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Impediments to Trade in Professional Services

By Alistair Abercrombie, Director of Trade Policy, International Financial Services, London

Despite its name, a high proportion of the membership of International Financial Services, London is made up of law firms and companies providing accountancy and consultancy services. Many of these are leading international players with a considerable interest in the global liberalisation of trade in services. Prior to the last WTO Ministerial Conference in Seattle, our predecessor organisation, British Invisibles, and its members produced a number of position papers setting out our objectives and priorities for the "GATS 2000" negotiations in the WTO. These papers were submitted to the UK Government negotiators. One of these papers was on professional services. Two years further on, the main points to come out of that paper about impediments to trade in professional services remain wholly valid.

The UK believes that, in both the accountancy and legal sectors, insufficient liberalisation commitments have been made under the GATS so far. WTO Members should be aware that liberalising professional services will go a long way to ensuring that existing investment is retained. On the regulatory side, while a fair amount has been achieved in the WTO in accountancy, much remains to be done. The WTO work also needs to be expanded so that other professional services sectors can benefit.

Priorities for Professional Services Generally

More and better liberalisation commitments from all WTO Members

Relatively few WTO Members have made commitments in those professional services sectors which are commercially tradable. We would argue that, during the market-opening phase of the current WTO negotiations in services, the binding of liberalisation, which has taken place since GATS came into being, is a priority; and commitments to further liberalisation need to be secured. Residence, citizenship and

nationality requirements can all present problems. Similarly, restrictions on the ability of foreign firms to employ or enter into partnerships with local professionals can seriously impede business opportunities. Limitations on legal forms, which foreign firms can adopt, and on the use of firms' names and professional titles, are additional irritants. With the growing importance of electronic commerce, efforts should be made to address the relative lack of commitments made in professional services, which are supplied across borders.

Restrictions on the temporary movement of key business personnel should be eased and more certainty, transparency and speed introduced through the elaboration of common approaches to commitments. Commitments should also take account of the need for key business personnel to move on short-term assignments of less than one year's duration. Pascal Kerneis will be telling you what we have been doing in the European Services Forum on this particular subject.

Adoption of regulatory disciplines in the WTO

In 1998, a set of regulatory disciplines were agreed in the WTO for the accountancy sector. These mainly cover licensing and qualifications. To be frank, we are rather disappointed that those disciplines are not as strong as we would have wished and that they only apply to countries that have made commitments in accountancy services. We believe that WTO Members should proceed rapidly to develop horizontal regulatory disciplines which would apply to all professional services sectors or even more widely. Such disciplines should apply to all WTO Members, regardless of whether they make commitments in a particular professional services sector. In addition, there might well be scope to compile a set of pro-competitive regulatory principles applicable to all professional services sectors or, as appropriate, to individual sectors. Again, such principles should apply to all WTO Members, regardless of whether a country takes on commitments in a particular sector.

Priorities for Specific Sectors

Legal Services

As the volume and complexity of international business increases, so does the importance of international markets for legal services. Most of this trade consists of advice based on a lawyer's home-country law, or on third-country or international law. Only rarely is a lawyer permitted to advise on host-country law (the law of the client's jurisdiction), unless extensive requalification conditions are met. Efforts to liberalise trade in legal services meet two traditional obstacles. First, the close linkage of laws to political subdivisions encourages governments and professional associations to restrict the supply of legal services on that basis. Second, the technical and often contentious nature of the practice of law persuades governments to regulate to protect non-expert clients, but in ways that serve only to shield local lawyers from foreign or other national competition.

Negotiating priorities

We believe that, in the long term, WTO Members should move towards full commitments in market access and national treatment. In addition, commitments should be made that promote a more competitive market for legal services within their territories. In the shorter term, negotiators should focus on those categories of measures that have the greatest effect in restricting trade in legal services. These mainly concern burdensome restrictions on the way law firms can operate, and onerous qualification requirements, in particular:

Easing of restrictions on the way law firms can operate

Eliminating prohibitions on firms that contain both foreign-qualified and domestic-qualified lawyers. This is the most important impediment to law firms attempting to establish a global practice. The claimed justification of these prohibitions is that they protect clients by isolating lawyers from other people or businesses that might conflict with clients' interests. Although serious arguments can be raised in this respect about multidisciplinary practices combining lawyers and non-lawyers, there is no conceivable reason (other than trade protection) for treating foreign-qualified lawyers as non-lawyers under regulations on single-profession firms.

