

# **LIBERALIZATION OF LEGAL SERVICES UNDER THE GATS AND THE EU/SWISS PREFERENTIAL TRADE AGREEMENTS**

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Par

**GILLES MULLER**

Acceptée sur proposition du jury :

- Prof. Petros C. Mavroidis, Faculté de droit de l'Université de Neuchâtel, directeur de thèse,
- Prof. Daniel Kraus, professeur à l'Université de Neuchâtel, rapporteur interne,
- M. Juan Marchetti, Directeur de la Division du Commerce des Services de l'OMC, rapporteur externe

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**Keywords:** Legal Services. Regulation of the legal professions. Cross-border legal practice. Barriers to trade in legal services services. Liberalization of trade in legal services. WTO law. General Agreement on Trade in Services (GATS). Free Trade Agreement. Preferential Trade Agreement. European Union. Switzerland. Transparency. Non-discrimination. Necessity. Recognition. Competition.

**Résumé:** The world is flat. This is the famous metaphor found in Thomas Friedman's novel, which views the world as becoming flat in terms of commerce and competition. According to the New York Times columnist's analysis, technological and others breakthroughs have continuously reduced distance and time. Therefore individuals around the world can communicate, collaborate and compete with one another in a world where there are almost no significant constraints. Even if the world is not entirely flat, the past two decades have witnessed remarkable developments in terms of the globalization of the world's economies. In this context the legal services play a crucial role in facilitating business and are a vital part of the infrastructure that underpins world commerce. Therefore this service sector has experienced continuous growth over the last ten years. These developments have led to the emergence of new model of legal services that is oriented towards providing legal advice to business rather than the traditional model of representing clients at local courts. However, these changes are not uniform. Lawyers in some jurisdictions have developed expertise on sophisticated advice on business law, which enables them to export their services to jurisdictions that lack expertise in this field, supporting their clients that invest abroad or advising local businesses. This situation generates opportunities for trade in legal services. The problem is that the regulation of legal services in most jurisdictions did not follow the same evolution, which result in restrictions on cross-border legal practice. Yet economic growth and globalization of economies increasingly require the adaptation of the regulation of legal services. Some of these reforms are undertaken autonomously. But in most instances they take place in the context of trade agreements, where exporters of legal services negotiate the terms of liberalization in key markets for their service providers. The goals of these agreements are not only to remove barriers to trade, but also secure the liberalization through the commitments of State Parties to maintain their level of liberalization. Based on the liberalization within the EU internal market, the purpose of the study is to analyze the liberalization of legal services in the context of these trade agreements with the EU and Swiss perspectives. Until recently to the exception of the EU and the NAFTA, the liberalization of trade in services took place in the context of the GATS. However, the last decade has witnessed a proliferation Preferential Trade Agreements (PTAs) that feature a chapter on trade in services, which include legal services. The EU and Switzerland are part of this process and have concluded a series of agreements and are negotiating the terms of other PTAs. It follows that the liberalization of trade in legal services takes place at both multilateral level within the GATS and at regional level within PTAs. To analyze the extent of the liberalization of legal services within the GATS and the EU/Swiss PTAs, this study distinguishes five principles: the transparency, the non-discrimination, the avoidance of unnecessary restrictions, the recognition and the application of competition principles. Thank

to these principles, this study carries out a crosscutting analysis of the level liberalization contained various trade agreements. In so doing, the first chapter begins with a description of the characteristics of the regulations of the legal services in various jurisdictions, the rationale for regulating these services and the different barriers to cross-border legal practice that result thereof. Then it turns to the examination of the five principles for the liberalization. This preliminary description provides the basis for the analysis, in the second and third chapter, of the liberalization of trade in legal services that takes place in the context of the GATS and the EU/Swiss PTAs. The study concludes that the liberalization revolves around the questions of transparency and non-discrimination, while the other trade issues are not yet on the agenda. Although transparency and non-discrimination obligations contained in the GATS and EU/Swiss PTAs foster the cross-border legal practice conditions of EU/ Swiss legal practitioners, the study proposes some ideas to improve them. The study takes into consideration the developments associated with the ongoing WTO and PTAs negotiations on legal services as of September 2012.

