

**Council for Trade in Services**

LEGAL SERVICES

Background Note by the Secretariat

A. Introduction

This Note has been prepared at the request of the Council for Trade in Services and provides background information on the legal services sector. It is meant to facilitate the discussion in the Council on the exchange of information programme and it should not be regarded as exhaustive.

During the Uruguay Round negotiations, the Secretariat produced a note on "Trade in Professional Services" in document MTN.GNS/W/67 of 25 August 1989, which contained general information and data on trade in professional services and two short sections focusing on legal services. This Note does not duplicate the work undertaken during the Uruguay Round, but attempts to provide a more specific analysis of issues affecting trade in legal services.

In the past decades international trade in legal services has grown as a result of the internationalisation of the economy. Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdictions often comes from their corporate clients, who do business across borders and choose to rely on the services of professionals who are already familiar with the firm's business and can guarantee high quality services. Some countries also favour international trade in legal services, as the establishment of foreign lawyers is seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment.

The concept of "one stop shopping" and access to high quality services for firms doing business cross-border appear as major factors in favouring the internationalisation of the legal profession. The lack of local expertise in certain fields of the law is, however, a factor that might gradually disappear as local practices develop skills in order to be able to attract foreign clients. The establishment of forms of collaboration between foreign and local firms as well as the employment of local lawyers by foreign firms and of foreign lawyers by local firms are factors which could contribute to the emergence of a more competitive legal profession in those countries which are still mainly importers of legal services.

The main obstacle to trade in legal services is represented by the predominantly national character of the law and by the national character of legal education. There are of course important similarities between national laws, in particular within the "great legal systems" or "legal families", which are based on the same legal tradition and often share common bodies of law such as caselaw or legal codes. Legal families, however, do not provide a satisfactory solution to the obstacles represented by qualification requirements in legal services, as the main aspect of a lawyer's education is still his knowledge of national law, which differs for each country within a legal family and in some cases even within the same country.

It is clear how common legal traditions might facilitate trade in legal services within legal families, but it should not be understated that there are also common elements among legal educations across the world and that obstacles to trade in legal services between countries belonging to different legal traditions - albeit higher than within legal families - may still be overcome.

## B. The legal profession

The legal profession is divided across national lines and reflects the national character of the law. National laws have been grouped in legal families, sharing common legal principles, and in some instances similarities in the structure of the legal profession. Comparative lawyers have identified the following main legal families: Romano-Germanic Law, Common Law, Socialist Law, Hindu Law, Muslim Law, Laws of the Far East, Black Africa and Malagasy Law.<sup>1</sup> The Romano-Germanic and the Common Law families stretch well beyond the countries in which they originated and are the families of laws who bring together the largest number of national laws. Moreover, other legal traditions, which constitute separate legal families, have been influenced by the expansion of Romano-Germanic Law and Common Law and share some legal principles with either of these two families or in some instances with both.

The Common Law legal family shares the same legal principle of *stare decisis*, which binds lower courts to decisions of higher courts on the same points of law. The corollary of the *stare decisis* principle is that caselaw constitutes the main body of law in common law countries. Some Common Law countries also share the same caselaw, even in the absence of a formal hierarchy between their respective courts of law.

The Civil Law tradition is based on the concept of codification. The law is codified by the legislator in codes (civil code, commercial code, criminal code, etc.), which cannot be altered and must be applied by the courts. Codes differ among Civil Law countries - to a certain extent more than the caselaw between Common Law countries - as each country adopted its "national codes", however, some codifications, especially in the field of civil law have exercised important influences on others. The first codification was the attempt by emperor Justinianus to codify Roman Law in the *Corpus Iuris Civilis*. More recent are the French *Code Napoleon* of 1804 and the German *BGB* of 1900, which have exercised great influence on the codifications which have taken place in the past two centuries in other Civil Law countries. As codes grow old in Civil Law countries, a major role is played by ordinary legislation passed by parliaments in the various fields of the law.

The national and local character of the legal profession is a reflection of the national character of the law and of the territorial jurisdiction of the courts. The principal role of the lawyer was originally that of advocate, and the legal profession was organised around the courts, with each bar associated to a specific local court. Lawyers were required to maintain physical establishment in the territory of the local court in order to be accessible to other members of the bar and to the court itself. The paradigm local court / local bar / local lawyer changed with the expansion of trade and with the emergence of new fields of the law such as business and trade law for which representation before a local court is relatively less important. In most circumstances these subjects require legal counselling in matters involving transactions, relationships and disputes not necessarily entailing court proceedings.

This change in the practice of law also led to the emergence of a new type of lawyer mainly involved in counselling, as opposed to the traditional lawyer/advocate, whose main role is representation before a court. While the profession of advocate is almost always regulated and is reserved to qualified members of a professional association (often the local bar), in some countries there is no monopoly by lawyers on legal advice so that members of other professions such as

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<sup>1</sup> David, René, "Major legal systems in the world today : an introduction to the comparative study of law," (*Les grands systemes de droit contemporains*) translated and adapted by John E.C. Brierley, 3rd ed., London, Stevens, 1985.

accountants, bankers or estate agents can offer legal advice in relation to economic activities covered by their respective professions. Trade restrictive aspects of the regulation of advocates include nationality requirements, residency requirements, local qualification requirements and local language requirements. In contrast, lower regulatory barriers for counselling lawyers in some countries have facilitated trade in legal services and in the particular the establishment of foreign lawyers as foreign legal consultants.

The distinction between advice and representation is clearly expressed in English law, where the profession of solicitor (counselling) is separated from that of barrister (court representation). The separation between the two professions is, however, becoming less rigid than in the past, as solicitors have been gradually admitted to appear before lower courts in England and Wales. In France the legal profession, previously divided between *avocats* and *conseillers juridique et fiscal*, was recently unified under the common title of *avocat*, resulting in the merger under a single profession of the functions of court representation and advice on legal and fiscal matters. In Japan there is not a formal distinction within the legal profession between counselling and representation functions, but the number of lawyers entitled to appear before a court, *bengoshi*, is relatively very small. Most of the counselling functions, on the other hand, are performed by company in-house lawyers, who do not qualify as *bengoshi* and cannot appear before a court of law. In some countries a nationality requirement exists for representation services, due to the public role performed by the court lawyer in the domestic legal system.

Another important distinction within the legal profession concern “notarial activities”. Notarial activities include property transactions, successions, affidavits on divorce and mergers and acquisitions in the area of company law. In some countries notarial activities are performed by counselling lawyers or by other public officials, while in other countries, in particular Latin countries in Europe and South America, they are reserved for an independent legal professional, the notary. In both cases the professional performing notarial services can act as public official, at least in some of the activities he performs. Due to the public role often played by the notary, notarial activities are not the forefront of liberalisation in legal services and in those countries where the profession is separated there is often a nationality requirements for notaries.<sup>2</sup>

Professional organizations exist in most countries, and in some cases more than one professional organization exists in one country, especially when the legal profession is divided between different professionals (advocates, counselling lawyers, notaries, etc.), geographic areas (on the basis of court jurisdiction) and different fields of the law. Membership of professional organizations is often compulsory, however, also in those countries where it is voluntary the vast majority of practising lawyers are members of the relevant organization. In some countries professional organizations have regulatory functions, while in others this function is performed by the courts especially with respect to court lawyers.

#### *Possible questions:*

- What is the role of international trade in sectors such as host country law and court representation, considering the differences in national law and legal education between national legal systems and families of laws? Are there common elements in national laws and educations, within and across legal families, which can help bridging the gap?
- Does the public role of certain professionals (court lawyers and notaries) justify nationality requirements?

