17 April 2014

Law Council
OF AUSTRALIA

Services Trade and Negotiations Section
Office of Trade Negotiations
Department of Foreign Affairs and Trade
R G Casey Building
BARTON ACT 2600

By Email services.negotiations@dfat.gov.au

Dear Sir/Madam

Trade in Services Agreement Submission

I refer to my letter dated 20 June 2013 enclosing the Law Council of Australia's submission on the negotiations relating to the proposed Trade in Services Agreement (TiSA).

At the time of lodging that submission, the Law Council had not had the opportunity to obtain the comprehensive views of its constituent law societies and bars, so I requested the submission be received on a confidential basis and not posted publically on your website.

Our consultation has now been completed and I enclose a revised version of the submission. The amendments minor amounting to grammatical and formatting corrections and the adoption of a consistent reference to 'TISA parties' throughout the document.

Thank you for your patience and I ask that you now treat the submission as a public document.

Yours sincerely

MARTYN HAGAN
SECETARY GENERAL

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Trade in Services Agreement (TiSA) Negotiations

Department of Foreign Affairs and Trade (DFAT)

19 June 2013[1]

[1] This submission is essentially identical to a submission dated 19 June 2013 lodged by the Law Council of Australia with the Department of Foreign Affairs and Trade on 20 June 2013. At the time of lodging the submission on 20 June 2013, the Law Council had not yet had an opportunity to seek input from its constituent bodies. The changes made in this submission involve making consistent the references to TiSA parties, and some grammatical and formatting changes. The date of this slightly edited version of the original submission is 2 April 2014.

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Table of Contents

Acknowledgement

This submission was prepared by the Law Council of Australia's International Law Section. Mr Brett Williams, Executive Member, International Law Section, was the lead author of this submission. Mr Williams prepared this submission in consultation with Mr Andrew Percival, Executive Member, International Law Section. The International Law Section also acknowledges the assistance of the Law Society of South Australia's International Legal Practice Committee in the preparation of this submission.

Attachment A provides a profile of the Law Council of Australia. **Attachment B** provides a profile of the International Law Section.

Introduction

1. The Law Council welcomes the opportunity to make this submission to Department of Foreign Affairs and Trade (DFAT) to assist in negotiations in Geneva on a plurilateral Trade in Services Agreement (**TiSA**). The Law Council may make further submissions in the future or may submit a revised version of this Submission.

Australia's regulation of legal services

2. Australia provides reasonably liberal terms of market access for foreign suppliers to provide legal services in the Australian market. The **Background Note** provided at **Attachment C** explains the evolution of regulation in Australia and of Australia's previous submissions on liberalization of trade in legal services toward the position that is set out here.

3. Australia provides access on terms under which:

    a) a distinction is made between:

        i. supply of legal services relating to Australian (host) country law for which foreigners must meet the same requirements as nationals to obtain a full practising certificate; and

        ii. supply of legal services relating to foreign country law for which foreigners are not required to obtain a full practising certificate and are subject to a less onerous registration requirement;

    b) there are no quantitative limitations, either in numerical form or in any form of economic needs test, on the number of suppliers or the number of foreign suppliers that may supply any kind of legal service on host country law or on the number of suppliers that may supply any kind of legal service on foreign country law. Neither are there any quantitative restrictions on the value of legal service transactions or assets, legal service operations or service output, or the total number of employees or the number of employees any supplier may employ;

    c) foreign suppliers of foreign country law do not have to satisfy residency requirements to supply legal services relating to home country or third country law:

        i. on a "fly in/fly out" basis; or

        ii. through a commercial presence in Australia;

d) foreign suppliers of foreign country law can supply legal services relating to home country or third country law on a "fly in/fly out" basis for up to 90 days per year without:

   i. having to obtain an Australian practising certificate; or

   ii. having to register as a registered foreign lawyer in Australia;

e) foreign suppliers of foreign country law can supply legal services relating to foreign country law by establishing a commercial presence in Australia if they are registered as a registered foreign lawyer in Australia; and

f) suppliers of legal services relating to foreign country law may (except in South Australia) operate in partnership or other profit sharing arrangement with local lawyers provided that those qualified in foreign country law or a particular foreign country supply legal services relating to foreign country law of that country and only those holding Australian practising certificates supply legal services related to Australian (host) country law.

4. Australia should require commitments from other countries that would require them to provide terms of access that reflect most of the major characteristics of the market access terms that Australia provides to others.

Australia's requirements regarding supply of legal services in TiSA Negotiations

5. The Law Council understands that there is no draft text for the TiSA at this stage in the negotiations.

6. However, the Law Council understands that the commitments to be made under the Agreement are intended to be in a form similar to the commitments under the GATS so that in the longer term they could be incorporated into the GATS.

7. Australia would certainly seek to build upon its previous submissions. The **Background Note** explains the proposals and submissions which Australia has made since 1998. In particular, there are some aspects of previous submissions that are likely to be less contentious within the subset of WTO Members participating in the negotiations for the TiSA than they were in the negotiation with the entire membership of the WTO in the Doha round negotiation on trade in services.

8. First, previous submissions sought to achieve a consensus on a distinction between full licensing for practising host country law and limited licensing for practising in foreign country law or international law. Although there was some difficulty gaining a broad consensus on this approach in the Doha Round, it appears that there is a much greater likelihood of reaching a consensus on this approach among the group of WTO Members that are participating in the negotiations for the TiSA.

9. Secondly, previous submissions sought to achieve a consensus on the categories of sub service sectors in which Members ought to make commitments and upon necessary matters of terminology. Australia is in a position to build upon its previous consensus building efforts on terminology by proceeding on the basis of the terminology used in the 2005 Friends of Services Joint Statement (TN/S/W/37).