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# TABLE OF CONTENTS

|                                                                                         |             |
|-----------------------------------------------------------------------------------------|-------------|
| <b>TABLE OF CASES .....</b>                                                             | <b>VIII</b> |
| <b>TABLE OF LEGISLATION .....</b>                                                       | <b>XIV</b>  |
| <b>ABBREVIATIONS .....</b>                                                              | <b>XXI</b>  |
| <br>                                                                                    |             |
| <b>INTRODUCTION .....</b>                                                               | <b>1</b>    |
| I. CHANGES IN THE LEGAL SERVICES SECTOR .....                                           | 3           |
| <i>A. The Modernization of the Legal Practice .....</i>                                 | <i>3</i>    |
| <i>B. The Internationalization of the Legal Practice.....</i>                           | <i>5</i>    |
| II. REGULATORY BARRIERS TO TRADE IN LEGAL SERVICES.....                                 | 8           |
| III. TRADE LIBERALIZATION OF LEGAL SERVICES .....                                       | 9           |
| IV. THE SCOPE OF THE STUDY .....                                                        | 11          |
| <br>                                                                                    |             |
| <b>CHAPTER 1: REGULATION AND TRADE LIBERALIZATION IN LEGAL SERVICES.....</b>            | <b>13</b>   |
| I. THE REGULATION OF THE LEGAL SERVICES SECTOR.....                                     | 14          |
| <i>A. The Main Characteristics of the Regulation of Legal Services .....</i>            | <i>15</i>   |
| 1. Rules Governing Access to the Profession.....                                        | 16          |
| 2. The Rules on Professional Conduct .....                                              | 16          |
| 3. Professional Associations.....                                                       | 18          |
| <i>B. The Rationale for Regulating Legal Services .....</i>                             | <i>20</i>   |
| 1. Public Interest Theories of Regulation.....                                          | 20          |
| 2. Private Interest Theories of Regulation.....                                         | 24          |
| II. LIBERALIZATION TRADE IN LEGAL SERVICES .....                                        | 26          |
| <i>A. The Most Significant Impediments to Cross-Border Legal Practice.....</i>          | <i>27</i>   |
| 1. Transparency .....                                                                   | 28          |
| 2. Nationality Requirements.....                                                        | 28          |
| 3. Residency and Local Presence Requirements .....                                      | 30          |
| 4. Quotas/Economic Need Test .....                                                      | 31          |
| 5. Prohibitions on Incorporation.....                                                   | 31          |
| 6. Restrictions on Ownership and Investment.....                                        | 32          |
| 7. Restrictions on Partnership between Foreign and Locally Qualified Professionals..... | 33          |
| 8. Restrictions on the Name .....                                                       | 34          |
| 9. Access to Local Practice.....                                                        | 35          |
| 10. Double Deontology: Conflicting Ethical Codes.....                                   | 38          |
| <i>B. Impediments to Competition in the Legal Services Market.....</i>                  | <i>41</i>   |
| 1. Exclusive Rights.....                                                                | 42          |
| 2. Entry Restrictions .....                                                             | 43          |
| 3. Restrictions on fee-setting .....                                                    | 44          |
| 4. Advertising Restrictions .....                                                       | 45          |
| 5. Restrictions on the Form of Practice .....                                           | 47          |
| <i>C. Trade Liberalization of Legal Services .....</i>                                  | <i>48</i>   |
| 1. Trade and Competition Rules.....                                                     | 48          |
| 2. Liberalization under the GATS and EU/EFTA/Swiss PTAs .....                           | 51          |
| 3. Liberalization under the TFEU.....                                                   | 56          |
| <i>D. Conclusion.....</i>                                                               | <i>61</i>   |
| <br>                                                                                    |             |
| <b>CHAPTER 2: THE GATS AND LEGAL SERVICES .....</b>                                     | <b>62</b>   |
| I. THE SCOPE OF THE GATS.....                                                           | 64          |
| <i>A. Services: Definition of Legal Services .....</i>                                  | <i>64</i>   |
| 1. Background Information: W/120 and CPC .....                                          | 65          |
| 2. The Definition of Legal Services .....                                               | 66          |
| <i>B. Trade in Legal Services .....</i>                                                 | <i>70</i>   |
| 1. Trade in Services: the four modes of supply .....                                    | 70          |
| 2. Trade in Legal Services .....                                                        | 72          |