Eliminating restrictions on the use of international or foreign firm names. International firms cannot fully realise the goodwill embodied in their international name if they are not permitted to carry on practice under it. The varying name requirements in different jurisdictions greatly increases the burden on a firm wishing to establish and maintain international activities.

Requiring that account be taken of prior knowledge and experience of lawyers in the application of professional licensing requirements

Inadequate recognition of foreign qualifications and experience is a serious obstacle to the full liberalisation of trade in legal services. Although harmonisation of regulations is a theoretical possibility, mutual recognition approaches provide a more realistic alternative. Two situations require particular attention.

In setting conditions for a foreign lawyer to practice host-country law, full account should be taken of relevant qualifications obtained in a foreign country. It is extremely difficult in most WTO Members for a foreign lawyer to practice host-country law. In most cases, the foreign lawyer must undergo a full local examination. Instead, credit where relevant should be given for foreign diplomas, titles, and experience.

In setting conditions for a foreign lawyer to practice home, third-country or international law, only minimal restrictions should be imposed. WTO Members should permit, subject only to minimal regulation, the practice of home, third country and international law. Such "foreign legal consultant" regimes should require at most that lawyers subject themselves to core ethical requirements of the host jurisdictions, and have basic qualifications in the law that they practice.

A better package of commitments in legal services should be secured

Members that have not made commitments in legal services should be encouraged to do so. In addition, countries acceding to the WTO should be pressed to offer more open markets in legal services. The MFN exemptions which have been lodged are generally based on reciprocal recognition of professional qualifications. They should

be reduced or eliminated. Instead, efforts should be made to develop a Framework Mutual Recognition Agreement, analogous to that negotiated in the accountancy sector, that would permit countries to negotiate open agreements recognising each others' qualifications.

Accountancy

The barriers affecting the provision of accountancy and consultancy services are varied. They include: nationality and residence requirements, restrictions on the mobility of personnel, restrictions on the use of brand names of firms, restrictions on advertising and price competition, "buy national" practices with respect to public procurement of accounting services, quantitative limits on the provision of services, restrictions on firm ownership, restrictions as to the legal form or structure of accountancy firms and discriminatory rules (and practices) with respect to the licensing of foreign accountants.

In many instances these barriers impact particularly on the larger accounting firms that are deterred from expanding and strengthening their international operations. Since the cultures of these firms foster high accounting and auditing standards, a consequence of the restrictions has been lower quality standards of accounting and auditing than might otherwise have been possible in a number of countries.

There are three priorities for action in the accountancy and consultancy sector.

Mobility of accountancy and consultancy personnel

The movement of business personnel, particularly accountants and consultants, across national boundaries has increased significantly. However, while business activity occurs in a borderless environment, various procedures and restrictions operate at national level which impede the temporary movement of specialist personnel. These restrictions can operate as significant non-tariff barriers to the competitiveness of accountancy firms. Accountants and consultants have to be where their clients want them to be. Although a few WTO Members have made commitments to improve the mobility of personnel, there has not been significant liberalisation in the WTO.

Restrictions on the movement of accountants and consultants can have particularly detrimental effects on their firms since people are their basic "product". There is scope, therefore, for further progress to be made by considering the need for common definitions of key business personnel, the introduction of transparent processes for granting visas and work permits, and making provision for expedited procedures to facilitate the movement of key business personnel for specific, short-term assignments.

Domestic regulation

Attempts have been made in the WTO to address some of the other barriers which exist but progress has been disappointing. WTO Members selected accounting as the first of the professional services areas for the development of regulatory disciplines and a set of such disciplines was adopted in 1998. Despite a commitment by Members not to introduce domestic legislation that runs counter to these disciplines, the rules will not become binding until the conclusion of the next negotiating round, and then only for those countries that have made commitments in the accountancy sector. There is much scope, therefore, to broaden and deepen commitments in the accountancy sector. In that regard, the industry will wish to address issues which arise in three main areas: (i) control and ownership; (ii) residency as a pre-condition to establishment; and (iii) legal form.

Mutual recognition of qualifications

Attention also needs to be drawn to the recognition of professional qualifications. In 1997, the WTO adopted a set of guidelines for the negotiation of mutual recognition agreements (covering education and accountancy standards, experience requirements and licensing eligibility). These guidelines, however, are only voluntary and in practice have had very little impact to date in the accountancy sector. Provided that accepted technical standards, knowledge of local law and tax, and language proficiency can be demonstrated, it is difficult to see why any impediment to the reciprocal recognition of any accountancy qualification can be justified.