10. Not having to make substantial further submissions or consensus building efforts in those two areas, Australia can approach this negotiation by offering and requesting of others detailed and specific commitments in the different categories of legal services, relating to respectively host country law, foreign country law and international law, using the terminology developed in earlier negotiations. The

section below sets out the position in terms of specific commitments that Australia should expect of other parties.

11. Before dealing with the specific commitments there are three other important matters to be addressed.

Free-riders and derogation from the Unconditional MFN rule in GATS Article II

12. It is understood that there is a desire among the participants in the negotiation to avoid free-riding by non-participants.

13. It is understood that some Members wish the TiSA to conform to GATS Article V so they can use Article V to justify withholding the benefits of the TiSA from non-parties. They then wish to encourage other parties to join the TiSA with a view toward the TiSA being multi-lateralised with GATS article II applying to all of the obligations and benefits arising under the TiSA.

14. It is not a certainty that this strategy of adopting an agreement that is initially discriminatory with a view to removing the discrimination later and bringing it back under the unconditional MFN rule will work. Alternative strategies for moving to a non-discriminatory position should be explored.

15. One alternative strategy would be for the parties to the TiSA to apply it on the basis of the unconditional MFN rule for a limited time with the intention that if other WTO Members have not acceded to the TiSA by the expiration of the fixed time period, then the TiSA parties would then cease to accord unconditional MFN treatment to non-parties. This could be done in two ways:

    a) the first way that parties could deny benefits to non-parties would be: if, by the end of the fixed period, ¾ of the membership had acceded to the TiSA, then they could vote themselves a waiver to the extent necessary to enable them to deny the benefits to non-parties; or

    b) the second way that parties could deny benefits to non-parties would be: if, by the end of the fixed period, the parties had moved sufficiently close to eliminating derogations from national treatment, then they would likely meet the terms of GATS Article V and could at that point invoke GATS Article V.

16. To facilitate compliance with GATS Article V at a future date, some additional obligations would need to be included in the TiSA.

17. Parties should agree that they will not raise the overall level of barriers to trade in services from suppliers from non-parties within sectors or subsectors the subject of commitments under the TiSA compared to the level applicable prior to the TiSA.

An Accession clause

18. The TiSA should have a pre-agreed accession clause so that countries that are not original parties can accede to the TiSA on the basis of fixed criteria and do not have to negotiate the terms of accession.

An MFN clause

19. The TiSA should have an unconditional MFN clause applying as between the parties to the TiSA.

20. A suggested clause is:

"Article …

With respect to any measure covered by this Agreement, each Party shall accord immediately and unconditionally to services and service suppliers of any other Party treatment no less favourable than that it accords to like services and service suppliers of any other country.

(2) A Member may meet the requirements of paragraph 1 by according to services and service suppliers of any other Party, either formally identical treatment or formally different treatment to that it accords to services and service suppliers of its most favoured country.

(3) Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of its most favoured country compared to the like services or service suppliers of any Party."

21. This MFN clause should <u>not</u> provide for any listing of derogations.

22. This MFN clause may provide that it does not require the elimination of any preference:

    a) in the degree of derogation from national treatment that is in force under existing integration agreements conforming to GATS Article V provided that the margin of preference may not exceed the difference existing on the date of the TiSA between the degree of derogation from national treatment provided under the existing integration agreement and the degree of derogation from national treatment provided under the TiSA; and

    b) in the degree of derogation from national treatment which is in force under an integration agreement conforming to GATS Article V entered into after the date of the TiSA provided that the integration agreement completely eliminates discrimination in the sense of GATS Article XVII between or among parties to the particular integration agreement in relation to supply of the particular service the subject of the preference.

<u>Specific Commitments – General Approach</u>

23. The commitments below are divided into the sub-sectors, host county law, foreign country law and international law. The Law Council believes that some commitments should be expected of all partiesto the TiSA, such as, for example, the commitment not to require full licensing in respect of the supply of legal services relating to foreign county law and international law. The Law Council has indicated that, in respect of some of the obligations under the GATS, all parties should submit to those obligations without scheduling any exceptions, limitations or derogations. For some other obligations, Australia may need to negotiate qualifications on a case by case basis.

    The general approach has been that if parties are subject to an MFN rule without being allowed to schedule any exceptions and are subject to prohibitions on quantitative restrictions without being able to schedule any derogations, then any future unilateral liberalization, by way of removing any remaining derogations from national treatment, would have to be granted in a way that extended the benefits to services and service suppliers from all parties to the TiSA. In order to ensure that 'cosy' deals cannot be done between parties, it is essential that the TiSA does require all parties to commit to an MFN clause without being able to schedule exceptions (see paragraphs 20 and 21 above) and to apply the prohibitions on quantitative restrictions under GATS Article XVI:2(a) to (d) without any qualifications (see paragraphs 24, 29 and 36 below).

Host country law

24. In relation to host country law involving either supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA should agree to neither maintain or adopt:

    a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service – *except to the extent that exceptions, conditions or qualifications are scheduled*;

    Australia requests that Members do not add qualifications requiring residency; and

    f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – e*xcept to the extent that exceptions, conditions or qualifications are scheduled.*

    Australia requests that members do not add qualifications requiring residency.

25. In relation to host country law involving a supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA should agree to neither accord foreign suppliers treatment less favourable than the party accords to its own like services and service suppliers – *except to the extent that exceptions, conditions or qualifications are scheduled.*

    Australia requests that parties do not add qualifications requiring residency.

26. In relation to host county law supplied by foreign suppliers on a Mode 4 (fly in fly out) basis, parties to TiSA should agree to neither maintain or adopt the measures listed in paragraphs (a) to (f) – e*xcept to the extent that exceptions, conditions or qualifications are scheduled.*

    Australia requests that parties to TiSA do not add qualifications requiring residency.

