OPENING UP OF LEGAL SERVICES UNDER GATS

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INTRODUCTION

The General Agreement on Tariff and Trade (GATT) was the first major multilateral trade agreement among governments, and it is now the WTO’s principal “rule book” covering trade in goods. The GATT has been in existence since 1947 but underwent major revisions during the “Uruguay Round” of trade negotiations from 1986 to 1994.

The General Agreement on Trade of Services (GATS), which was also negotiated during the Uruguay Round, is a similar agreement but sets out a comprehensive framework of rules governing trade in services, instead of goods. It sets out a set of basic rules, a clear set of obligations for each member country and a dispute-settlement mechanism to ensure that the rules are enforced. The GATS applies to all service sectors and all forms of trade in services, though with adjustments and exceptions tailored to the type of service.

The types of services covered include telecommunications, insurance and financial services, research and development services, computer and information services and professional services, to name a few. Professional services include legal services, as well as accounting services, engineering services, architectural services and so on.

The forms (or “modes”) of trade in services are:

- Cross-border trade in services: a firm deals with a client in another country (e.g. electronically) without crossing the border (Mode I);
- Consumption abroad: a client travels to a firm’s country of operation to consume a service (Mode II);
- Commercial presence: a firm establishes an operation in the market of another country (Mode III), and;
- Temporary movement of a natural persons: a firm travels to the client’s country of operation to provide the service (Mode IV).

At the moment, the GATS only provide a basic framework of general rules. What is now being negotiated is how those general rules will apply in specific countries, service sectors, industries and modes of supply of service. This is obviously a big job, and carries with it the challenge of avoiding the development of generally applicable rules appropriate to some services but inappropriate to others.

INDIA’S CURRENT POSITION UNDER GATS

India has submitted its initial offers for services which it is willing to open. These cover business services, construction and related engineering services, health-related services, tourism and travel-related services, maritime services and transport services.

India’s initial offers do not include the opening up of professional services in legal sector, which will essentially be covered in Mode III services. This is because there is strong opposition from domestic industry in these domains, which feels that the competition at this stage will prevent them from developing fully. However, recent news reports suggest that the Government is discussing the possibility of allowing foreigners to pick up up to 26% stake in law firms.

However, several of India’s trading partners have urged India to open legal services and it is felt that during the negotiation process, India may be willing to offer the opening of the legal services sector provided it gets

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comfort from advanced nations in areas such as agriculture.

NEED FOR OPENING LEGAL SERVICES

India is fast integrating itself into the Global Supply Chain and opening up of trade in legal services would probably have its largest impact in international business transactions, financial services and large-scale mergers and acquisitions. These are the big money-making areas in which international law firms would likely be most interested. People with smaller practices or who practice real estate law, family law, criminal law, general litigation or small-scale corporate and commercial law may be affected but the chances are fairly small.

Liberalizing trade in legal services will also surely mean increased international competition for those lawyers who practise international business, financial services and mergers and acquisitions work in India. At the same time, however, it represents an opportunity for firms who do this work to expand into international markets.

However, currently the trade in legal services for host-country law is marginal, e.g. US Law firms having offices in Singapore are not really interested in practicing Singapore law. Countries arguably have a legitimate public-interest objective in ensuring lawyers have a base level of competence and knowledge with respect to domestic law as well as court structures and court rules. Also, opening up host country law could be unfair to domestic lawyers if it requires lesser qualification standards for foreign lawyers than domestic lawyers.

TREATMENT OF LEGAL SERVICES UNDER GATS

The unique characteristics and core values of the legal profession in a democratic society require it to be treated separately, and in some key respects quite differently.

There are market access limitations in the legal services industry unlike any other service sector. Such restrictions include restrictions on the movement of personnel between jurisdictions, restrictions on the form of incorporation and, in rare cases (such as India) nationality requirements. National treatment limitations include nationality requirements, requirements to partner with or hire locally qualified counsel, restrictions on the usage of firm names (usually to current or former partners) and residency requirements. Qualification requirements, especially for the practice of host country law, are often a significant barrier because the content of law and legal education varies from country to country.

In view of the above, it appears that the regulation of legal services will be considered in different categories: home country law (the law of the jurisdiction of the lawyer); host country law (the law of the jurisdiction where the lawyer is “practising”) and international law. Each category has been subdivided into advice (including transactional support services) and representation in court. It is possible under GATS for a country to have different qualification and licensing rules for the different types of practice.

Given the complexities involved and keeping in mind the demand from India’s major trade partners, India should immediately allow lawyers who supply legal services to usually act as foreign legal consultants (FLCs).

FLCs typically provide advice on home country (jurisdiction where they are admitted) and international law. Countries which have introduced the concept of FLC’s generally allow them to practice if they:

— are members in good standing of the legal profession in their home country;
— are of good character, have worked for some years under the direct supervision of a qualified lawyer;
— do not handle trust funds, and;
— submit to the relevant host country law society’s regulations and rules of professional conduct.

CONCLUSION

It is important to remember that multilateral trade negotiations are not an all-or-nothing proposition. If India does decide to open up trade in legal services, the government must make the choice as to what areas of legal service it wants to open up to trade (advisory/representation, home/host/international), in what modes (cross-border trade, consumption abroad, commercial presence, temporary movement) and what types of restrictions it would wish to maintain (MFN, national treatment, market access, domestic regulation). The main concern is that these matters be specifically set out in the GATS schedules so that the rules are known by the practitioners themselves, and by the clients.

Another important consideration is the independence and self-governing feature of our legal profession, and the importance this plays in our democracy. How can nation-to-nation agreements take into account this reality? Even if the government wishes to liberalize the rules concerning trade in legal services, should this only occur with the consent of the law societies? Is it possible to foresee by treaty that foreign
nationals must submit to the disciplinary supervision of local law societies?

All of these matters should be reviewed carefully to determine whether they are in furtherance of a legitimate objective or whether they are unnecessary barriers to trade.

Even if there were a demand from international firms to practice Indian law (host country), and a demand from clients that they should be able to, there probably will be a substantial reluctance to open up the doors for foreign lawyers/firms to practice Indian law and in services such as representation in court.

However, one must remember that trade negotiations are almost always reciprocal. Whenever one country decides that it will limit access to foreign service providers, other countries will likely reciprocate. Countries may have valid reasons for limiting outsiders’ access. However, in doing so, they are also probably limiting opportunities for their own service providers in foreign markets.

It is also worth remembering that even where there is a significant qualitative and competitive difference between foreign and domestic service providers, it is ultimately the consumer of legal services that benefits and is enabled to compete internationally.