

COMMUNICATION FROM AUSTRALIA

Negotiating Proposal: Legal Services Classification

Supplement

The attached communication has been received from the delegation of Australia with the request that it be circulated to Members of the Council for Trade in Services as a second supplement to document S/CSS/W/67. It has also been requested that it be circulated to the Committee on Specific Commitments.

1. This paper proposes expanding the definition of 'Legal Services' in the World Trade Organisation's Services Sectoral Classification List¹. The paper completes the initial suite of negotiating proposals on legal services tabled by Australia.² Australia reserves the right to submit further proposals in relation to legal services at a later date.

I. BACKGROUND

2. In its background paper on legal services, the WTO Secretariat addresses the classification issue and poses the following questions:³

- Should the revision of the United Nations Central Product Classifications take account of the Uruguay Round scheduling distinctions in legal services in redefining classification in the sector?
- Is the distinction between host-country, international, home-country and third-country law satisfactory?

3. Even though these two questions relate to the UN Provisional Central Product Classifications (CPC), they would be equally pertinent if directed at the WTO's Services Sectoral Classifications (W/120) as the latter list is closely correlated to, and in some cases derived from, the CPC. Accordingly, if the questions are rephrased in context of W/120, Australia's answer to both questions would be affirmative in that: (1) any revision of W/120 should take into account the Uruguay Round scheduling distinctions in legal services in redefining classification in that sector; and (2) it follows

¹ World Trade Organisation 'Services Sectoral Classification List' MTN.GNS/W/120 of 10 July 1991.

² Australia's initial proposal identified some impediments to further liberalisation and proposed six guiding principles for the liberalisation of trade in legal services (S/CSS/W/67 of 27 March 2002 and S/CSS/W/67/Corr.1 of 11 April 2001). It was followed by a paper proposing 'Limited Licensing' as a regulatory approach for foreign lawyers (S/CSS/W/67/Suppl.1/Rev.1 of 10 July 2001).

³ World Trade Organisation 'LEGAL SERVICES: Background Note by the Secretariat' S/C/W/43 of 6 July 1998, at paragraphs 15 to 18.

from Uruguay Round scheduling by Members that the distinctions between host-country, international, home-country and third-country law are appropriate.

4. At present, W/120 has a single undifferentiated entry for 'Legal Services' listed under the subsector of 'Professional Services', which in turn is listed under the 'Business Services' sector. However, the nature of market access barriers associated with the provision of transnational legal services is such that the liberalisation of trade in legal services would be better served if 'Legal Services' were further differentiated to include subcategories that reflect the reality of trade in transnational legal services. A survey of Uruguay Round commitments clearly indicates that the area of law (essentially, home-country law, international law, third-country law and host country law) and the type of service (advisory/consultancy and representational) provide an useful guide as to the appropriate subcategories that should be incorporated into W/120.

5. As recognised in the Secretariat's paper in 1998,⁴ Australia considers that there is a strong case for expanding W/120 to more clearly reflect the commercial realities of international trade in legal services and provide a framework for Members to have enhanced flexibility in making commitments in legal services. An expanded W/120 should take into account the different types of services that can be provided by foreign legal practitioners and the different considerations that may underlie a Member's approach when making commitments in the legal services sector.

II. PROPOSAL

6. Australia proposes that the definition of "Legal Services" in W/120 should be expanded to include the following subcategories:

- (a) Home-country law (advisory services) – limited to providing advice or consultancy services in the law of the legal practitioner's home country or jurisdiction in which the practitioner has a legal right to practise law;
- (b) Home-country law (representation services) – extends to representing clients before a court or judicial body in the law of the practitioner's home-country or jurisdiction;
- (c) Third-country law (advisory services) – limited to providing advice or consultancy services in the law of a third-country or jurisdiction where the practitioner has competency in the law of that country or jurisdiction;
- (d) Third-country law (representation services) – extends to representing clients before a court or judicial body in the law of a third-country or jurisdiction where the practitioner has competency in the law of that country or jurisdiction;
- (e) Host-country law (advisory services) – limited to providing advice or consultancy services in the law of the host country or jurisdiction;
- (f) Host-country law (representation services) – extends to representing clients before a court or judicial body in the law of the host-country;
- (g) International law (advisory services) – limited to providing advice or consultancy services in international law;

⁴ World Trade Organisation 'LEGAL SERVICES: Background Note by the Secretariat' S/C/W/43 of 6 July 1998, at paragraphs 17 and 18.