27. In relation to host county law supplied by foreign suppliers on a Mode 4 (fly in fly out) basis, parties to TiSA should agree tonot accord foreign suppliers treatment

less favourable than the party accords to its own like services and service suppliers – e*xcept to the extent that exceptions, conditions or qualifications are scheduled.*

Australia requests that parties do not add qualifications requiring residency.

Foreign country law (including arbitration)

28. In relation to foreign country law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to foreign country law, parties to TiSA must give specific additional commitments that:

    a) they will not require foreign suppliers to obtain full admission/licence as a local practitioner in order to provide these services; and

    b) they will grant a licence to foreign applicants to provide these services on a Mode 3 basis, that is, through a commercial presence, if:

        i. the applicant is licensed or authorised to practice law in the relevant foreign country by, and is in good standing with, his or her home regulatory authority;

        ii. the applicant is a person of good character and repute;

        iii. the applicant agrees to submit to the Code of Ethics, or its equivalent of the host regulatory authority; and

        iv. if applicable, carries liability insurance or bond indemnity or other security consistent with domestic law and which, if applicable, is no more burdensome than that required by the host regulatory authority of fully licensed local lawyers.

29. In relation to foreign country law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to foreign country law, involving either supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA will not maintain or adopt:

    a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – *with NO exceptions, conditions or qualifications*;

    b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

    c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[2] – w*ith NO exceptions, conditions or qualifications*;

    d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in

[2] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service – *except to the extent that exceptions, conditions or qualifications are scheduled*;

Australia requests that Parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners;

Australia requests that Parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm; and

Australia requests that Members do not add qualifications requiring residency.

f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – *except to the extent that exceptions, conditions or qualifications are scheduled*.

Australia requests that parties to TiSA do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners.

Australia requests that parties to TiSA do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm.

30. In relation to foreign country law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to foreign country law, involving either supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA will not accord foreign suppliers treatment less favourable than the party accords to its own like services and service suppliers – *except to the extent that exceptions, conditions or qualifications are scheduled.*

Australia *requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners*.

Australia requests that that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm.

Australia requests that parties do not add qualifications requiring residency.

"Fly in/Fly out" (Mode 4)

31. In relation to foreign country law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to foreign country law, supplied by foreign suppliers on a "fly in/fly out"

basis, parties to TiSA will not maintain or adopt the measures listed in paragraphs (a) to (f) – *except to the extent that exceptions, conditions or qualifications are scheduled.*

Australia requests that parties do not schedule qualifications regarding residency requirements.

32. In relation to foreign country law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to foreign country law, supplied by foreign suppliers on a fly in fly out basis, parties to TiSA will not accord foreign suppliers treatment less favourable than the party accords to its own like services and service suppliers – *except to the extent that exceptions, conditions or qualifications are scheduled.*

    Australia requests that parties do not schedule qualifications regarding residency requirements.

    Australia would likely add a qualification that supply exclusively on a Mode 4 basis should not exceed 90 days in any 365 day period and would not object to other parties scheduling substantially similar qualifications.

33. Parties to TiSA should add an additional commitment that they will not require:

    a) admission as local practitioner; or

    b) registration as a foreign lawyer,

    in order for practice on a Mode 4 basis for less than 90 days in any 365 day period in a field of law in which the person is qualified to practice in their home country.

34. It is acknowledged that Commitments on Mode 4 will be read in conjunction with commitments made and qualifications entered in the horizontal part of each party's schedule relating to immigration and visa requirements.

International law (including arbitration)

35. In relation to international law, including advisory services in relation to foreign country law and legal arbitration and mediation/conciliation services to the extent they relate to international law, parties to TiSA will adopt specific additional commitments that:

    a) they will not require foreign suppliers to obtain full admission/licence as a local practitioner in order to provide these services ;

    b) they will grant a licence to foreign applicants to provide these services on a Mode 3 basis, that is, through a commercial presence, if:

        i. the applicant is licensed or authorised to practice law in another jurisdiction, and is in good standing with, his or her home regulatory authority;

        ii. the applicant is a person of good character and repute;

        iii. the applicant agrees to submit to the Code of Ethics, or its equivalent of the host regulatory authority; and

        iv. if applicable, carries liability insurance or bond indemnity or other security consistent with domestic law and which, if applicable, is no more burdensome than that required by the host regulatory authority of fully licensed local lawyer.

36. In relation to international law, including advisory services in relation to international law and legal arbitration and mediation/conciliation services to the extent they relate to international law, involving either supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA will not maintain or adopt:

    a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

    c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications*;

    e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service – *except to the extent that exceptions, conditions or qualifications are scheduled*;

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners.

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm.

Australia requests that parties do not schedule qualifications regarding residency requirements.

and

f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – *except to the extent that exceptions, conditions or qualifications are scheduled*.

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners;

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm

Australia requests that parties do not schedule qualifications regarding residency requirements.

37. In relation to international law, including advisory services in relation to international law and legal arbitration and mediation/conciliation services to the extent they relate to international law, involving either supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia, parties to TiSA will not accord foreign suppliers treatment less favourable than the party accords to its own like services and service suppliers: *except to the extent that exceptions, conditions or qualifications are scheduled.*

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from employing one or more local practitioners.

Australia requests that parties do not schedule qualifications that would permit them to prevent a registered foreign lawyer from operating in partnership with a local practitioner or a local law firm or from operating in any other form of commercial association with a local practitioner or local law firm.

Australia requests that parties do not schedule qualifications regarding residency requirements.

"Fly in/Fly out" (Mode 4)

38. In relation to international law, including advisory services in relation to international law and legal arbitration and mediation/conciliation services to the extent they relate to international law, supplied by foreign suppliers on a fly in fly out basis, parties to

TiSA will not maintain or adopt the measures listed in paragraphs (a) to (f): – *except to the extent that exceptions, conditions or qualifications are scheduled:*

Australia requests that parties do not schedule qualifications regarding residency requirements.