|                                                                                                                          |            |
|--------------------------------------------------------------------------------------------------------------------------|------------|
| C. Measures by Members .....                                                                                             | 76         |
| 1. Measures covered by the GATS .....                                                                                    | 76         |
| 2. Public Authorities of WTO Members .....                                                                               | 76         |
| 3. Service Suppliers of another WTO Member .....                                                                         | 77         |
| D. Measures Affecting Trade in Legal Services .....                                                                      | 78         |
| II. GATS MAIN PROVISIONS .....                                                                                           | 79         |
| A. Transparency .....                                                                                                    | 79         |
| 1. Transparency (Article III) .....                                                                                      | 80         |
| 2. Domestic Regulation (Article VI: 1–3) .....                                                                           | 82         |
| B. The Non-Discrimination Principle .....                                                                                | 82         |
| 1. The General Obligation .....                                                                                          | 83         |
| 2. Specific Commitments (Articles XVI–XVII) .....                                                                        | 86         |
| C. Avoidance of Unnecessary Restrictions .....                                                                           | 97         |
| 1. The Necessity Test in WTO Agreements .....                                                                            | 98         |
| 2. The Necessity Test and Article VI: 4–5 GATS .....                                                                     | 99         |
| D. Recognition .....                                                                                                     | 100        |
| 1. Recognition in the Legal Services Sector .....                                                                        | 101        |
| 2. Recognition under the GATS .....                                                                                      | 104        |
| III. NEGOTIATIONS ON THE LIBERALIZATION OF LEGAL SERVICES WITHIN THE GATS .....                                          | 107        |
| A. Market Access Negotiations .....                                                                                      | 107        |
| 1. Market Access Negotiations on Legal Services .....                                                                    | 108        |
| 2. EU and Swiss Commitments in the Legal Services Sector .....                                                           | 114        |
| B. Domestic Regulation Negotiations .....                                                                                | 120        |
| 1. The Accountancy Disciplines in a Nutshell .....                                                                       | 121        |
| 2. Extension of the Accountancy Disciplines to Legal Services .....                                                      | 124        |
| 3. Horizontal Disciplines: Consequences for Legal Services .....                                                         | 131        |
| 4. Concluding Remarks .....                                                                                              | 133        |
| IV. CONCLUSION .....                                                                                                     | 134        |
| <b>CHAPTER 3: THE LIBERALIZATION OF LEGAL SERVICES UNDER THE EU AND SWISS (EFTA) PREFERENTIAL TRADE AGREEMENTS .....</b> | <b>135</b> |
| I. OVERVIEW OF PREFERENTIAL TRADE AGREEMENTS (PTAs): EU AND SWISS PERSPECTIVES .....                                     | 136        |
| A. General Presentation of PTAs and Trade in Services .....                                                              | 137        |
| 1. Definition of PTAs .....                                                                                              | 137        |
| 2. Historical Evolution of PTAs and Trade in Services .....                                                              | 138        |
| 3. The Motivation for PTAs dealing with Trade in Services .....                                                          | 142        |
| B. EU Preferential Treatment Agreements (PTAs) .....                                                                     | 145        |
| 1. The EU's Trade Policy Shift .....                                                                                     | 145        |
| 2. Overview of EU PTAs .....                                                                                             | 147        |
| 3. EU PTAs and Legal Services .....                                                                                      | 154        |
| C. Swiss/EFTA PTAs .....                                                                                                 | 156        |
| 1. Swiss/EFTA Trade Policy .....                                                                                         | 156        |
| 2. Overview of EFTA PTAs .....                                                                                           | 157        |
| 3. EFTA PTAs and Legal Services .....                                                                                    | 159        |
| II. LIBERALIZATION OF TRADE IN SERVICES IN EU AND EFTA/SWISS PTAs .....                                                  | 160        |
| A. General provisions of EU and Swiss/EFTA PTAs .....                                                                    | 161        |
| 1. Scope of EU/Swiss/EFTA PTAs .....                                                                                     | 161        |
| 2. Rules of Origin .....                                                                                                 | 163        |
| B. Liberalization Provisions Concerning Trade in Services .....                                                          | 166        |
| 1. Transparency .....                                                                                                    | 166        |
| 2. Non-Discrimination .....                                                                                              | 171        |
| 3. Avoidance of Unnecessary Trade Restrictions .....                                                                     | 176        |
| 4. Recognition .....                                                                                                     | 177        |
| 5. Competition .....                                                                                                     | 180        |
| III. LIBERALIZATION OF TRADE IN LEGAL SERVICES IN EU AND EFTA/SWISS PTAs .....                                           | 182        |
| A. Scheduling Modalities .....                                                                                           | 183        |
| 1. Positive-list versus Negative-list Approaches .....                                                                   | 183        |
| 2. EU and Swiss PTA Commitments in the Legal Services Sector .....                                                       | 184        |
| B. Liberalization of Legal Services in EU and EFTA PTAs .....                                                            | 188        |
| 1. Chile: EFTA–Chile and EU–Chile .....                                                                                  | 189        |
| 2. Colombia: EFTA–Colombia and EU–Colombia .....                                                                         | 191        |
| 3. Peru: EFTA–Peru and EU–Peru .....                                                                                     | 192        |
| 4. Central America: EU–CA .....                                                                                          | 193        |

