1 gives further specifications of "national" under Mexican and United States legislation);
- "enterprise of a Party" means an enterprise constituted or organized under the law of a Party. In the Chapter on Investments it is made clear that "a branch located in the territory of a Party and carrying out business activities there" would also be considered an enterprise of a Party.

In the Chapter on Financial Services

- "person of a Party" means a national, or an enterprise of a Party but "for greater certainty, clarifies that [this] does not include a branch of an enterprise of a non-Party".

In the Part on Intellectual Property

- "nationals of another Party" means, in respect of the relevant intellectual property right, persons who would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Geneva Convention (1971), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), the UPOV Convention (1978), the UPOV Convention (1991) or the Treaty on Intellectual Property in Respect of Integrated Circuits, as if each Party were a party to those Conventions, and with respect to intellectual property rights that are not the subject of these Conventions, "national of another Party" shall be understood to be at least individuals who are citizens or permanent residents of that Party and also includes any other natural person referred to in Annex 201.1 (Country-Specific Definitions).

*European Economic Community*

15. Article 58 of the Treaty of Rome deals with the treatment and definition of companies of Member States. It reads as follows:

"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

ANNEX 1

Texts of Certain Provisions of the General Agreement on Trade in Services (GATS)

Natural person of another Member

1. The text of subparagraph (k) of Article XXVIII reads as follows:

(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:

1. is a national of that other Member; or
2. has the right of permanent residence in that other Member, in the case of a member which:
  - (a) does not have nationals; or
  - (b) 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 resident. Such notification shall include the assurance, 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."

Juridical persons of another Member

2. The text of subparagraph (m) of Article XXVIII reads as follows:

"A juridical person of another Member is:

a juridical person which is either:

1. 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
2. in the case of the supply of a service through commercial presence, owned or controlled by:
  - (a) natural persons of that Member; or
  - (b) juridical persons of that other Member identified under subparagraph (1)."

3. The text of subparagraph (n) of Article XXVIII reads as follows:

"A juridical person is:

1. "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;
2. "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;
3. "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."

## ANNEX 2

### Nationals and Persons Assimilated to Nationals under the TRIPS Agreement

In the area of Industrial Property, as well as in the area of the Layout-Design for Integrated Circuits:

Natural or legal persons who:

- are nationals of a TRIPS Member; or
- are domiciled in a TRIPS member; or
- have real and effective industrial or commercial establishment in a TRIPS member.

In the area of Copyright and Related Rights:

Authors of literary or artistic works who:

- are nationals of a TRIPS Member; or
- have their habitual residence in a TRIPS Member; or
- whose works are first (or simultaneously) published in a TRIPS Member; or
- are authors of cinematographic works, the maker of which has his headquarters or habitual residence in a TRIPS Member; or
- are authors of works of architecture erected in a TRIPS Member or of other artistic works incorporated in a building or other structure located in a TRIPS Member.

(Artistic) performers whose:

- performance takes place in another TRIPS Member; or
- performance is incorporated in a phonogram as defined below; or
- performance is covered by a broadcast as defined below.

Producers of phonograms:

- which are nationals of another TRIPS Member (criterion of nationality); or
- if the phonogram was first fixed in another TRIPS Member (criterion of fixation); or
- if the phonogram was first published in another Member (criterion of publication).



Broadcasting Organizations:

- whose headquarters are situated in another TRIPS Member; or [and]
- if the broadcast was transmitted from a transmitter in another TRIPS Member.