39. In relation to international law, including advisory services in relation to international law and legal arbitration and mediation/conciliation services to the extent they relate to international law, supplied by foreign suppliers on a fly in fly out basis, parties to TiSA will not accord foreign suppliers treatment less favourable than the Member accords to its own like services and service suppliers: – e*xcept to the extent that exceptions, conditions or qualifications are scheduled.*

    Australia requests that parties do not schedule qualifications regarding residency requirements.

40. Parties to TiSA should add an additional commitment that they will not require:

    a) admission as local practitioner; or

    b) registration as a foreign lawyer,

    in order for practice on a Mode 4 basis for less than 90 days in any 365 day period in a field of law in which the person is qualified to practice in their home country.

Additional commitment

41. Parties to TiSA should not without reasonable cause, restrict a lawyer or law firm from trading in Australia under the same name that the lawyer or firm trades under in the home country of the lawyer or law firm.

Licensing and Qualification Standards and GATS Article VI **Disciplines**

42. It is noted that the proposals set out above do not constrain parties to TiSA of their autonomy in fixing appropriate standards for licensing and regulation of lawyers as local practitioners and do not constrain a party's autonomy in fixing appropriate standards for licensing and regulation of practice by foreign lawyers except to the extent set out in:

    a) the paragraphs above dealing with the criteria for grant of Limited Licences for the practice of foreign county law and international law through commercial presence in Australia; and

    b) the paragraphs above dealing with the criteria for permitting lawyers qualified in their home jurisdiction to practice foreign country law or international law through the temporary presence of natural persons, that is, on a fly in fly out basis.

    It is also noted that respect of matters relating to qualification requirements and procedures, technical standards and licensing requirements, all of the parties negotiating the TiSA are bound by GATS Article VI. Australia has made the submissions contained in S/WPDR/W/34 dated 5 September regarding the disciplines under GATS Article VI. The Law Council will consider whether similar submissions need to be incorporated in Australia's proposals in the negotiation for the TiSA and may include such submissions in future submissions.

Australia proposes that the TiSA ought to incorporate the rules contained in GATS Article VI:5 (and will make a later submission on the appropriate wording).

Australia ought to make clear to other parties negotiating the TiSA that Australia's request that other parties do not schedule residency requirements is without prejudice to Australia's view that residency requirements are restrictions that are more burdensome than necessary to ensure the quality of the service.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Profile of the International Law Section

The International Law Section (ILS) provides a focal point for judges, barristers, solicitors, government lawyers, academic lawyers, corporate lawyers and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues.

The ILS runs conferences and seminars, establishes and maintains close links with overseas legal bodies such as the International Bar Association, the Commonwealth Lawyers' Association and LAWASIA, and provides expert advice to the Law Council and its constituent bodies and also to government through its Committees.

Members of the 2013 ILS Executive are:

- Dr Gordon Hughes, Section Chair
- Dr Wolfgang Babeck, Deputy Chair
- Ms Anne O'Donoghue, Treasurer
- Mr Fred Chilton, Executive Member
- Mr John Corcoran, Executive Member
- Mr Glenn Ferguson, Executive Member
- Ms Maria Jockel, Executive Member
- Mr Andrew Percival, Executive Member
- Dr Brett Williams, Executive Member.

The ILS Committees are:

- The Alternative Dispute Resolution Committee (Ms Mary Walker, Chair)
- The Migration Law Committee (Mr Erskine Rodan, Chair and Ms Katie Malyon Vice-Chair)
- The Human Rights Committee (Dr Wolfgang Babeck and Mr Glenn Ferguson, Co-Chairs)
- The Trade & Business Law Committee (Mr Andrew Percival, Chair)
- The Comparative Law Committee (Dr Wolfgang Babeck and Mr Thomas John, Co-Chairs).

Attachment C: Background Note

The Law Council of Australia, in conjunction with the International Legal Services Advisory Council (ILSAC), has taken the lead role in formulating proposals for liberalisation of trade in legal services.

The development of Australian proposals on how WTO Members should deal with liberalization of trade in legal services and of Australian requests for market access for Australian suppliers of legal services to other countries have been developed through the work of ILSAC and the Law Council

1998 Statement of the International Bar Association

On 6 June 1998, the Council of the International Bar Association adopted a "Statement of General Principles for the Establishment and Regulation of Foreign Lawyers" (available from the IBA website at http://www.ibanet.org/PPID/Constituent/Legl_Profession_World_Orgs/BIC_ITILS_Working_Group/Default.aspx)

These provide for members to be able to choose between regulation on a Full Licensing Approach and Limited Licensing Approach or a combination between the two.

The Statement refers to Full Licensing as appropriate for regulation of the practice of host country law and describes Full Licensing as requiring foreign suppliers to become admitted as local lawyers.

The Statement refers to Limited licensing as appropriate for regulation of the practice of home country law by foreign lawyers in the host jurisdiction and described Limited Licensing as not requiring the foreign lawyers to become admitted as local lawyers in the host country jurisdiction.

The Statement sets out some Common Regulatory Principles (see paragraphs II.A to E):

- having a legitimate host Authority;
- that regulation and decisions should be "fair, non-discriminatory, and based upon uniformly applied, objective criteria";
- regulations should be clear and be consistently applied;
- regulations should be designed and administered so as to promote the interests of clients and facilitate the effective delivery off legal services;
- regulation should promote access to competent legal advice.

The statement sets out the desirable criteria to be applied:

- in admitting foreign lawyers to a full licence for practice of host country law and
- in admitting foreign lawyers to a limited licence for practice of foreign law.