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<sup>2</sup> In some countries certain notarial activities are regarded as “services supplied in the exercise of governmental authority,” like legal services pertaining to the administration of justice. However, unlike judges, court clerks and public prosecutors, who are civil servants, notaries often supply their services “on a commercial basis,” and therefore subject to the provisions of the GATS.

### C. Definition of legal services

A broad definition of legal services would include advisory and representation services as well as all the activities relating to the administration of justice (judges, court clerks, public prosecutors, state advocates, etc.). This second aspect, however, is effectively excluded from the scope of the GATS as in most countries it is considered a “service supplied in the exercise of governmental authority” according to Article I(3)(c) of the Agreement. The GATS covers all advisory and representation services in the various field of the law and in statutory procedures.

In the WTO “Services Sectoral Classification List” (document MTN.GNS/W/120), “(a) legal services” are listed as a sub-sector of “(1) business services” and “(A) professional services”. This entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification. In the UN CPC the entry “legal services” is sub-divided in “legal advisory and representation services concerning criminal law” (86111), “legal advisory and representation services in judicial procedures concerning other fields of law” (86119), “legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.” (86120), “legal documentation and certification services” (86130) and “other legal and advisory information” (8619).<sup>3</sup>

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<sup>3</sup> 861 Legal services

8611 Legal advisory and representation services in the different fields of law

86111 Legal advisory and representation services concerning criminal law

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to criminal law. Generally, this implies the defence of a client in front of a judicial body in a case of criminal offence. However, it can also consist of acting as a prosecutor in a case of criminal offence when private legal practitioners are hired on a fee basis by the government. Included are both the pleading of a case in court and out-of-court legal work. The latter comprises research and other work for the preparation of a criminal case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to criminal law.

86119 Legal advisory and representation services in judicial procedures concerning other fields of law

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to law other than criminal law. Representation services generally consist of either acting as a prosecutor on behalf of the client, or defending the client from a prosecution. Included are both the pleading of a case in court, and out-of-court legal work. The latter comprises research and other work for the preparation of a case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to law other than criminal law.

8612 86120 Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to statutory procedures. Generally, this implies the representation of a client in front of a statutory body (e.g. an administrative tribunal). Included are both the pleading of a case in front of authorized bodies other than judicial courts, and the related legal work. The latter comprises research and other work for the preparation of a non-judicial case (e.g. researching legal documentation, interviewing witnesses, reviewing reports), and the execution of post-litigation work.

The revision of the UN CPC approved by the UN statistical committee in February 1997 leaves the legal services classification substantially unchanged. However, it includes as a subclass of legal services "Arbitration and conciliation services," previously part of management consultancy services.<sup>4</sup>

It appears, however, that the UN CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was not as relevant to Members scheduling commitments as the distinction between advice and representation in host country, home country and international law. As the UN CPC classification in this sector did not reflect the reality of trade in legal services, Members have preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services: (a) host country law (advisory/representation); (b) home country law and/or third country law (advisory/representation); (c) international law (advisory/representation); (d) legal documentation and certification services; (e) other advisory and information services.

A Member may allow foreign professionals to practice its domestic law, international law and the law of his home country or of a third country. In all these circumstances the commitment may cover only advisory services or it may extend to representation services, so that a foreign professional may represent a client before a domestic court or an arbitration tribunal in the host country. Professionals practising international, home and third country law are often referred to as Foreign Legal Consultants (FLCs). This definition has also been adopted in some GATS schedules.

- Should the revision of the UN CPC take account of the Uruguay Round scheduling distinctions in legal services in re-defining classification in the sector?
- Is the distinction between host country, international, home country and third country law satisfactory?

#### D. The legal services sector

The legal services sector has experienced a steady and continuous growth in the past decades as a consequence of the growth in international trade and of the emergence of new fields of practice, in particular in the area of business law. Sectors such as corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property rights, new financial instruments and competition law have generated an increasing demand for more and more sophisticated legal services in the past years. Unfortunately there are no comprehensive disaggregated data on the size of the sector, as legal services are often bundled together with other professional services or business services.<sup>5</sup> It has been estimated that in the European Community the number of professional

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8613	86130	<u>Legal documentation and certification services</u>
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Preparation, drawing up and certification services of legal documents. The services generally comprise the provision of a number of related legal services including the provision of advice and the execution of various tasks necessary for the drawing up or certification of documents. Included are the drawing up of wills, marriage contracts, commercial contracts, business charters, etc.

8619	86190	<u>Other Legal advisory and information services</u>
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Advisory services to clients related to their legal rights and obligations and providing information on legal matters not elsewhere classified. Services such as escrow services and estate settlement services are included.

<sup>4</sup> See, "Detailed analysis of the modifications brought about by the revision of the central product classification," Note by the Secretariat – Addendum, S/CSC/W6/Add.10, 27 March 1998.

<sup>5</sup> Disaggregated data on legal services are available from the OECD for Iceland and the United States.

providers of legal services has grown on average by over 20% in the period 1989-1993, while in the United States it has tripled between 1973 and 1993.<sup>6</sup>

The number of lawyers and law firms varies among countries according to the size of the economy, the level of economic development and the structure of the legal profession. In the mid 1990s the number of lawyers reached 800.000 in the United States (925.000, including non-professional staff), 500.000 in the European Community and 19.000 in Japan. The relatively low figure for Japan is explained by the fact that most of the counselling work is performed by non-qualified law graduates working as in-house lawyers for companies. It has been estimated that together there were in 1992 125.000 suppliers of legal services in Japan.<sup>7</sup> In the early 1990s the output of legal services represented 14% of all professional services and 1.1% of the economy in a "representative" industrialised country.<sup>8</sup> In 1992 the output of legal services in the United States was \$US 95 billion, while in the European Community it reached \$US 52 billion.<sup>9</sup>

In the vast majority of countries the legal profession is practiced by individual professionals or by small firms, while the large law firms are still a phenomenon limited to a small number of Anglo-Saxon, Common Law countries. In 1988 the first 91 law firms by number of partners were from the United States, Canada, the United Kingdom and Australia. The top twenty firms included 17 from the United States (including the top three), two from Canada (4 and 15) and one from the United Kingdom (8). The first non Anglo-Saxon large law firm was from France (92), followed by Korea (116), the Netherlands (121), Hong Kong (132), Germany (133) and Brazil (135). In the past few years, however, more large firms have emerged in Civil Law jurisdictions such as France Germany and the Netherlands.

- Can liberalisation, and in particular mode four commitments and rules on qualification requirements, favour the internationalization of small practices?
- Is there a separation in the fields of practice of small firms and large firms, where the former dominate in the field of domestic law and the latter in the fields of business law and international law?
- Does the prohibition of certain legal forms (partnership, incorporation) prevent the emergence of large firms?

#### E. Trade in legal services

The demand for legal services comes from business and organizations as well as from individual citizens. The former have a need for a constant flow of legal assistance, while the latter need it only occasionally and often in situations of crucial importance to their lives (divorce, succession, purchase of real estate and criminal matters). It also appears that in the large majority of cases individual citizens resort to legal services in fields of domestic law, where the offer would normally come from local providers. Less frequently, individual citizens seek legal advice in foreign and international law,

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<sup>6</sup> Commission of the European Communities, "Panorama of EU industry", 1997.

<sup>7</sup> The Economist, 18 July 1992.

<sup>8</sup> UNCTAD/ World Bank, "Liberalizing international transactions in services: a handbook," United Nations, New York and Geneva, 1994. The data reflect averages for Canada, France and the United States.

