

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Services

INFORMAL GNS MEETING - 10 DECEMBER 1993

CHAIRMAN'S STATEMENT

The main purpose of this meeting is to inform you of the progress made in my consultations on taxation, basic telecommunication services, and other matters, some of which have implications for text of the GATS.

1. Taxation Issues

During the consultations which led to the finalisation of the provisions relating to taxation in Article XIV and Article XXII:3 it was suggested that it would be helpful to consolidate in one place the various notes on taxation issues which have been issued by the Secretariat and which form part of the understanding on which delegations have been working in the drafting of the relevant provisions. These appear essentially in document MTN.GNS/W/178 and its addendum and in W/210.

First, it should be noted that tax measures affecting service suppliers require no justification under Article XIV (General Exceptions) unless they violate an obligation or commitment under the Agreement. The two relevant provisions in this respect are Article XVII (National Treatment) and Article II (MFN). The imposition of a tax on a person, or the denial of a tax benefit, is a measure applied to that person.

Under Article XVII, at least three conditions must be met before a tax (or any other) measure constitutes a violation of national treatment: the service suppliers must be "like"; the distinct treatment must relate to the national origin of the service supplier; and the treatment must be less favourable. To the extent that service suppliers in different jurisdictions are not "like", a tax measure which distinguishes between these two suppliers on the basis of residency would not violate national treatment. Further, distinctions without a link to national origin and based on objective criteria would not normally violate the national treatment provisions. Distinctions based on objective criteria would include, for example, the level of distribution of profits or other assets, whether deductible payments can be used to erode the Member's tax base, or whether an incentive such as a research and development credit is allowable on the basis of the location of the activity. Similar rules also apply to measures affecting trade in services taken by sub-central governments and authorities.

Finally, any formally different treatment accorded would have to result in less favourable conditions of competition. Measures designed to ensure the neutrality or integrity of the taxation system can be viewed as ensuring that service suppliers, in the structuring of their transactions, do not benefit from conditions of competition more favourable than others in similar circumstances.

In Article II (MFN) these considerations also apply: for a violation to occur, there must be likeness between service suppliers, a distinction related to national origin of the service supplier and less favourable conditions of competition. Article II prohibits a Member from treating one foreign service supplier less favourably than another on the basis of their respective countries of origin. To the extent that services suppliers in different jurisdictions are not in "like" circumstances, a tax measure which distinguishes between a foreign service supplier located in a lower-tax jurisdiction and another foreign service supplier would not violate the MFN obligation. Measures of this kind include the imposition of withholding taxes on residents of lower-tax jurisdictions but not on other non-residents, taxation measures applicable in the absence of exchange of information arrangements with another jurisdiction, and different methods providing for relief from double taxation. Some tax authorities may accord less favourable treatment to a service supplier on the basis not of its country of origin but of the country where its affiliate is located, in order to counteract the tax advantages derived from the deferral possibilities offered by the use of lower-tax regimes for items of income and by related persons abroad. Such tax measures would not in themselves be inconsistent with 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 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 up on the basis of objective criteria designed to safeguard the Member's tax base or counter tax evasion or avoidance and not on the basis of nationality distinctions.

In summary, it would appear that very few tax measures affecting service suppliers would ever require justification under Article XIV (General Exceptions). Most tax measures providing distinct treatment to different categories of service supplier appear to deal with unlike service suppliers, to be based on objective considerations, or not in fact to accord less favourable conditions of competition.

Turning now to textual issues, the latest version of the GATS, that of 6 December, incorporated provisions related to direct taxation, in Articles XIV and XXII, which appeared to have the support of all participants, save the United States. There have been very intensive consultations on these matters which have resulted in proposals to amend the texts in question.

I am very pleased to say that regarding the footnote to Article XIV(d) I am in a position to propose a text for inclusion in the final version of the GATS which enjoys the support of all participants. This text is now available in the room and it is the text that will replace the footnote in the 6 December version of the GATS. Regarding Article XXII:3, there is a proposal to add a footnote to paragraph 3 which would say "with respect to agreements on the avoidance of double taxation which exist at the time of entry into force of the Agreement Establishing the MTO, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to the agreement." There was a reservation regarding this proposal on the part of certain participants who have now, as I understand it, removed their reservation. This being confirmed, we shall now include this footnote in the final text of the GATS.

In the consultations leading to the final version of the first footnote to Article XIV(d), a number of points were made which I have felt it appropriate to put on record as a contribution to the understanding of this text. First, the listing in the footnote of types of measures which governments may find it necessary to take is without prejudice as to whether any of them would necessarily be inconsistent with Article XVII. Secondly, it was noted with reference to the first

tiret in the footnote that it would cover cases in which a tax measure would be applied not directly to a service supplier, because he is outside the jurisdiction, but rather through a consumer acting as a withholding agent. Thirdly, it was noted that measures found to be justified under the footnote would normally be expected also to meet the requirement in the chapeau to Article XIV that they should not constitute a disguised restriction on trade. Fourthly, it was confirmed that nothing in the footnote or this statement would or was intended to affect or influence any question concerning taxation at issue between Members in the context of bilateral tax treaties.

During these discussions a large number of specific tax measures were mentioned as illustrations of the kind of action which might be taken by governments to meet the objectives mentioned in the footnote: for example, the imposition of withholding taxes or the denial of personal reliefs and reductions; the non-granting of dividend tax credits to non-residents; reporting, record-keeping and collection systems for cross-border transactions; measures that reduce the tax burden on persons subject to tax on their world-wide income; thin capitalization measures and measures that tax resident persons on all or part of the income, profits or gains earned by a non-resident. The number of possible examples is almost infinite, and there is no suggestion that the examples I have cited have any greater claim to consistency with Article XIV than any others: but they may help to illustrate the thinking behind this complex provision.