|                                                                                     |            |
|-------------------------------------------------------------------------------------|------------|
| 5. The Caribbean States: EU–CARIFORUM .....                                         | 194        |
| 6. Ukraine: EFTA–Ukraine .....                                                      | 195        |
| 7. The GCC: EFTA–GCC .....                                                          | 196        |
| 8. Hong Kong: <i>EFTA–Hong Kong</i> .....                                           | 198        |
| 9. Japan: Switzerland–Japan .....                                                   | 198        |
| 10. The Republic of Korea: EFTA–Korea and EU–Korea .....                            | 200        |
| 11. Future Trends in Legal Services Liberalization under EU and EFTA FTAs .....     | 202        |
| <i>C. Summary</i> .....                                                             | 210        |
| IV. CONCLUSION .....                                                                | 212        |
| <b>CONCLUSION .....</b>                                                             | <b>215</b> |
| I. FINDINGS .....                                                                   | 215        |
| <i>A. Transparency</i> .....                                                        | 216        |
| 1. Availability of Information on Measures Affecting Trade in Services .....        | 216        |
| 2. Transparency in the Administration of Measures Affecting Trade in Services ..... | 216        |
| <i>B. Non-Discrimination</i> .....                                                  | 217        |
| 1. Most-Favored-Nation Treatment .....                                              | 217        |
| 2. Market Access/National Treatment .....                                           | 217        |
| <i>C. Avoidance of Unnecessary Restrictions</i> .....                               | 218        |
| <i>D. Recognition</i> .....                                                         | 219        |
| <i>E. Application of Competition Principles</i> .....                               | 219        |
| II. COMMENTS .....                                                                  | 220        |
| <i>A. Comments on Trade Rules</i> .....                                             | 220        |
| 1. Transparency .....                                                               | 220        |
| 2. Non-Discrimination .....                                                         | 222        |
| <i>B. Comments on Trade in Legal Services</i> .....                                 | 222        |
| 1. Trade in Legal Services and the FLC Concept .....                                | 222        |
| 2. The Relevance of the Current FLC Concept to International Legal Practice .....   | 223        |
| 3. Alternatives to the current FLC Concept .....                                    | 224        |
| <b>REFERENCES .....</b>                                                             | <b>228</b> |

# TABLE OF CASES

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- **EU-Mexico:** Decision 2000/658/EC of the Council of European Communities of 28 September 2000, *concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*, 28 October 2000, L 276/44
  
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- **EU-Korea:** Decision 2011/265/EU of the Council of European Communities of 16 September 2010, *on the signing, on behalf of the European Union, and the provisional application of the Free Trade Agreements between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, 14 Mai 2011, L 127/24
- **EU-CA:** *Agreement establishing an association between the European Union and its Member States on the one hand, and Central American on the other*, signed in May 2010, Pending <http://trade.ec.europa.eu> (last visit)
- **EU-Colombia/Peru:** *Trade Agreement between the European Union and Colombia and Peru*, signed in February 2010, Pending <http://trade.ec.europa.eu> (last visit)
- **EU-Canada:** *The consolidated text of the draft EU-Canada FTA as of 12 January 2010*, <http://www.bilaterals.org> (last visit).