<sup>9</sup> OECD, "International Trade in Professional services: advancing liberalisation through regulatory reform," OECD Proceedings, 1997.

although this is a field in which in recent times demand has grown due to the increase in the mobility of labour.<sup>10</sup>

Most of the demand for legal services in the fields of business law and international law comes from businesses and organizations involved in international transactions. These institutional actors will look for the legal services provider who gives them guarantees as to its knowledge of the firm's activities and of the place of business as well as of the quality of the service it can deliver, regardless of its place of origin. It is clear that a legal services supplier from the firm's country of origin (the firm's habitual lawyer) would have a comparative advantage with respect to the knowledge of the client's business, while a local service supplier would have a comparative advantage with respect to the knowledge of the local business and regulatory environment. Business law and international law are therefore the sectors most affected by international trade in legal services, although the possibility of entry of foreign service suppliers in more traditional sectors of domestic law should not be completely discounted as the sector becomes increasingly more integrated and competitive.

Foreign lawyers supplying legal services cross-border or by means of establishment act in the vast majority of cases as foreign legal consultants, that is to say, they provide advisory legal services in international law, in the law of their home country or in the law of any third country for which they possess a qualification. Domestic law (host country law) still plays a marginal role in international trade of legal services, due to the high barriers represented by qualification requirements, which, like domestic law, are shaped along national lines.

Most of trade in legal services still takes place cross-border (mode one) or via the temporary stay of natural persons travelling as individual professionals (mode four) or as employees/partners of a foreign established law firm. Affiliate trade of legal services is still limited as suppliers often find the costs and the difficulties associated with establishing a commercial presence too high, especially if compared to the relatively lower barriers to cross-border transactions.<sup>11</sup> It has been estimated that the number of lawyers who move abroad on a permanent basis (modes three and four) is very small, a few thousand, if compared to a total of over 300.000 lawyers travelling abroad occasionally.<sup>12</sup> Due to the high costs and risks involved, affiliate trade is still limited to the large law firms and is mostly directed towards the world major financial and business centres (Brussels, Frankfurt, Hong Kong, London, New York, Paris, Singapore, Tokyo) where the demand for legal work in the fields of business law and international law is highest.

Lawyers doing business at the international level are often structured in networks of firms, bringing together local practices from different countries under the same firm brand name, or in integrated international partnerships. Networks range from loose associations of independent local practices to fully integrated multinational companies, which control local practices, but maintain the decentralised structure of the network. It appears that integrated international partnerships tend to specialise in business and international law, while networks, because of their decentralised structure, often also engage in the practice of local law.

Cross-border trade in legal services consists in the transmission of legal documents or advice via the post or via telecommunications devices. Technological developments in the telecommunications sector are creating increasingly more efficient and accessible ways by which cross-border trade in legal services can take place. Trade in legal services is expected to benefit from the growth of the internet and of electronic commerce, as most of the activities involved in the delivery of legal services - with the exception of court appearances - can be delivered electronically.

In the past decades trade in legal services appears to have grown at a rate even faster than the overall economic performance of the sector. This is probably a reflection of the constant growth of

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<sup>10</sup> OECD, "Liberalisation of trade in professional services," OECD Documents, 1995.

<sup>11</sup> US International Trade Commission, "Recent Trends in US Services Trade," May 1997.

<sup>12</sup> OECD, "Liberalisation of trade in professional services," OECD Documents, 1995.

international trade and of emergence of new fields of practice with important cross-border implications (financial instruments, corporate re-structuring, privatizations, competition law, etc.). In Italy, for example, exports of legal services have grown from US\$ 4 million in 1990 to US\$ 115 millions in 1997, while in Australia they have grown from US\$ 29 millions in 1991 to US\$ 118 millions in 1997. The two major exporters of legal services are the United States and the United Kingdom. The US and the UK had a combined net trade balance of almost US\$ 2 billion in the early 1990s, where the UK alone counted for US\$ 830 million, representing nearly 15% of the entire UK net trade balance from services. The figure for the UK is remarkable, considering that the size of the profession in the UK (72.000) is only about a tenth of that in the US (800.000).<sup>13</sup> The US balance-of-payments data for private legal services, which only capture cross-border trade and temporary establishment of natural persons, show that in 1990 the US had a surplus with respect to the whole EC of US\$ 188 million, but a deficit against the UK of US\$ 60 million.<sup>14</sup>

There are two major factors which play a crucial role in the comparative advantage enjoyed by US and UK suppliers in international trade in legal services: (a) the structure of the sector, which in these countries relies on large and medium sized law firms, rather than on individual professionals; and (b) the role of British and US law in international transactions. (a) Large and medium sized enterprises have a competitive advantage in terms of human and financial resources with respect to individual professionals in dealing with complex business transactions which are often the object of international legal services. Individual professionals on the other hand tend to specialize in those traditional fields of domestic law, which although they constitute the major part of a country's legal services sector, are still the least exposed to international trade, due to the high barrier represented by qualification requirements and to the local nature of domestic law. (b) The Anglo-American comparative advantage in legal services is also favoured by the adoption of English law and New York law as the standards for international business transactions. To ensure legal certainty in international commercial transactions, especially major financial transactions, private parties often choose to subject their agreements to the laws of countries other than those in which they are resident, and sometimes to the laws of countries having nothing to do with the transaction itself.

- So far liberalisation has been a phenomenon limited to business and international law. Could it also expand to more traditional fields of domestic law?
- Can liberalisation help to change the current comparative advantage in international trade in legal services?
- Can electronic commerce also favour the growth of trade in legal services by individuals and small firms?

## F. Regulatory barriers to trade

### *Market access*

Nationality requirements in legal services are still quite common, although they affect some sectors more than others. As many as 11 OECD countries maintain nationality requirements, although often such requirements only affect some sectors of the legal profession.<sup>15</sup> The most

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<sup>13</sup> Peter Goldsmith, "Globalisation of laws - tearing down the walls," in Harper, Ross (ed.), "Global law in practice," Kluwer International and International Bar Association, London 1997.

<sup>14</sup> EUROSTAT, "Legal services," research paper, March 1993.

<sup>15</sup> OECD, "International trade in professional services: assessing barriers and encouraging reform," OECD Documents 1996.

common sectors subject to nationality requirements are notarial services, representation services (in all fields of the law) and less frequently the practice of domestic law (including advice and representation). Nationality requirements in these sectors are often based on the “public function” performed by the attorney in court or by the notary, who in some countries is also a public official. Advisory services in international and home/third country law (foreign legal consultant services) are hardly ever the object of a nationality requirement, however, they might be inaccessible to foreign service suppliers in presence of a overall nationality requirement for legal services.

An important market access barrier is represented by restrictions on the movement of professional, managerial and technical personnel, which often constitute an integral part of a country’s immigration policy. Such restrictions can apply to natural persons seeking long term or permanent establishment or to individuals travelling for business purposes for short periods of time. Short term business visitors often use tourist visa to circumvent restrictions and complications which might be involved in the obtaining of a business visas, with the consequence that their cross-border activity escapes balance-of-payments statistics. Also those countries who have scheduled mode four horizontal commitments often limit entry to a selected and limited number of people and make it conditional to a series of strict criteria.

Restrictions on legal form are still very common in this sector. Several countries, including 8 OECD Members, prohibit incorporation.<sup>16</sup> Some countries allow selected forms of incorporation, especially those who do not afford a shield against professional liability. In almost all cases, however, this is not a discriminatory restriction in so far as it applies equally to domestic and foreign suppliers. Countries justify such restriction on public policy grounds and in particular to ensure that professionals do not limit their professional responsibilities and liabilities.

Restrictions on foreign equity specific to legal services are not very common. More often the restriction specified in the general investment legislation will apply to legal services. As most law firms still prefer partnership to incorporation as their legal form, restrictions on the number of foreign partners can also be used to obtain the same result of foreign equity limitations, however, under the GATS they would be regarded as national treatment limitations, not market access ones.