- (h) International law (representation services) – extends to representing clients before a court or judicial body in international law;
- (i) International commercial arbitration services – extends to the right to prepare and appear in international commercial arbitration on behalf of clients;
- (j) Other alternative dispute resolution services - extends to advice or consultancy and participation in mediation and similar non court-based dispute resolution services;
- (k) Preparation and certification of legal documents – including providing advice and the execution of various tasks necessary for the drawing up or certification of documents; and
- (l) Other legal advisory or consultancy services – extends to advisory or consultation services to clients on their legal rights and obligations and providing information of legal or law-related matters not elsewhere classified.

III. DEFINITION: AREA OF LAW AND TYPE OF SERVICE

7. Each of the proposed subcategories is, in effect, a combination of an area of law and type of service. Australia is of the view that it is more appropriate to define and include areas of law and types of service into W/120, rather than defining the service provider. The proposed approach provides Members with an opportunity to make commitments on widely recognised areas of law and types of service without the need to describe the service provider as a foreign lawyer, legal practitioner, advocate, foreign legal consultant or any other term used by individual Members.

8. The structure of the WTO schedules is better suited to accommodating definitions focused on the area of law and type of service, rather than on the definition of the service provider. In other words, the scheduling structure appears to lend itself to providing greater efficiencies and possibly better outcomes during negotiations if Members focus on areas of law and types of service rather than on the type or types of service provider. Realities of transnational trade in legal services, as confirmed by the Uruguay Round commitments and negotiating proposals tabled by Members in the current negotiations,⁵ strongly suggest that the distinctions between host-country, home-country, third-country and international law are fundamental to achieving liberalisation of trade in legal services. Therefore, Australia considers that in expanding the definition of 'Legal Services' in W/120, Members should maintain a focus on areas of law and types of service rather than on the service provider.

IV. CONCLUSION

9. The proposed subcategories allow Members to make commitments with certainty where meaningful market access can be provided to foreign legal practitioners while, where considered appropriate, restricting access to the practice of host-country law, the primary domain of local practitioners. Countries that maintain a nationality requirement in relation to the provision of legal services appear to do so to protect a 'public function' performed by host-country practitioners involved in the practice of host-country law, particularly in relation to representation associated with a

⁵ Negotiating Proposals on Professional Services by the European Communities, S/CSS/W/33 of 22 December 2000; Canada, S/CSS/W/52 of 14 March 2001; and Switzerland, S/CSS/W/75 of 4 May 2001 as well as Australia's Negotiating Proposals on Legal Services, S/CSS/W/67 of 27 March 2001 and S/CSS/W/67/Suppl.1/Rev.1 of 10 July 2001.

right of audience in the courts of host jurisdictions.⁶ The proposed subcategories, together with a limited licensing regulatory system,⁷ would provide those Members with a clear mechanism through which to limit the practise of ‘host-country law (representation services)’ to local practitioners, but make substantial commitments through other subcategories, thus protecting the ‘public function’ as well as providing meaningful market access to foreign legal practitioners.

10. Therefore, by expanding and refining W/120 as proposed above, Members could increase the number and quality of commitments without compromising the protection of domestic consumers or the quality of legal services, and safeguard the rule of law.

⁶ WTO Secretariat “Guide to the GATS: An Overview of Issues for Further Liberalisation of Trade in Services” (2001) Kluwer Law International, The Hague and the World Trade Organisation, Geneva, at Page 407.

⁷ Refer to Australia’s negotiating proposal tabled with the Council for Trade in Services on 10 July 2001 detailing a ‘Limited Licensing’ system for foreign lawyers, S/CSS/W/67/Suppl.1/Rev.1.