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- **EFTA-Mexico:** *Free Trade Agreement between EFTA States and the United Mexican States*, signed on 27 November 2000, in force on 1 July 2000
- **EFTA-Singapore:** *Free Trade Agreement between EFTA States and Singapore*, signed on 26 June 2002, in force on 1 January 2003
- **EFTA-Chile:** *Free Trade Agreement between EFTA States and the Republic of Chile*, signed on 26 June 2003, in force on 1 December 2004
- **EFTA-Korea:** *Free Trade Agreement between EFTA States and the Republic of Korea*, signed on 15 December 2005 at Hong Kong, China, in force on 1 September 2006
- **EFTA-Canada:** *Free Trade Agreement between the EFTA States and Canada*, signed on 26 January 2008, in force on 1 July 2009
- **EFTA-Colombia:** *Free Trade Agreement between EFTA States and Colombia*, signed on 25 November 2008, in force on 1 July 2011
- **EFTA-Peru:** *Free Trade Agreement between the EFTA States and the Republic of Peru*, signed on 24 June 2010 in Reykjavik and on 14 July 2010 in Lima; in force on 1 July 2011 for Peru, Liechtenstein and Switzerland and the 1 October 2011 for Iceland
- **EFTA-GCC:** *Free Trade Agreement between EFTA States and the Member States of the Co-operation Council for the Arab States of the Gulf*, signed on 22 June 2009, entry into force pending
- **EFTA-Ukraine:** *Free Trade Agreement between EFTA States and Ukraine*, signed on 24 June 2010 entry into force pending

- **EFTA-Hong-Kong:** *Free Trade Agreement between EFTA States and Hong-Kong China*, signed on 21 June 2011, the entry into force pending

### 3.3 Between Switzerland and Third Countries

- **Switzerland- Japan:** *Agreement on Free Trade and Economic Partnership (FTEPA) between Switzerland and Japan*, signed on 19 February 2009, in force on 1 September 2009

### 3.4 Other Free Trade Agreements

- **NAFTA:** *North American Free Trade Agreements*, adopted in 1993, Entry into Force, January 1, 1994
- **US-Singapore:** *The United States- Singapore Free Trade Agreement*, signed on 6 May 2003, in force on 1 January 2004
- **US-Chile:** *United States-Chile Free Trade Agreement*, signed on 6 June 2003, in force on 1 January 2004
- **US-Australia:** *United States-Australia Free Trade Agreement*, signed on 8 February 2004, in force on 1 January 2005
- **US-Korea:** *United States-The Republic of Korea Free Trade Agreement*, signed on 30 June 2007, in force on 15 March 2012
- **Australia-Singapore:** *Australian - Singapore Free Trade Agreement*, signed on 17 February 2003, in force on 28 July 2003

## 4. National Regulation

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## **ABBREVIATIONS**

|         |                                                             |
|---------|-------------------------------------------------------------|
| ABA     | American Bar Association                                    |
| ACP     | Africa Caribbean Pacific                                    |
| ASEAN   | Association of Southeast Asian Nations                      |
| APEC    | Asia Pacific Economic Cooperation                           |
| BITs    | Bilateral Investment Treaties                               |
| BVs     | Business Visitors and Salespersons                          |
| CA      | Central America                                             |
| CARICOM | Caribbean Community                                         |
| CCBE    | Council of the Bars and Law Societies of the European Union |
| CBA     | Canadian Bar Association                                    |
| CETA    | Comprehensive Economic Trade Agreement                      |
| CEU     | Council of the European Union                               |
| CM      | Common Market                                               |
| CSI     | Coalition of Service industries                             |
| CSSs    | Contract Service Suppliers                                  |
| COMECON | Council for Mutual Economic Assistance                      |
| COMESA  | Common Market Eastern Southern Africa                       |
| CPC     | Central Product Classification                              |
| CTS     | Council for Trade in Services                               |
| CUs     | Custom Unions                                               |
| DDA     | Doha Development Agenda                                     |
| DSR     | Dispute Settlement Review                                   |
| EC      | European Communities                                        |
| ECT     | European Communities Treaty                                 |
| ECJ     | European Court of Justice                                   |
| ECHR    | European Convention of Human Rights                         |
| ECR     | European Court Report                                       |
| EEA     | European Economic Area                                      |
| EEC     | European Economic Community                                 |
| EFTA    | European Free Trade Agreement                               |