### *National treatment*

Important national treatment limitations include: restrictions on partnership with local professionals, restrictions on the hiring of local professionals, restrictions on the use of international and foreign firm names, residency requirements and in general discrimination in the licensing process.

Restrictions on partnership with locally licensed professionals and restrictions on the hiring of locally licensed professionals prevent law firms acting as foreign legal consultants - and therefore limited to the practice of international and foreign law - from expanding into the fields of court representation and host country law by associating with or employing locally qualified lawyers. This is regarded as being more efficient than having professionals qualified in the home country re-qualifying in the host country and in this respect represents a good solution to the barrier presented by the national character of legal qualification requirements. In the OECD area 14 countries prohibit partnerships between foreign and local lawyers, while 7 countries prohibit foreign firms from engaging local lawyers.<sup>17</sup>

The restrictions are often based on the refusal of regulators to recognize foreign lawyers as “lawyers” and are covered by the general prohibition of practising law in partnership with anyone who is not a qualified lawyer, which is based on public policy grounds such as consumer protection ensuring the quality of the service and ensuring the independence of professionals. In this respect the

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<sup>16</sup> OECD, *idem*.

<sup>17</sup> OECD, *idem*.

prohibition on multinational partnerships has the same foundation as the prohibition on multidisciplinary partnerships, however, while the latter is clearly a non-discriminatory measure and is subject to the provisions of Article VI, the former alters the conditions of competition between foreign and domestic service suppliers and might be considered as falling within the scope of Article XVII.

Restrictions on international and foreign firm names represent national treatment limitations as they disadvantage foreign service suppliers. Other restrictions on firm names, which do not affect the conditions of competition between foreign service suppliers and those of national origin, however, should be regarded as domestic regulatory measures. In some countries foreign law firms are allowed to use their firm name as long as there is also mention of one of the partners' names. Eight OECD countries have restrictions on the use of foreign or international firm names.<sup>18</sup>

Residency requirements are in principle origin-neutral measures - in the sense that they do not target directly foreigners - and impose the same legal obligation on domestic and foreign service suppliers. Several countries maintain residency requirements for suppliers of legal services in the form of prior residency, permanent residency and domicile.

*Prior residency* requirements confer a competitive advantage on those services suppliers who have already been residing in the host country for a number of years, where the vast majority of such suppliers are nationals of that country. Some countries, including 7 OECD Members, impose prior residency requirements as a condition for obtaining a license.<sup>19</sup> The requirement of *permanent residency* (establishment for firms), albeit less restrictive, also imposes an additional burden on foreign service suppliers, who, unlike already residing domestic ones, have to take up residency in the host country. This, in the case of natural persons, might often lead to the loss of the home country residency. Permanent residency is often required for representation services, as court lawyers must reside within the jurisdiction of the court in order to be accessible to clients, other members of the profession and the same court. A similar result, however, can often be achieved by a requirement of domicile. In the OECD 11 countries impose residency or establishment requirements on suppliers of legal services.<sup>20</sup> *Domicile* is the requirement to have an address where one can be reached in the country or in the jurisdiction where the service is supplied. It appears that this is not only an origin-neutral measure (like the first two categories of residency), but it also does not alter the conditions of competition between domestic and foreign service suppliers. Domestic service suppliers are of course much more likely to already have an address in their home country; however, the extra effort required of foreign service suppliers (to elect a domicile) - at least with respect to modes three and four - appears as *de minimis* and it should not alter the conditions of competition.

In all the cases above, where residency requirements represent formally identical treatment of foreign and national service suppliers, a determination on whether they affect conditions of competition within the meaning of Article XVII would have to be made on a case by case basis. In this determination factors such as the nature of the legal service supplied (representation, advice, notarial activities, etc.), the mode of supply and the type of residency required would have to be taken into account.

### *Domestic regulation*

Qualification requirements often represent an insurmountable barrier to trade in legal services, especially for the practice of host country law. Legal education differs from country to country and in some cases within the same country. In some instances these differences are so wide that regulators require foreign qualified lawyers to re-qualify in order to be able to practice.

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<sup>18</sup> OECD, *idem*.

<sup>19</sup> OECD, *idem*.

<sup>20</sup> OECD, *idem*.

In most countries legal qualification requirements include a university degree of three to five years and a period of practice followed by a professional examination. In some countries the university education is supplemented by a further period of postgraduate or vocational studies of one to three years. A few countries allow lawyers to practice on completion of their legal education without going through a professional examination. The period of practical experience normally precedes the professional examination and is conducted under the supervision of a qualified lawyer. In some countries the period of practice coincides with lawyers' access to employment, that is to say the firm/individual professional who takes on a practitioner is the same who will employ him as qualified lawyer upon completion of the professional examination. In other countries, however, there is no necessary continuity between the period of practice and employment or self-employment as a qualified lawyer, but lawyers access the job market following the successful completion of their professional examination.

It is evident how qualification requirements constitute serious barriers for foreign lawyers seeking to access a Member's domestic law market. Keeping in mind the regional nature of the European Union and its high level of internal liberalisation and market integration, it is interesting to see how in the EU the trade restrictive effects of qualification requirements have been virtually eliminated in a legal environment which reproduces, albeit on a smaller scale, elements of diversity in qualification requirements similar to those existing at the multilateral level. In fact, the Member States of the EU not only have different national legal systems, but also belong to different families of laws (Romano-Germanic, Common Law and Scandinavian).

Three EC Directives have dealt with qualification requirements within the EU. The Directives do not restrict the scope of practice and allow access to all fields of the law, including representation services and host country law. Lawyers who are not European citizens and have qualified outside the European Union (and EEA) cannot invoke the Directives. Their access to the EU legal services market is regulated by the individual Member States. The first Directive (77/249/EEC) requires each Member State to recognise lawyers from another Member State for the purpose of providing occasional services. It allows the foreign lawyer to practice under the home title, but requires submission to the deontology of both home and host state. It also requires a foreign lawyer to be assisted by a local lawyer for in-court services. The second Directive (89/48/EEC), on the mutual recognition of qualifications, provides for the full integration into the legal profession of a host Member State upon that state's recognition of home state legal qualifications. Member States are required to ensure that recognition takes place via two alternative routes: an aptitude test or a waiting period of practice before a lawyer can become a fully qualified member of the host state legal profession.<sup>21</sup> The third and most recent Directive (95/5/EC) provides for an alternative to the requirements of an aptitude test or a waiting period in the legal services sector. It allows a foreign lawyer from one EU Member State to practice host country law immediately, after simply proving registration as a lawyer in another Member State, with no limitations on the scope of practice and without supervision by locally qualified lawyers. Initially foreign lawyers will only be allowed to practice host country law under their home professional titles, however, after three years of host country law practice they will be entitled to gain admission to the local profession and to the host country professional titles.

The NAFTA (North American Free-trade Agreement) Agreement does not contain binding provisions on the mutual recognition of qualifications among its Members. However, it includes disciplines on transparency, objectivity and licensing in professional services and a work programme for the development of mutually acceptable professional standards and criteria for licensing and certification in professional services (Annex 1210, Section A). Standards and criteria may be developed with respect to matters such as: education, examinations, experience, conduct and ethics,

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<sup>21</sup> The Community system on the recognition of professional qualifications was presented by the European Communities to the Working Party on Professional Services with respect to the Accountancy profession. See document S/WPPS/W3, Communication from the European Communities and their Member States.

professional development and re-certification, scope of practice, territory specific knowledge and consumer protection. NAFTA Members have also undertaken to eliminate any citizenship or permanent residency requirement for the licensing and certification of professional services providers (Article 1210(3))<sup>22</sup>.