It is especially worth noting the approach of the IBA statement to Limited Licensing to practice Foreign Law. The statement excludes certain things from the scope of practice by Foreign Lawyers:

- appearing in courts,
- advising on the law of the host jurisdiction law,
- advising on the law of any jurisdiction where they are not fully qualified an licensed (para IV.B.1 & IV.B.2).

The statement indicates that Foreign Lawyers may be required to represent to the public their limited status (para IV.B.3).

Most important is the way that the Statement sets out conditions that are much less onerous to satisfy that the conditions for Full Licensing (at paragraph IV.A.1-6).

Under this approach the Host authority should grant a [Limited License] permitting the practice of foreign law if the applicant:

- is licensed or authorised to practice law by, and in good standing with, his or her Home Authority;
- has satisfied reasonable minimum practice requirements;
- is a person of good character and repute;
- agrees to submit to the Code of ethics, or its equivalent, of the Host Authority;
- carries liability insurance or bond indemnity or other security consistent with local law and which, if applicable, is no more burdensome that required by the Host Authority of fully licensed lawyers; and
- consents to local service of legal process.

1998 ILSAC's Six Principles for Liberalisation

On 20 July 1998, ILSAC adopted an instrument entitled "Principles for Liberalisation of relating to liberalization of Trade in Legal Services" (available from the ILSAC website at http://www.ilsac.gov.au/GlobalLegalServicesandMarketAccess/Pages/default.aspx).

1. Formal recognition, on reasonable terms, of the right to practise home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (eg, a minimum number of three years of professional experience or a refusal to recognise concurrent practice rights where the foreign lawyer's home country is a federal jurisdiction).

2. Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.

3. Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.

4. The right to practise local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through transparent process.

5. Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.

6. Formal recognition of the right to prepare and appear in an international commercial arbitration.

Australia's Proposal to the WTO on 27 March 2001 – setting out the 6 principles

ILSAC's Six Principles formed the main part of Australia's first written submission on legal services in the WTO's Doha Round of negotiations. This is comprised in WTO document no S/CSS/W/67 dated 27 March 2001.

In addition setting out the 6 Principles, Australia also proposed in this document that:

- a distinction be made between:
    - legal services relating to host country law for which WTO Member countries ought to be able to require foreign suppliers to obtain a host country practising certificate;
    - legal services relating to home country law, third country law or international law for which WTO Member countries ought not to require foreign suppliers to obtain a host country practising certificate but instead ought to provide for an easier to obtain limited licence (paras 7 and 8);
- that regulatory objectives should be achieved through "appropriate non-discriminatory means" and in particular that "nationality and residency requirements should be eliminated (para 9).

Australia's Proposal to the WTO on 10 July 2001 – elaborating upon limited licences

Australia submitted a revised proposal which elaborated upon the concept of limited licences for supply of legal services relating to law other than host country law. This is comprised in the document entitled "Communication from Australia – Negotiating Proposal for Legal Services – Revision", S/CSS/W/67/ Suppl.1/Rev.1, dated 10 July 2001.

This proposal stressed that requiring full admission as a local practitioner was an "unnecessarily burdensome" way to regulate practice of home-country, third-country or international law (para 5). The proposal drew upon the IBA Statement to elaborate upon the concept of limited licences. The Australian proposal:

- Supported the IBAs guidelines on the criteria for grant of a Limited Licence (set out above from para VI.B of the IBA Statement);
- Supported the IBA views on the conditions that can be imposed on foreign legal practitioners (set out above from para IV.C of the IBA statement).

The Australian proposals go further than the 1998 IBA Statement in some ways:

- while agreeing that Members be permitted to exclude foreign lawyers from advising on host country law, Australia proposed that that Members should also permit foreign lawyers "to advise on the effect of host-country law, if the giving of that advice is necessarily incidental to the practice of home-country law, third-country law or international law and the advice is expressly based on advice of a host-country practitioner not employed by the foreign practitioner" (para 13);
- Australia also added a proposal that "foreign legal practitioners have the right to provide legal services (including appearances) in relation to international commercial arbitration" (para 9);
- while supporting the IBA approach to Limited Licensing for foreign lawyers establishing a presence in the host country, Australia proposed a more liberal approach to permitting foreign legal practitioners to supply services on a "fly in/fly out" basis without establishing a commercial presence (i.e in the scheme of the GATS, supply under Mode 4, through the temporary presence of natural persons). Australia proposed that the practice of foreign lawyers in home-country law, third-country law or international law through Mode 4 should not be subject to prior registration as a foreign legal practitioner in the host jurisdiction (para 9).

Australia's Proposal to the WTO on 11 March 2002 – on the Classification of Legal Services

Australia submitted a further proposal in 2002 setting out a number of subcategories of the Legal Services subsector so as to facilitate a clear mechanism for WTO Members to be able to limit the practice of host country law to local practitioners but still be able to make substantially liberalizing commitments for the practice of other categories of legal services. Australia proposed 12 separate categories:

- Home country law (advisory services);
- Home country law (representation services) ;
- Third-country law (representation services);
- Third-country law (advisory services);
- Host-country (advisory services);
- Host-country law (representation services);
- International law (advisory services);
- International law (representation services);
- International commercial arbitration services;
- Other alternative dispute resolution services;
- Preparation and certification of legal documents; and
- Other legal advisory or consultancy services.

ILSAC Australian Legal Services Export Development Strategy 2003-2006

In March 2003, ILSAC updated, revised and reprinted its Legal Services Development Strategy. Among the other strategies was a strategy for pursuing liberalisation of legal service markets in which the key desired outcome was:

> Adoption of a 'limited licensing' system for the regulation of foreign lawyers by a greater number of trading partners.

September 2003 International Bar Association resolution on "Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations"

The IBA Council Meeting in September 2003 in San Francisco adopted a "Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations" (available on the IBA website at http://www.ibanet.org/PPID/Constituent/Legl_Profession_World_Orgs/BIC_ITILS_Working_Group/Projects.aspx).