|          |                                                  |
|----------|--------------------------------------------------|
| EEIG     | European Economic Group Interest                 |
| EGC      | European General Court                           |
| EPAs     | Economic Partnership Agreements                  |
| ESF      | European Service Forum                           |
| EU       | European Union                                   |
| EUCCC    | European Union Chamber of Commerce China         |
| EUCCK    | European Union Chamber of Commerce Korea         |
| FLA      | Foreign Law Alliance                             |
| FLC      | Foreign Legal Consultant                         |
| FLCA     | Foreign Consultant Act                           |
| FLP      | Foreign Law Practice                             |
| FTAs     | Free Trade Agreements                            |
| FLSC     | Federation of Law Societies of Canada            |
| GAERC    | General Affairs and External Relation Council    |
| GATS     | General Agreement on Trade in Services           |
| GATT     | General Agreement on Tariffs and Trade           |
| GCC      | Gulf Co-operation Council                        |
| GJB      | Gaikoku Jim Bengoshi                             |
| GSP      | Generalized System of Preferences                |
| GTs      | Graduate Trainees                                |
| IBA      | International Bar Association                    |
| IFLS     | International Financial Services London          |
| ILSAC    | International Legal Services Advisory Council    |
| ICTs     | Intra Corporate Transfers                        |
| IPs      | Independent Professionals                        |
| JLV      | Joint Law Venture                                |
| LDCs     | Least Developing Countries                       |
| MA       | Market Access                                    |
| MD       | Ministerial Declaration                          |
| MERCOSUR | Southern Common Market (“Mercado Común del Sur”) |
| MFN      | Most Favored Nation                              |
| MRA      | Mutual Recognition Agreement                     |
| NAFTA    | North American Free Trade Agreement              |

|        |                                                                        |
|--------|------------------------------------------------------------------------|
| NAMA   | Non Agricultural Market Access                                         |
| NT     | National Treatment                                                     |
| LPIS   | Legal Profession International Services                                |
| OECD   | Organization for Economic Co-operation and Development                 |
| OJ     | Official Journal                                                       |
| OHCR   | Office of the High Commissioner for Human Rights                       |
| PCAs   | Partnership and Cooperation Agreements                                 |
| PTAs   | Preferential Trade Agreements                                          |
| QFLP   | Qualified Foreign Legal Practice                                       |
| QLTT   | Qualified Lawyers Transfer Test                                        |
| RTAs   | Regional Trade Agreements                                              |
| SAAAs  | Stabilization and Association Agreements                               |
| SACU   | Southern Common Market                                                 |
| SAP    | Stabilization and Association Process                                  |
| SLP    | Singapore Legal Practice                                               |
| SECO   | State secretariat for economic affairs Switzerland                     |
| TEU    | Treaty of the European Union                                           |
| TFEU   | Treaty on the Functioning of the European Union                        |
| TPRB   | Trade Policy Review Body                                               |
| TPRM   | Trade Policy Review Mechanism                                          |
| UAE    | United Arab Emirates                                                   |
| UIA    | International Lawyers Association (“Union Internationale des Avocats”) |
| UNCTAD | United Nation Conference on Trade and Development                      |
| USITC  | United States International Trade Commission                           |
| USTR   | United States Trade Representative                                     |
| WGTC   | Working Party on the Interaction between Trade and Competition         |
| WGTR   | Working Party on the Relationship between Trade and Investment         |
| WPDR   | Working Party on Domestic Regulation                                   |
| WPGR   | Working Party on GATS Rules                                            |
| WPPS   | Working Party on Professional Services                                 |
| WTO    | World Trade Organization                                               |

# INTRODUCTION

The world is flat. This is the famous metaphor found in Thomas Friedman's novel, which views the world as becoming flat in terms of commerce and competition.<sup>1</sup> According to the New York Times columnist's analysis, technological and others breakthroughs have continuously reduced distance and time. Therefore individuals around the world can communicate, collaborate and compete with one another in a world where there are almost no significant constraints.