At the multilateral level qualification requirements come within the scope of Article VI of the GATS. Article VI:4 requires the Council for Trade in Services (or any appropriate bodies it might establish) to develop multilateral disciplines on domestic regulation in services, including qualification requirements, licensing requirements and technical standards. The work in the Working Party on Professional Services, however, is currently focusing on the accountancy profession. The GATS also allows Members to discipline qualification requirements by means of bilateral or plurilateral mutual recognition agreements (Article VII). Several countries facilitate access to their legal profession for lawyers coming from jurisdictions within the same legal family, either by fully recognising their qualifications or by providing for a short route to host country qualification, which takes account of their home qualifications (aptitude test, adaptation period, integrative education). A good degree of recognition exists between Commonwealth countries, which partly share the same caselaw, and to a lesser extent between all Common Law countries. Less recognition exists between Civil Law countries, who share common legal principles, but whose national codes and legislation constitute separate bodies of law.

In the fields of international law and home/third country law, qualification requirements constitute lower barriers to trade than in the field of host country law. Foreign legal consultants (FLCs) face lower qualification barriers, as they normally seek access in fields of the law for which they possess the right qualifications. Considering the high market access, national treatment and domestic regulatory barriers to trade in host country law services, foreign legal consultants are, at least for the time being, in the forefront of liberalisation in the sector. However, even in the absence of serious qualification requirements barriers, foreign legal consultants still face important regulatory barriers in particular with respect to licensing requirements.

Foreign legal consultants encounter few barriers when providing services cross-border. However, their establishment is regulated by most Members. Keeping in mind that Members have different regimes on foreign legal consultants, these are some of the most common features of domestic regulatory regimes in the sector:

- Foreign legal consultants are normally not required to qualify in the host country, but they are often required to observe the host country rules of professional conduct and not to provide services in fields of the law for which they do not possess a qualification, such as host country and third country law.
- Some countries regard foreign legal consultants as lawyers, while others do not. This may have important consequences for the extension to foreign legal consultants of the rights and privileges accorded to domestic lawyers. It might also affect the regulation of multinational practices (*supra*).
- More liberal regulatory regimes allow foreign legal consultants to provide advisory services on host and third country law, as long as such advice is based on the advice of a fully qualified local or third country lawyer. This extension of the scope of practice favours lawyers providing services in respect of transactions that may be affected by laws of countries other than that of principal qualification. A further

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<sup>22</sup> However, Article 1210(3) also provides that “where a Party does not comply with this provision with respect to a particular sector, any other Party may maintain an equivalent requirement or re-instate any such requirement eliminated pursuant to this Article, only in the affected sector, for such period as the non-complying Party retains the requirement.”

extension of the scope of practice consists in allowing foreign legal consultants to appear before arbitral tribunals in the host country.

- Most countries require foreign legal consultants not to present themselves as members of the local profession, but to use a specific different title (in the local language) or in some instances their home professional title.
- Some countries require foreign legal consultants to register with the local bar and/or to pass a professional examination. The professional examination is normally different in scope than the full local professional examination, reflecting the difference in scope of practice between foreign legal consultants and domestic lawyers, however, it might constitute an important obstacle to trade especially if it is held in the local language.
- Some countries require foreign legal consultants to have practiced for a certain number of years in their home country following their qualification in order to be licensed as FLCs in the host country. This requirement can be relaxed by taking account of years of practice in other jurisdictions including the host country jurisdiction.
- Some countries do not regulate the provision of legal advice, making it particularly easy for foreign legal consultants to establish and supply advisory services.
- Some countries regulate advice and have no foreign legal consultant regimes. In such cases access to legal services market is conditional on qualification as host country lawyer. The harshness of similar regimes is often countered by more relaxed access for foreign qualified professionals to the local profession, falling short of a full re-qualification requirement.<sup>23</sup>

In the United States, 18 states and the District of Columbia have adopted rules for the licensing of foreign legal consultants without examination. In 1993 the ABA (American Bar Association) issued guidelines on foreign legal consultants (“model rule”) which have been adopted in their most liberal form by the state of New York. The guidelines have also been substantially followed in Arizona, the District of Columbia, Hawaii, New Jersey and Ohio. The ABA “model rule” includes liberal provisions on partnership and employment of local lawyers, scope of practice and previous practical experience.

The NAFTA Agreement includes rules on foreign legal consultants. According to Annex 1210 (Chapter 12) Section B, in implementing its commitments regarding foreign legal consultants, each Member shall ensure that foreign legal consultants from other Members are allowed to practice or advise on the law of the country in which such consultant is authorised to practice as a lawyer. The same section also includes provisions on future liberalisation and provisions mandating consultations with professional bodies on matters such as associations and partnerships between locally licensed lawyers and foreign legal consultants and standards and criteria for the licensing of foreign legal consultants.

A controversial issue of domestic regulation is the treatment of multidisciplinary practices. Many countries prohibit them on public policy grounds, while other countries do not regulate the association

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<sup>23</sup> France and Denmark require foreign legal consultants to pass the local bar examination prior to drafting legal documents or providing legal advice. However, this allows foreign lawyers to become full members of the local profession with no limitations on their scope of practice.

between lawyers and non-lawyers. Those countries who do not regard foreign qualified lawyers as “lawyers” under national law might prohibit multinational partnerships on the same grounds of multidisciplinary partnerships.

Countries and professional organizations justify prohibitions on multidisciplinary partnerships on grounds of consumer protection and ensuring the quality of the service. In particular it is often argued that multidisciplinary partnerships endanger the lawyer-client privilege and the professional independence of the lawyer. In the first case confidential information could be passed within the partnership to non-lawyer professionals who are not protected under national law by the lawyer-client privilege. Also, the independence of the lawyer could be compromised in associations bringing together professionals subject to different ethical standards. For example, accountants and consultants are not subject to the same rules on conflicts of interest as lawyers are.<sup>24</sup> It appears that multidisciplinary practices sometimes exist *de facto* in countries where they are prohibited or not regulated. This creates even greater public policy concerns as the lack of regulation or its circumvention might lead more easily to the unauthorised practice of law by non-qualified professionals or to the violation of ethical standards specific to the legal profession.

Multidisciplinary partnerships are also resisted because of differences in economic structure between the various professions. For example the accountancy profession is characterised by the presence of very large multinational firms bringing together as many as 5.000 partners world-wide and tens of thousands of employees. In contrast, the legal profession is dominated by individual professionals and small firms in most countries. Large law firms are still limited to the Anglo-Saxon world, and only recently have they begun to emerge in some other OECD countries. However, the largest Anglo-Saxon firms do not exceed 500 partners world-wide and a total of 2.000 employees. A concern expressed by the legal profession is that large accountancy firms might use their dominant position in the accountancy sector to engage in anti-competitive practices in the legal services sector, by “tying” clients for which they perform accountancy services. Arguments in favour of multidisciplinary practices include economies of scale and considerable savings for clients, who can rely on a single firm for different professional services (“one stop shopping”), increase in trade due to deregulation and better and cheaper services as a consequence of enhanced competition.

Ethical standards. In general a condition for the establishment of foreign legal consultants is the submission of the professional to the local code of ethics, and this is not regarded as a major obstacle by the profession. Although differences exist between countries, national codes of conduct for lawyers appear to be based on a certain number of overriding common principles, including strict rules on conflicts of interest, loyalty to the client and confidentiality. Points of difference are represented by restrictions on advertisement, protection of confidentiality of lawyers’ correspondence - especially with respect to in-house lawyers - and contingency fees.