This IBA also saw the adoption of categories of legal services as a way to assist WTO Members to achieve some progress in the WTO Doha Round negotiations. The IBA Resolution endorsed most of the elements of the categories proposed by Australia in:

- Home country law (advisory services);
- Home country law (representation services) ;
- Third-country law (advisory services);
- Third-country law (representation services);
- Host-country (advisory services); and
- International commercial arbitration services.

It is important to note that the IBA definitions of "advisory services" included "the verification of documents of any kind for purposes of an in accordance with the requirements of the specified body of law".

Australia as co-sponsor of the Friends of Legal Services "Joint Statement on Legal Services" of 24 February 2005 **(TN/S/W/37)**

On 22 February 2005, eleven WTO Members (Australia, Canada, Chile, the EC, Japan, Korea, NZ, Singapore, Switzerland, and Taiwan) submitted a joint statement setting out

some areas of convergence in approach to setting out of scheduled commitments. (WTO Doc TN/S/W/37; S/CSC/W/46, dated 24 February 2005). [3]

The outcome represents a compromise among different views about the appropriate categories of legal services that should be used for further scheduled commitments under the GATS.

Members appear not to have agreed on separating commitments on advisory representation and arbitration services. They suggested that WTO Members use four terms:

- *Legal advisory services* – which inter alia, did include "verification of documents … in accordance with the requirement of law" but did not include "documentation services performed by service suppliers entrusted with public functions, such as notary services".
- *Legal representation services* – expressly excluding "documentation services performed by service suppliers entrusted with public functions, such as notary services".
- *Legal arbitration and conciliation/mediation services* – expressly including, as a sub-category, International legal arbitration and conciliation/mediation services; and expressly excluding services unrelated to law which can be properly treated as services incidental to management consulting; or
- *Legal services* – which term can include the first 3 categories and also "legal advisory and legal documentation and certification services performed by service suppliers entrusted with public functions, such as notary services".

Members appear not to have been in agreement on the desirability of having different levels of liberalisation for practice of host country law and practice of other categories of law but they agreed that Members could use the following terminology:

- Domestic law (host country law): " … the law of the territory of the specific member scheduling [the] commitments"
- Foreign law: " … the law of the territories of … countries other than the law of the territory of the specific Member scheduling those commitments"
- International law: "includes law established by international treaties and conventions, as well as customary law."

The adoption of the term "foreign law" removed the need for separate categories of home country law and third country law.

26 May 2005 Australia's Revised Offer in the Doha Round Negotiations on Trade in Services[4]

Australia's offer broke the classification of legal services into two subsectors, one for which Full Licensing is required and one for which Limited Licensing is required.

The two sectors were:

[3] WTO, Council for trade in Services, Special Session, Committee on Specific Commitments, "Communication from Australia, Canada, Chile, The European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States – Joint Statement on Legal Services", TN/S/W/37, S/CSC/W/46, 24 February 2005.

[4] WTO, Council for Trade in Services, Special Session, "Australia – Revised Services Offer", 26 May 2005, (downloaded from the website of the Australian Department of Foreign Affairs and trade http://www.dfat.gov.au/trade/negotiations/services/services_trade_wto.html on 16 June 2013.). The same document is available as WTO doc TN/S/O/AUS/Rev.1 dated 31 May 2005 in the WTO document facility (checked 29 March 2014).

(i) Legal advisory and representational services in domestic law (host country law) (but with definitions that, inter alia, excluded documentation services by service suppliers entrusted with public functions, such as notary services ; and
(ii) Legal advisory services in foreign law and international law and (in relation to foreign and international law only) legal arbitration and conciliation/mediation services.

Therefore, public notary services were excluded completely from the commitment.

In respect of the second classification, Australia added a positive commitment not to require full admission as a local practitioner.

The commitment to which the limited licensing approach would apply covered foreign law (without distinction between home country law and third country law), and would cover arbitration and conciliation/mediation services but not to the extent that services might cover advising on host country law.

The Schedule provides:

Modes of supply: (1) Cross-border; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons

Sector or Sub-sector	Limitations on Market access	Limitations on national Treatment	Additional Commitments
A Professional Services			
a) Legal services			
i. Legal advisory and representational services in domestic law (host country law	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	
ii. Legal advisory services in foreign law and international law and (in relation to foreign and international law only) legal arbitration and conciliation/mediation services.	1)None 2)None 3)Natural persons practising foreign law may only join a local law firm as a consultant and may not enter into partnership with or employ local lawyers in SA.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.	Limited licence only is required: Only registration with limited licence is required, rather than full admission/licence, in order to provide a)Legal advisory services in foreign law, where licensed in the relevant foreign jurisdiction(s); b)legal advisory services in international law; or c)legal arbitration and

	4) Unbound except as indicated in the horizontal section.		conciliation/mediation services in relation to foreign and international law. (By contrast, a Full Licence is required for a)i) above (legal advisory and representational services in domestic law (host-country law)), for which full admission is required: i.e. practitioners must satisfy admission requirements, including qualification requirements, applicable to domestic legal practitioners. 3)Joint offices involving revenue-sharing between foreign law firms and Australian local law firms are permitted in NSW, Victoria, Queensland, Tasmania, WA, the ACT and the NT subject to the foreign law firms satisfying certain requirements including in relation to liability, standard of conduct and professional ethics.

The effect of this commitment needs to be explained in terms of the obligations under Articles XVI and XVII of the GATS.

In relation to host country law

Article XVI:2 would prohibit Australia from imposing in relation to supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – *with NO exceptions, conditions or qualifications*;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the

form of quotas or the requirement of an economic needs test;[5] – *With NO exceptions, conditions or qualifications*

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service – *with NO exceptions, conditions or qualifications*; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – *with NO exceptions, conditions or qualifications.*

In relation to foreigners supplying host country (Australian) law on a "fly in/fly out" basis (Mode 4), Australia remains free to impose any of the restrictions set out above except to the extent that entries in the horizontal part of Australia's schedule contain positive commitments to allow the entry of natural persons.