Even if the world is not entirely flat, the past two decades have witnessed remarkable developments in terms of the globalization of the world's economies. As a result world trade has vastly expanded. For instance, in 2010 the volume of traded merchandise was four times higher than in 1993, 26 times higher than in 1973 and 252 times higher than in 1947. Another important feature of the globalization process is the emergence of new economic powers, with consequent changes in the status of the nations involved. When the General Agreement on Tariffs and Trade (GATT) was negotiated, the United States represented 22%, while the United Kingdom around 11% of world merchandise exports. Nowadays, the United States represents just 8.6 %, while the United Kingdom's share is 2.3%. In contrast, China, or Japan's shares have grown enormously. For instance, China's share has risen from 0.9 % in 1948 to 10% in 2010.<sup>2</sup> Therefore, not only has international trade increased dramatically, it has also become more diverse.

Various reasons have been given for this phenomenon. Technological innovation, particularly developments that have increased the speed of transportation and communication and lowered their cost, is certainly one of the main driving forces. Moreover, the political changes in the twentieth century, such as China's economic reforms, the fall of the Berlin Wall and the collapse of the Soviet Union, have also contributed to increased globalization. Finally, the process has also benefited from economic policies, which have favored deregulation and the reduction or elimination of restrictions on international trade, foreign investments and financial transactions.<sup>3</sup>

Legal services are no exception to these developments and have experienced continuous growth over the last two decades. This is because legal services play a vital role in supporting and facilitating the conduct of business and form a critical part of the infrastructure that underpins commercial transactions.<sup>4</sup> They enable economic and commercial activity by defining rights, responsibilities and processes for dispute resolution when commercial conflicts arise. Legal services are typically categorized as intermediate services. They include the provision of advice to corporate clients and financial institutions that increases the predictability of the business environment, facilitate engagement in contracts and mitigate investment risks.

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<sup>1</sup> FRIEDMAN (2006), *the World is Flat*, 2<sup>nd</sup> ed., Farrar, Straus and Giroux, New York.

<sup>2</sup> WTO SECRETARIAT (2011b), *International Trade Statistics 2011*, World Exports 2010, Geneva, p. 22.

<sup>3</sup> WTO SECRETARIAT (2008), *Trade in a Globalizing World*, World Trade Report 2008, Geneva.

<sup>4</sup> GELOSO GROSSO (2004), *Managing Request offer Negotiations under the GATS: the Case of Legal Services*, OECD Trade Policy Working Paper No 2, OECD Publishing.

In other words, they deliver the level of certainty and confidence required for commercial, trade and investment decisions. As cross-border business transactions have increased, the demand for sophisticated, fully integrated legal services that are able to provide advice on the laws of multiple jurisdictions has increased in parallel.<sup>5</sup>

In 2009, the global market for legal services was estimated to have generated total revenues of US\$ 546,8 billion, representing an average annual growth rate of 4.2 % for the period 2005-2009. This included an average annual growth of 5.4% in 2005-2008 but fell to 0.9% in 2009 due to the economic downturn. An analysis of the market by geographic area shows that in 2005, the Americas<sup>6</sup> and Europe<sup>7</sup> respectively accounted for 61.3 % and 33.6 % of the global legal services market, while the Asia Pacific region<sup>8</sup> accounted for only 5.1%. By 2009, the shares of the Americas and Europe had declined to 59.2 % and 30.4% respectively, while the share of Asia-Pacific share had risen to 10.4 %.<sup>9</sup>