Commonalities between countries’ ethical standards in legal services have allowed the Council of the Bars and Law Societies of the European Community (CCBE) to adopt a European Common Code of Conduct, which applies to 17 European countries. Five other countries have observer status. This code is binding on any lawyers undertaking cross-border activities in Europe. In contacts between the ABA, the Nichibenren and the CCBE - respectively the US, the Japanese and the European lawyers professional associations - the respective codes of conduct for lawyers have been compared, with the result that no serious differences were found.<sup>25</sup> An international code of ethics has been developed by the International Bar Association (IBA) (*infra*).

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<sup>24</sup> In Germany partnerships between court attorneys, patent attorneys, tax consultants/auditors and notaries have been allowed in some regions, in presence of a common code of ethics protecting the secrets of clients with their lawyers and accountants. Commission of the European Communities, “Panorama of EU industry”, 1997.

<sup>25</sup> OECD, “Liberalisation of trade in professional services,” OECD Documents, 1995.

Professional associations are also involved in the bilateral negotiation of market access for foreign lawyers<sup>26</sup> and mutual recognition agreements on matters such as qualification requirements, licensing requirements and ethical standards. Bilateral agreements exist between the American Bar Association (ABA) and the Law Society of England and Wales. It is evident that any such agreement will have to comply with the MFN obligation of Article II and with the provisions of Article VII on mutual recognition.

- What is the relevance of restrictions on the movement of natural persons for individual professionals and law firms?
- In ensuring that professionals do not limit professional liabilities, should forms of incorporation that do not limit liability be considered as an alternative to a prohibition on incorporation?
- Do prohibition on partnerships between locally qualified and foreign qualified lawyers or on the employment of locally qualified lawyers by foreign firms constitute national treatment limitations (XVII)?
- Do different categories of residency requirements fall within the scope of different GATS provisions (e.g. Articles XVII and VI)?
- Do policy grounds justifying residency requirement differ for court lawyers and counselling lawyers?
- Do regional mutual recognition arrangements represent a useful example for multilateral rules, considering that the high degree of diversity between national legal systems and legal educations existing within some regional areas (EC) reproduces multilateral diversity?
- Should foreign legal consultants be exempted from host country qualification requirements if their scope of practice is restricted to advice in foreign and international law?
- Can public policy objectives be satisfied by imposing on foreign legal consultants only home country (and third country if applicable) qualification requirements and host country licensing requirements (examination and/or registration with the local bar) and ethical standards?
- Are the advantages of allowing multidisciplinary practices (economies of scale, one stop shopping and economic efficiency) offset by risks for ethical standards and the competitive structure of the legal services market?
- Can regulation, and in particular the development of common ethical rules among professions and the effective enforcement of competition law, provide an answer to the concerns expressed by the legal profession on multidisciplinary practices?

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<sup>26</sup> It has been reported that the Law Society of England and Wales has been negotiating with the relevant bar councils in India to discuss the creation of a foreign lawyer regime for the country, ideally mirroring the rights that Indian advocates enjoy in the United Kingdom.

- Are national ethical standards in legal services close enough to warrant the development of mandatory international ethical rules?

#### G. Specific commitments and MFN exemption lists

In the Uruguay Round 45 Members (counting the then 12 Member States of the EC as one) made commitments in legal services.<sup>27</sup> Two acceding Members also included legal services in their schedules.<sup>28</sup> Of these 47 Members 22 made commitments in advisory host country law (19 in representation), 41 in advisory international law (20 in representation), 40 in advisory home country law (20 in representation), 4 in advisory third country law and 6 in other legal services (including legal documentation and certification services and other advisory and information services).

Four Members have MFN exemptions in legal services<sup>29</sup>, while four other Members have exemptions in professional services.<sup>30</sup> Three of the legal services sector specific exemptions cover all measures pertaining to the provision of legal services and apply to all countries on the basis of reciprocity. The fourth exemption extends full national treatment for mode three and four only to companies and citizens of countries with which preferential arrangements exist. All the professional services exemptions maintain reciprocity as a condition for authorizations to exercise professional activities, including legal services.

It appears that in some countries which have undertaken specific commitments the actual legal services regime is more liberal than the regime bound in the schedules and that some countries who have not scheduled specific commitments and have listed MFN exemptions maintain rather liberal legal services regimes.<sup>31</sup>

#### *Market access*

The most common scheduled limitations on market access in legal services are restrictions on the type of legal entity. In most cases Members have limited the choice of legal form to natural persons (sole proprietorship) or partnership, excluding limited companies, while in a few instances partnerships have also been excluded. Some Members who have committed mode one have kept it unbound for the drafting of legal documents. Six Members have scheduled nationality and citizenship limitations, although in some cases they are limited to geographic areas or to a particular sub-sector such as representation services or notaries. One Member has scheduled a nationality requirement only with respect to establishment (modes three and four). Other market access restrictions are in one case the discretionary consent of the bar association for establishment, which corresponds to an economic needs test on the number of service suppliers (XVI(a)) and a sector specific foreign equity limitation of 49%.

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<sup>27</sup> Antigua and Barbuda, Argentina, Aruba, Australia, Austria, Barbados, Canada, Chile, Colombia, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, European Communities, Finland, Gambia, Guyana, Hungary, Iceland, Israel, Jamaica, Japan, Lesotho, Liechtenstein, Malaysia, Netherlands Antilles, New Zealand, Norway, Papua New Guinea, Poland, Romania, Rwanda, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, South Africa, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, United States, Venezuela.

<sup>28</sup> Bulgaria and Panama.

<sup>29</sup> Brunei Darussalam, Bulgaria, Dominican Republic and Singapore.

<sup>30</sup> Costa Rica, Honduras, Panama, Turkey.

<sup>31</sup> US International Trade Commission, "General Agreement on Trade in Services: examination of the schedules of commitments submitted by Asia/Pacific trading partners," Investigation no. 332-374, Washington DC, August 1997.

### *National treatment*

The large majority of scheduled national treatment restrictions are residency requirements (9). In some cases these requirements are linked to a nationality requirement, however, if both nationality *and* residency are required for the same sub-sector and mode of supply only the former should be scheduled under market access limitations, while the latter, which is a national treatment limitation in its own right, would not need to be scheduled. When on the other hand the requirement is of citizenship *or* residency only the second should be scheduled as a national treatment limitation, as foreign service suppliers can hurdle the market access restriction (citizenship) by taking up residency. In one case a time-limited residency is required (for a minimum of 180 days per year), while in another case only a legal domicile is required.

In two instances Members have rightly scheduled as national treatment restrictions measures which requires all legal services suppliers (domestic and foreign) to be graduates of national universities, since this measure, albeit apparently origin neutral, discriminates *de facto* between domestic and foreign service suppliers. In fact the vast majority of the former would have attended domestic universities, while the latter are highly unlikely to have attended a university of the host country, although nothing prevented them from doing so. In practice foreign service suppliers would be faced with a requirement of full re-qualification in the host country, with no chance of seeing all or part of their home qualification recognised as equivalent.

Other scheduled national treatment restrictions include: (i) language requirements, (ii) recognition of foreign degrees only for nationals who have studied abroad, (iii) the requirement that foreign ventures be competitive institutions in their country of origin and (iv) the requirement for foreign lawyers to take active part in the business in order to be able to maintain an interest in a local law firm. All these measures have been scheduled as national treatment restrictions as they discriminate *de jure* or *de facto* against foreign service suppliers.

The number of scheduled market access and national treatment restrictions in legal services is relatively modest, especially if compared to other services sectors, where substantial commitments exist. It should be kept in mind, however, that aside from those Members who have made no commitments - and can therefore deny market access and national treatment - those Members who have undertaken commitments in legal services have maintained the most relevant market access limitations by relying on the "positive list" approach to the sector column and on the distinctions between modes of supply.