Further in relation to foreigners supplying host country (Australian) law either on a cross border basis, on a consumption abroad basis, or through a commercial presence in Australia, Article XVII would prohibit Australia from according a foreigner treatment less favourable than Australia accords to its own like service suppliers – *with NO exceptions, conditions or qualifications.*

In relation to foreigners supplying host country (Australian) law on a fly in-fly out basis (Mode 4), Australia remains free to accord treatment that is less favourable than the way that Australia treats its own like service suppliers – except to the extent that entries in the horizontal part of Australia's schedule contain positive commitments to allow the entry of natural persons.

These rules in Articles XVI:2 and XVII do not prohibit Australia from requiring legal practitioners to meet qualification requirements to be admitted as a local legal practitioner, provided that the qualification requirement does not derogate from the national treatment rule in Article XVII. Australia's qualification requirements are already subject to the disciplines of GATS Article VI.

In relation to foreign law, international law or arbitration and conciliation/mediation services (to the extent that they relate to foreign or international law)

Article XVI:2 would prohibit Australia from imposing in relation to supply on a cross border basis, supply on a consumption abroad basis or supply through a commercial presence in Australia:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – *with NO exceptions, conditions or qualifications*;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

[5] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[6] – *with NO exceptions, conditions or qualifications*

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test – *with NO exceptions, conditions or qualifications*;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service – *with NO exceptions, conditions or qualifications – OTHER than* the rule in SA that foreigners practising foreign law may not enter into partnership with or employ local lawyers and requiring that a foreign lawyer practising foreign may only join a local law firm as a consultant; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – *with NO exceptions, conditions or qualifications.*

In relation to foreigners supplying foreign country law or international law or arbitration and conciliation/mediation services on a fly in-fly out basis (Mode 4), Australia remains free to impose any of the restrictions set out above except to the extent that entries in the horizontal part of Australia's schedule contain positive commitments to allow the entry of natural persons.

Further in relation to foreigners supplying foreign country law or international law or arbitration or conciliation/mediation services (involving foreign country law or international law) either on a cross border basis, on a consumption abroad basis, or through a commercial presence in Australia, Article XVII would prohibit Australia from according a foreigner treatment less favourable than Australia accords to its own like service suppliers – *with NO exceptions, conditions or qualifications*.

These rules in Articles XVI:2 and XVII do not prohibit Australia from requiring legal practitioners to meet qualification requirements to be admitted as a local legal practitioner, provided that the qualification requirement does not derogate from the national treatment rule in Article XVII.

However, because of the additional commitment saying that only registration with limited licence is required, rather than full admission, then Article XVI: 1 would prohibit Australia from according foreign service suppliers less favourable treatment than is specified in the Schedule. This would mean that Article XVI:1 would prohibit Australia from requiring full admission as a local practitioner in order to supply legal services relating to foreign law, international law or arbitration, conciliation or mediation (to the extent they involve foreign law or international law).

Because of the additional commitment relating to joint office involving revenue sharing, Article XVI:1 would prohibit Australia from applying laws in any of the names Australian states and territories that prevented foreign law firms supplying services relating to foreign law or international law from sharing revenue with Australian local law firms .

Australian Proposal of September 2005 to the WTO Negotiations on Disciplines on Domestic Regulation of Legal Services (WT/SPDR/W/34 dated 6 September 2005)

[6] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

On 6 September 2005, Australia submitted a proposal relating to the work under GATS Article VI relating to development of disciplines on domestic regulation relating to qualification requirements and procedures, technical standards and licensing requirements.

One part of the proposal addresses the appropriate criteria to be applied to grant of limited licences for the practice of foreign law or international law. The proposal indicates that there was less than universal agreement with the general approach of having different levels of liberalization for practice of host county law and practice of foreign and international law. It provided in part:

> "Where Members have a 'limited licensing system' either on its own or together with a 'full licensing' system, to accommodate the provision of legal advisory services in foreign law and international law, Members shall ensure that foreign lawyers are not required to satisfy licensing requirements for a 'full licence', but would be granted a 'limited licence' permitting the practice of foreign and international law if the foreign lawyer":
>
> - is licensed or authorised to practice law by, and is in good standing with, his or her home regulatory authority;
> - is a person of good character and repute;
> - agrees to submit to the Code of Ethics, or its equivalent of the host regulatory authority; and
> - if applicable, carries liability insurance or bond indemnity or other security consistent with domestic law and which, if applicable, is no more burdensome [than] that required by the host regulatory authority of fully licensed local lawyer.

Paragraphs (a), (b), (c) and (d) repeat the content of the 1998 IBA guidelines but the Australian proposal leaves out 2 of the criteria in the 1998 IBA guidelines:

- The requirement that the applicant "has satisfied reasonable minimum practice requirements"
- The requirement that the applicant "consents to local service of legal process".

Australian progression toward adoption of a uniform scheme for regulating the legal profession

August 2006 public release of the Australian Model Legal Profession Bill and the accompanying Model Legal Profession Regulations

On 1 March 2008, ILSAC released a report indicating the state of play in implementing the Model scheme of regulation for the legal profession (available at http://www.ilsac.gov.au/Publications/Publicationsbydate/Pages/default.aspx).

Limited Progress in the negotiations under the GATS as part of the WTO's Doha Round of Multilateral Trade Negotiations

Since 2001, WTO Members have attempted to negotiate further liberalization on trade in services by way of adding commitments to their Schedules of Specific Commitments under the General Agreement on Trade in Services.

Significant numbers of WTO Members had made no offers of further liberalization.