2. Basic Telecommunications

As I noted yesterday, two new texts have emerged from consultations on this subject which will permit negotiations aimed at liberalising trade in basic telecommunications services to extend beyond the completion of the Uruguay Round. The first of these texts was circulated yesterday as a Ministerial Declaration on Negotiations on Basic Telecommunications. This text addresses the mandate of the negotiations, institutional aspects such as the establishment of a negotiating group and guidelines such as a provision on standstill, some times referred to as a peace clause. In the version that will appear in the final text, the Ministerial Declaration has been renamed the Ministerial Decision, and has been reformatted slightly, solely for the sake of bringing it into consistency with the other Ministerial Decisions.

With regard to the standstill provision contained in paragraph 7 of the Ministerial Decision on Negotiations on Basic Telecommunications, it is my understanding that measures to improve a participant's negotiating position and leverage could include any category of actions, not excluding MFN inconsistent measures. It is also my understanding that the standstill contained in this decision is intended to serve a purpose and convey a level of commitment similar to that of the Substantive Guidelines for the Negotiations of Initial Commitments in the Uruguay Round, in particular the standstill provision contained in paragraph 3 of those guidelines. This provision said that "For the duration of the negotiations, each participant agrees not to take any measures in such a manner as to improve its negotiating position and leverage".

Regarding the timeframe, the date of 30 April 1996 for completion of these negotiations, contained in paragraph 5 of the Ministerial Decision, is an arbitrated date on which some delegations continue to have reservations. It is, however a date that represents a compromise between earlier dates sought by some delegations and later dates sought by others.

In relation to the final status of these two texts, I note that there is a certain expectation with respect to MFN Exemption requests that are on the table regarding basic telecommunications. That expectation is that the agreement to enter into these negotiations will make it possible to withdraw such requests.

Finally, regarding participation in the negotiations on basic telecommunications, paragraph 4 of the Ministerial Decision contains a list of the governments that have informed the Secretariat of their intention to participate. Participants have made it clear that their inclusion on the list is dependent on whether this list will represent a critical mass, meaning that countries with major markets for these services should be on it. The list currently contains eight names. I would like to point out that it will be possible for participants to add their names to the list up to 15 December. It is my hope that additional participants will be able to so identify themselves, following resolution in the HOD forum of any issues which may be preventing participants from doing so today. I would also like to note that the list is open-ended. Any other government that decides at a later date to participate will be admitted to the negotiations by submitting a notification of its intention to do so.

The second document is the Annex on Negotiations on Basic Telecommunications, which was also distributed yesterday, and which will be attached to the GATS itself, along with the other Annexes to the Agreement. As I noted yesterday, the Annex will permit delayed implementation of MFN-related provisions of the GATS with respect to Basic Telecommunications Services. The delayed implementation will be in effect for the duration of the negotiations and will apply to all Members for all basic telecommunication services except those which are already inscribed in a Member's schedule of commitments. I also want to point out that in the version that will appear in the final text of the GATS, paragraph 2 of the Annex has been amended to refer to "specific commitments on Basic Telecommunications" instead of "Basic Telecommunications Services" since the word "Services" does not appear elsewhere in this text.

3. Audiovisual Services

Today, there was a proposal by the European Community to insert language into certain provisions of the GATS regarding the cultural specificity of the audiovisual sector. The proposal relates to Article XIX (Progressive Liberalization), Article XV (Subsidies), and the Annex on Article II (Exemptions). While there was considerable support for the EC proposals there were also a number of participants who registered reservations. In view of this situation, consultations on this proposal will continue among the participants concerned.

4. The Scope of the GATS

In my statement on 29 October I reported on consultations which had been taking place on the question whether certain categories of governmental measures, such as measures relating to social security, fall within the scope of the GATS. This obviously has relevance for the scheduling of such measures and for the question of MFN exemptions. I wish to re-emphasise, perhaps more strongly than in my earlier statement, that pending further clarification of this and other questions relating to the scope of the Agreement, that it is assumed that participants would refrain from taking issues arising in this area to dispute settlement but would try to settle them through bilateral consultations. However, participants must assume their own responsibilities in deciding whether any measures of this sort which they maintain should be scheduled or made the subject of MFN exemptions - though in this respect also it is hoped that restraint will be shown.

5. Professional Services

During today's consultations a proposal was put forward that a Ministerial Decision providing for a programme of work under Article VI, paragraph 4 concerning professional services should be added to the other decisions to be taken by Ministers in the field of services. Copies of the draft decision which was tabled are available in the room. In discussion there was a

wide measure of support for this proposal but some participants had reservations, in part related to the late submission of the idea. Consultations among interested participants will be pursued.

6. Maritime Services

Regarding my consultations on the scheduling of commitments on access to and use of port services, it is clear that countries willing to commit themselves in this area should so indicate in the additional commitments column of their schedule. This should be done by listing all port services which a Member intends to ensure access to and use of, irrespective of whether or not all or any of such services are covered by the former Article XXXIV(c)(ii), (now Article XXVIII). Such a listing could be preceded by a chapeau along the following lines:

"when the following services are not otherwise covered by the obligation resulting from Article XXVIII(c)(ii), they will be made available to international maritime transport suppliers on reasonable and non-discriminatory terms and conditions."

A full reference can be found in the informal Secretariat Note of 2 December, copies of which are available in the room.