Thus for example only 22 Members out of 45 have made commitments in host country law, while 6 Members do not commit commercial presence, 6 Members do not commit cross-border supply and the vast majority of mode four commitments are "unbound except as indicated in the horizontal section." Moreover, even in those limited cases where there is a full commitment in legal services, including advisory and representation services in host country, international and home country law by all modes of supply (12 Members), foreign lawyers still face high domestic regulatory barriers and in particular qualification requirements.

### *Domestic regulation*

Legal services, like other professional services, are a sector where the number of Members who have scheduled domestic regulatory measures is rather high (26). Most of these measures are licensing and qualification requirements, which may constitute important barriers to trade in legal services. However, scheduling domestic regulatory measures is not necessary and does not exempt the scheduled measures from the disciplines in other provisions of the GATS. Among scheduled

domestic regulatory measures in legal services, an important distinction concerns host country law qualification requirements as opposed to home and third country law qualification requirements.

The first ones are normally required of those service suppliers who intend to practice domestic law (advisory and representation) or appear before a domestic court, even if only in cases concerning their home country law or international law. The second ones are relevant where a Member has made commitments only in home country, third country or international law and wants to ensure that the foreign professional is qualified and licensed for the field of the law he intends to practice in the host country. Home and third country licences and qualifications are normally sufficient only for the supply of advisory services in foreign and international law. However, some Members seem to imply in their schedules that they would be willing also to allow foreign advocates to appear before a domestic court on subjects covered by their qualifications on the basis of their foreign licence and qualifications.<sup>32</sup> Both host country law qualification requirements and home/third country law qualification requirements are domestic regulatory measures according to the GATS and therefore are not subject to scheduling under Articles XVI and XVII.

Some countries impose - whether they have scheduled them or not - domestic law qualification and licensing requirements for advisory services in international and home law. These requirements also represent domestic regulatory measures according to the GATS, falling out of the scope of Articles XVI and XVII.

#### H. International bodies

The two major international associations of lawyers are the International Bar Association (IBA) and the International Union of Lawyers (UIA). The IBA is closer to the Common Law/Anglo-Saxon legal tradition, while the UIA is closer to the Civil Law/Latin tradition. The UIA claims to be the most representative international association of lawyers in Europe, South America and Africa. Both associations, however, have world-wide coverage and their membership include national professional organizations and individual lawyers.

The International Bar Association (IBA) is a federation of national bar associations and law societies, based in New York. Its membership includes national professional organizations (173) and individual lawyers (18.000). Among the aims stated in the IBA constitution three are of particular relevance to trade in legal services: (a) to establish and maintain relations and exchanges between Bar Association and Law Societies and their members throughout the world; (b) to assist members of the legal profession throughout the world, whether in the field of legal education or otherwise, to develop and improve their legal services to the public; and (c) by common study of practical problems to promote uniformity and definition in appropriate fields of law. Although the IBA membership has often been divided over liberalisation issues, these aims have allowed the IBA to undertake work in the areas of ethical standards, foreign legal consultants and multidisciplinary practices.

The IBA International Code of Ethics was first adopted in 1956. The latest edition dates back to 1988. The code is not binding on the members of the IBA and applies to any lawyer of one jurisdiction in relation to his contracts with a lawyer of another jurisdiction or to his activities in another jurisdiction. The code includes rules on ethical standards which are common to most countries on matters such as: honour and dignity, independence, courtesy and fairness to colleagues, financial diligence, conflicts of interests, contingency fees, unauthorised practice of law, professional liability, disclosure of confidential information, confidentiality of lawyer-client communications, respect towards the courts, advertisement and solicitation, handling, refusal and withdrawal from cases and out of court settlements. It also includes a rule which binds lawyers who undertake work in a jurisdiction where they are not full members of the local profession to the ethical rules of host

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<sup>32</sup> This, however, would be normally subject to registration with the local bar.

country as well as to those of their home country. The IBA may bring incidents of alleged violation of the code to the attention of relevant organizations.

At its meeting of 6 June 1998, the IBA Council adopted General Principles for the Establishment and Regulation of Foreign Lawyers and encouraged their adoption by its institutional members or, for those members who have no regulatory powers, by the competent authorities in the respective jurisdictions. Recognising that, while certain principles should be common to all regulatory regimes, alternative approaches to the establishment and regulation of foreign lawyers should be permissible, the IBA has identified two main approaches for the establishment of foreign lawyers: (a) full licensing approach; and (b) limited licensing approach.

Under the full licensing approach foreign lawyers are integrated as full members of the local profession, with no restrictions on their scope of practice, provided that they satisfy some basic conditions including: (1) licensing in the home country; (2) minimum periods of practice; (3) good character and repute; (4) submission to the local code of ethics and to all rules and regulations applicable to lawyers in the host country; and (5) reasonable qualification requirements in the host country. This last point is probably the most delicate given the high barrier represented by qualification requirements for host country law. With respect to point (5) the IBA principles specify that “reasonable qualification requirements in the host country by examination or otherwise” should (a) give due consideration to the foreign lawyer’s earlier training and experience in the home jurisdiction or elsewhere and (b) be no more burdensome than necessary to satisfy a public policy objective such as consumer protection or public confidence in the profession.

The limited licensing approach sets out principles applicable to foreign legal consultants. The principles limit the scope of practice to advice on home country law, and exclude all court work, host country law and the law of any other jurisdiction where the foreign lawyer is not qualified and licensed. The conditions which a foreign lawyer must satisfy in order to be admitted to practice under the limited licensing approach are the same illustrated above under the full licensing approach with the exclusion of (5) and the limitation of (4) to ethical rules. In addition to these conditions a foreign legal consultant must also: (a) carry liability insurance or bond indemnity consistent with local law, and (b) consent to local service of legal process.

At its meeting of 6 June 1998, the IBA Council also adopted a Report on Multidisciplinary Partnerships, recommending that regulators and other bodies be made aware of the problems and risks inherent in the integrated co-operation between lawyers and non-lawyers for matters such as lawyer independence, conflict of interests and client privilege, and suggesting that they be encouraged to provide and maintain rules on the matter.

The International Union of Lawyers (UIA) was founded in Charleroi (Belgium) in 1927 by the bars of Charleroi, Luxembourg and Paris. The UIA’s main object is “to promote in the interest of the litigant, the basic principles of the lawyers’ profession in the world, with particular reference to independence and freedom.” Also the UIA has expressed interest in the work of the WTO in the field of international trade in legal services, but, like the IBA, its membership is divided over the issue of liberalisation and it has not been actually involved in negotiations. Although the UIA has not taken yet a final position on the matter, it favours access by foreign lawyers on the basis of an aptitude test, with the exclusion from the scope of practice of host country law and court representation as in many countries advocates constitute an integral part of the national judicial system.

Other international and regional organizations in the legal services sector include: the Young Lawyers International Association (AIJA); the International Law Association (ILA); the International Union of Civil Notaries (UINL); the Council of the Bars and Law Societies of the European Community (CCBE); The European Bars Federation (FBE); LawAsia; the Inter-Pacific Bar Association (IPBA); the Commonwealth Lawyers’ Association (CLA); the Inter-American Bar

Association (IABA); the Union of European Lawyers (UAE); the European Company Lawyers Association (AEJE); the European Association of Lawyers (AEA).<sup>33</sup>

- Can the WTO, in developing multilateral disciplines on domestic regulation under Article VI:4, take advantage of the work done by international professional organization in the field of ethical standards and establishment of foreign lawyers?
- Is the interest of the legal profession in liberalisation, expressed through national professional organizations and international professional bodies, important for the negotiation of further specific commitments and for the development of disciplines on domestic regulation in this sector?