There was also no consensus on amendments to rules in the areas of safeguards and subsidies.

The lack of agreement on trade in services was one of the factors leading to the failure to conclude the Doha Round in July 2008.

The Plurilateral Trade in Services Agreement or International Trade in Services Agreement

[see various reports in http://libraryeuroparl.wordpress.com/2013/03/01/international-services-agreement-towards-a-new-plurilateral-trade-agreemeent/]

After some discussions through the first half of 2012, on 5 July 2012 a group of WTO Members called “Really Good Friends of Services” agreed to attempt to reach an agreement to further liberalize trade in services. It was clear that the United States wanted the agreement to be set up in a way that denied the benefits of the further liberalization from non-participants. There was some discussion of this point. There was also discussion of how the agreement, if preferential, could be made consistent with the WTO. One possibility was that it be created as a plurilateral agreement under Article II:3 of the Agreement Establishing the WTO. The obstacle to this is that the WTO agreement would require a unanimous decision to add such a plurilateal agreement (Article X:9). Another possibility was that it could conform with GATS Article V as an integration agreement justifying deviation from the MFN rule. The difficulty with that is that complying with Article V requires not merely further liberalization among the parties but “absence or elimination of substantially all discrimination between or among the parties”.

In early 2013 when the European Commission described the agreement between the “Really Good Friends of Services” to the European Council, the EC described the elements of the agreement in the following way: (see European Commission Press Release entitled “Negotiations for a Plurilateral Agreement on Trade in Services” Brussels, 15 February 2013. Reference: MEMO/13/107, Event Date: 15/02/2013

> “The participants in this initiative are the so-called "Really Good Friends of Services". This "Really Good Friends" group is neither an exclusive nor a stable group of WTO members, but an ad-hoc coalition of all those WTO members that showed willingness to advance the services negotiations in the DDA. In addition to the EU and its 27 Member States, the "Really Good Friends" is made up of some 20 other WTO members: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Pakistan, Peru, Switzerland, Turkey and the USA.
>
> These countries are a mix of developed and developing countries and in 2010 represented around two thirds of global trade in cross-border services (excluding intra-EU trade).
>
> The EU would welcome any WTO members which share the objectives of the agreement to join the negotiations at any time.
>
> **Main elements of the future agreement**
>
> As an outcome of the exploratory talks that took place in 2012, the "Really Good Friends" agreed that any agreement would not simply be a Free Trade Agreement among the participants but would have the objective of being a full part of the WTO system.
>
> The objective of the plurilateral trade in services agreement should be to negotiate an ambitious agreement that is compatible with the GATS, which would attract broad participation and which could be multilateralised at a later stage. Indeed, by staying close to the GATS, it could be easier to convince some of the leading emerging countries that were active in the DDA negotiations to join the initiative, either during the negotiations or later on.
>
> The agreement should be comprehensive in scope with no exclusion of services sectors or modes of supply at the outset. Commitments taken by "Really Good Friends" should

reflect the reality on the ground, i.e. the actual level of existing liberalisation, and provide for new or improved market access.

All services sectors will potentially be covered by the negotiations, to the same extent they were covered by the GATS/DDA negotiations. However, it will be up to each participant to decide for which sector and to what extent it allows foreign services suppliers to provide services in their territory. The agreement will also include regulatory disciplines e.g. in the area of telecommunications, financial services or postal and courier services. These disciplines typically cover issues such as the independence of regulators, fair authorisation processes or non-discriminatory access to telecommunication networks.

There should also be new and better rules on the basis of proposals brought forward by the participants. Members of the "Really Good Friends" made suggestions to include new rules, covering domestic regulation (e.g. authorisation and licensing procedures), international maritime transport, telecommunication services, e-commerce, computer related services, cross-border data transfers, postal and courier services, financial services, temporary movement of natural persons, government procurement of services, export subsidies and state-owned enterprises. This list is based on the interests expressed by individual participants in the "Really Good Friends" group. It is not exhaustive and it does not mean it was agreed that there will be new or better rules in all the sectors listed.

Structure

In terms of the structure of the agreement, it was agreed that it would be based on the GATS, with some core GATS articles (including on definitions, scope, market access and national treatment, general and security exemptions) being incorporated. This would, by and large, make it possible at a later stage to integrate the plurilateral agreement into the GATS.

There would be additional provisions to govern how each member of the "Really Good Friends" could take commitments. In this respect, it was agreed that commitments on national treatment would in principle be applied on a horizontal basis to all services sectors and modes of supply, i.e. the understanding on national treatment would be closer to the GATT model. Exemptions to this horizontal application would have to be listed in the countries' national schedule of commitments. Participants in the negotiations might also agree that commitments would in principle reflect actual practice (the "standstill clause") and that future elimination of discriminatory measures would be automatically locked in (the so-called "ratchet clause") unless an exemption were listed.

Multilateralisation: bringing the agreement under the WTO umbrella

In a first phase, the agreement will only be binding upon the participants – and therefore will not be part of the DDA as such. But the EU has ensured that the structure of the agreement provides for a credible pathway to future multilateralisation.

Two conditions are necessary for bringing the future agreement into the WTO system.

First, the type of obligations undertaken under the agreement need to be the same sort as in the GATS so they can be easily brought into the remits of the GATS. This will be ensured by relying on the same basic concepts (market access, national treatment…).

Second, the number of participants will need to reach a critical mass so that the benefits of the agreement can be extended to all WTO members.

In order to avoid free-riding, the automatic multilateralisation of the agreement based on the Most Favoured Nation (MFN) principle should be temporarily suspended as long as there is no critical mass of WTO members joining the agreement. At the same time, "Really Good Friends" agreed to include an accession clause for interested WTO members and a pathway to the multilateralisation of the agreement, i.e. the agreement should set out the mechanisms and conditions for subsequent multilateralisation.