MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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TAXATION ISSUES RELATED TO ARTICLE XIV(D)

Note by the Secretariat

Negotiators have requested the Secretariat to provide a clarification of certain provisions of the draft GATS on the treatment of taxation measures. The questions raised were as follows:

1. The imposition of a tax on a person is a measure applied to that person. However, is the denial of a tax benefit to a person also a measure that is "applied" to that person?

Any treatment accorded to a category of persons can also be expressed in terms of treatment not accorded to persons outside that category. More favourable treatment to some is equivalent to less favourable treatment to others. Therefore, while the extension of a tax benefit to a category of persons would be considered a measure applied to such persons, the denial of such a benefit to persons outside that category would also be considered a measure applied to those persons.

2. How would the question of whether a person is a "resident" or a "non-resident" be determined?

The interpretative footnote to Article XIV(d) refers to "measures taken by a Member under its taxation system ... ". That reference is understood to mean that the determination of whether a person is to be considered a "resident" or a "non-resident" would be in accordance with each Member's relevant tax legislation.

3. Is the footnote to Article XIV(d) an exhaustive listing of categories of measures that may be considered "equitable or effective"? If so, what is the legal effect of such a list?

In the absence of a term specifically indicating that the list is indicative, such as "including", the footnote to Article XIV(d) constitutes an exhaustive list of categories of measures that are considered equitable or effective. Because the categories are so widely drawn, any measure intended to be covered by Article XIV(d) will normally fit within the terms of the footnote. However, in the rare case where there may be doubt as to whether or not the measure is within the terms of the footnote, it is necessary to consider how the provision will be interpreted. Since the list is exhaustive, it is clear that new categories cannot be added to embrace measures that cannot be fitted into existing categories. The interpretative question then becomes: does the measure fall within the boundaries of one of the listed categories? In determining these boundaries, rules of international treaty interpretation[1] direct that one take into account the ordinary meaning of the terms in their context, and in the light of the object and purpose of the treaty. In this case therefore, one is entitled to examine the context of a particular listed category in the footnote to Article XIV(d), including its relationship with the other listed categories, and in light of the object and purpose of the GATS. Consequently, even though the footnote to Article

[1]Vienna Convention on the Law of Treaties, Art. 31

XIV(d) constitutes an exhaustive list, the interpretative process introduces some flexibility through examination of the text with reference to its context, and to the object and purpose of the GATS.

4. Do taxation measures applying to resident service suppliers with affiliates in low-tax jurisdictions raise problems of consistency with Article II (MFN) of the GATS?

Article II of the GATS prohibits a Member from treating one foreign service supplier less favourably than another foreign service supplier, on the basis of their respective countries of origin. Some tax authorities may accord less favourable treatment to a service supplier based not on its country of origin, but on the country where its affiliate is located, in order to counteract the tax advantages derived from the deferral possibilities offered by the use of low-taxed subsidiaries abroad. Such tax measures would not infringe the MFN obligation since the distinctions drawn are based not on the country of origin of the service supplier but on the location of its affiliates.

Furthermore, where a list is maintained either of "qualifying" or "excluded" countries, with respect to the application of certain measures, the maintenance of such a list would not in itself be inconsistent with Article II of the GATS as long as it is drawn on the basis of objective criteria designed to counter tax avoidance and not on the basis of nationality distinctions.