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<sup>33</sup> For descriptions of the roles of these associations and contact addresses, see the website of the Law Society of England and Wales, <http://194.130.107.20/lawsoc/home.html>.

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**Trade in legal services (1990-1997)**

	1990		1991		1992		1993		1994		1995		1996		1997	
	CR	DB	CR	DB	CR	DB	CR	DB	CR	DB	CR	DB	CR	DB	CR	DB
Australia			29	15	84	28	88	35	92	43	111	51	131	60	118	64
Italy	4	14	14	48	22	88	20	73	43	95	33	91	62	110	115	121
Lithuania															0.5	0.6
Norway									48	86	64	94	22	24	23	29
Portugal							19	11	21	10	26	15	27	18	26	25
UK	702	-	750	-	830	-	751	-								
US	451	111	1309	244	1397	314	1453	326								
Netherlands	219	229	259	260	316	292	305	296								
Norway	25	-	25	-	37	68	37	66								
Canada											186.7	157.3	193.3	152.9		

Sources: IMF, balance-of-payments statistics; OECD, services statistics on international transactions; Canada's international transactions in services, 1996. Figures expressed in millions of US dollars.

**Legal services: gross value added (current prices)**

	1987	1988	1989	1990	1991	1992	1993	1994
Iceland <sup>1</sup>	854	1037	1291	1512	1970	1901	2106	2184
United States <sup>2</sup>	61.1	69.4	74.2	80.7	83.7	90.1	92.3	94.4

1: Millions of Kronurs; 2: Billions of US dollars

Source: OECD, services statistics on value added and employment

**Legal services: employment**

	1987	1988	1989	1990	1991	1992	1993	1994
Iceland	524	483	578	535	569	565	569	559
United States <sup>1</sup>	1059	1117	1153	1110	1148	1148	1163	1203

1: Thousands



## World's 20 leading law firms by number of partners (1988)

	COUNTRY	PARTNERS	OFFICES		LAWYERS		TOTAL STAFF
			TOTAL	FOREIGN	TOTAL	FOREIGN	
1	Baker & McKenzie US	404	41	32	1179	771	1179
2	Jones Day US	306	13	5	903	26	1071
3	Sidley & Austin US	231	5	2	607	8	769
4	Blake Cassels Canada	227	...	1	...	...	...
5	Morgan Lewis US	216	8	1	645	5	764
6	Mayer Brown US	215	7	2	427	12	523
7	Mc Dermott US	214	6	...	414	...	501
8	Clifford Chance UK	193	12	11	...	...	1649
..	...						
47	Malleeson Stephen Australia	103	...	4	112	...	...
..	...						
92	Francis Lefebvre France	70	...	2	98	3	...
..	...						
11 6	Kim & Chang Korea, Rep. of	47	...	1	59	1	...
..	...						
11 8	Loyens & Volkmaars Netherlands	45	...	10	186	...	...
..	...						
13 2	Deacons Hong Kong	30	...	1	87	1	...
13 3	Boden Oppenhoff Germany	29	...	1	...	1	...
..	...						
13 5	Pinheiro Neto Brazil	26	...	1	52	2	...

X: indicates a partial or full market access and national treatment commitment.

XF: indicates a partial or full commitment in home and third country law.

86130: legal documentation and certification services.

86190: other legal advisory and information services.

MA: Market Access

NT: National Treatment

\*: mode four unbound, except as indicated in the horizontal section

Legal Services: Uruguay Round Commitments

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION		
Antigua and Barbuda			X		X			All*
Argentina	X	X	X	X	X	X		All*
Aruba			X		X			All, NT 4; unbound
Australia			X	X	X	X		All*
Austria			X		X			1,2,4*
Barbados							86130	3, 4
Bulgaria			X		X			All*
Canada			X		XF			All*
Chile			X					3, 4*
Colombia			X		XF		All* modes of supply for legal advisory services relating to mining	1, 2
Cuba	X	X	X	X	X	X	86190	2, 3, 4*
Czech Republic	X	X	X	X	X	X	86190	All*
Dominican Republic								MA: 1, 2, 3; NT: 3
Ecuador			X		X			All*
El Salvador							86190	All*
European Communities	(France and Luxembourg)	(France and Luxembourg)	X		X			All*
Finland			X		X			All*
Gambia	X	X	X	X	X	X		All*
Guyana	X	X	X	X	X	X		All*
Hungary					X			All*
Iceland			X		XF			All*
Israel	X	X	X	X	X	X		All*
Jamaica			X		X			All*
Japan	X	X	X	X	X	X	Services supplied by qualified patent attorneys and maritime procedure agents	All*

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 86130: legal documentation and certification services.  
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 MA: Market Access  
 NT: National Treatment  
 \*: mode four unbound, except as indicated in the horizontal section

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION		
Lesotho	X	X	X		XF			3, 4*
Liechtenstein			X		X			1, 2, 4*
Malaysia (Domestic Offshore corporation laws)			X		X			1, 2, 4*; mode 3 limited to Federal territory of Labuan
Netherlands Antilles			X		X			All
New Zealand	X	X	X	X	X	X		All*
Norway					X			All*
Panama			X		X			All*
Papua New Guinea	X	X	X	X	X	X		All*
Poland	X	X	X	X	X	X		1, 2
Romania	X	X	X	X	X	X		1, 2
Rwanda	X	X	X	X	X	X		All
Sierra Leone	X	X	X	X	X	X		All*
Slovak Republic	X	X	X	X	X	X		All*
Slovenia	X	X	X	X	X	X		All*
Solomon Islands			X	X	X	X		All*
South Africa	X	X	X	X	X	X		3, 4*
Sweden			X		X			All*
Switzerland			X		X			All*
Thailand	X	X	X	X	X	X		2, 3
Trinidad and Tobago			X					All
Turkey			X		XF			All
United States	X	X	X	X	X	X		All*
Venezuela	X		X		X			2, 4*
<b>TOTAL</b>	<b>22</b>	<b>20</b>	<b>42</b>	<b>20</b>	<b>42</b>	<b>20</b>	<b>6</b>	

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**Level of commitments in legal services by mode of supply**  
(Percentages of full, partial and no commitments)

Mode of supply	Market Access			National treatment		
	Full	Partial	No	Full	Partial	No
Cross-border supply	22 18*	62 67*	16 16*	22	60	18
Consumption abroad	31 24*	60 67*	9 9*	31	58	11
Commercial presence	13 4*	78 87*	9 9*	16	76	9
Natural persons	2 2*	91 91*	7 7*	2	91	7

\* Percentage taking account of horizontal commitments applicable to all sectors.

**Types of measures scheduled in legal services**  
(Taking account of horizontal measures applicable to all sectors)

<b>Market Access</b>	Mode 1	Mode 2	Mode 3	Mode 4
Value of transaction or assets			8	
Number of natural persons			4	26
Types of legal entity	4	2	18	2
Participation of foreign capital			8	2
Other market access measure	1	3	12	
<b>Total</b>	<b>5</b>	<b>5</b>	<b>50</b>	<b>30</b>

<b>National Treatment</b>	Mode 1	Mode 2	Mode 3	Mode 4
Financial measures			1	
Nationality and residency requirements	6	2	16	11
Licensing, standards, qualifications	7	2	12	11
Registration requirements	4	1	7	4
Authorization requirements			1	1

Local content, training requirements				1
Other national treatment measure	2	1	6	5
<b>Total</b>	<b>19</b>	<b>6</b>	<b>43</b>	<b>33</b>

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