The increased demand for international legal services is the result of various factors. First, the commercial activity associated with economic development and growth in both developed and developing countries such as China, Russia and other emerging markets has increased the need in areas of business law that include corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property rights, new financial instruments and competition law, as well as alternative business-to-business dispute resolution mechanisms.<sup>10</sup> A specific example is Russia, where a surge in corporate finance activity has fueled demand for international legal services.<sup>11</sup> Furthermore, the globalization and the expansion of trade and foreign investment has required firms to seek legal advice on issues such as business permits, company formation, tax burdens and regulatory compliance.<sup>12</sup> Increasing integration within the European Union (EU) has also contributed to growth in demand for international legal services. At the Community level, integration has led firms to seek advice on the EU regulatory schemes and decision-making in Brussels. At the level of Member States, the opening of borders and the developments of new methods of production, financing, marketing and sales mean that business is conducted in various national jurisdictions simultaneously. This increases the need for legal advice in order to navigate through the different legal systems.<sup>13</sup> Finally, the collapse of the Soviet bloc has generated opportunities. The rebuilding process that has been facilitated by aid and capital investment on the one hand and the privatization and restructuring of local economies, on the other has required the intervention of external expert.<sup>14</sup>

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<sup>5</sup> ILSAC (2008), *ILSAC Submission on Legal Services to the Department of Foreign Affairs and Trade in Respect of a possible Australia-India Free Trade Agreement*, June 2008.

<sup>6</sup> Brazil, Canada, Mexico and the United States.

<sup>7</sup> Belgium, The Czech Republic, Denmark, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Russia, Spain, Sweden and the United Kingdom.

<sup>8</sup> Australia, China, Japan, India, Singapore, Korea and Taiwan.

<sup>9</sup> USITC (2011), *Recent Trends in US Services Trade*, Investigation No. 332-345, Publication No 4243, July 2011, p. 7-2.

<sup>10</sup> WTO-CTS (2010b), *Legal Services*, Council for Trade in Services Special Session, Background Note by the Secretariat, S/C/W/318, 14 June 2010.

<sup>11</sup> LLOYD (2008), *Firms Hungry for More Lawyers in Russia*, the American Lawyer, 7 January 2008.

<sup>12</sup> USITC (2009), *Recent Trends in US Services Trade*, Investigation No. 332-345, Publication 4084, July 2009, p.6-4, 6-5.

<sup>13</sup> TRUBECK/ DEZALEY/ BUCHANAN/ DAVIS (1994), *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, Case Western Law Review, Vol. 44, No. 2, 1994, pp. 407-497.

<sup>14</sup> MORGAN/ QUACK (2006), *Global Networks or Global Firms? The Organisational Implications of the Internationalisation of Law Firms*, A. Ferner, J. Quintanilla & C. Sanchez-Runde (eds), in *Multinationals*,

The economic transformations that have taken place in various region, the dramatic increase in international trade and investment and the emergence of borderless commerce have increased demand for multi-jurisdictional legal advice in business areas. This evolution has brought about profound transformations in legal services, which have had to modernize and internationalize their practice. However, the regulation of legal services has not necessarily followed the same path. This has created barriers to cross-border legal practice and led to negotiations about the removal of these barriers. A brief overview of these trends provides us the necessary background to delineate the scope of this study.

## **I. CHANGES IN THE LEGAL SERVICES SECTOR**

The globalization of economies has increased demand for multi-jurisdictional legal services, which has obliged providers to modify their business model in order to meet this demand. Lawyers have had to modernize and internationalize their practice.

### **A. The Modernization of the Legal Practice**

Originally, the principal role of lawyers was to represent clients in courts. This function required them to be in good standing, to have specialist legal and procedural knowledge and to follow specific rules of conduct. Their role in the administration of justice gave members of the legal profession the right to be independent of government control through the creation of bar associations. Membership of a bar associations was generally mandatory. They were composed of other lawyers, who were under the obligation to discipline their members and report serious misconduct. The legal professions were organized around the courts with each bar association linked to a specific local court. Lawyers worked mainly as solo practitioners or in a law firm.<sup>15</sup>

Economic developments and the emergence of modern governance have had a profound impact on legal services. Economic developments have generated new demands from commerce in the field of business law, which have forced law firms to transform their own ways of working. Indeed, clients' needs have expanded to include a substantially wider range of services and expertise than any single legal practitioner could not provide. Furthermore, the modernization of governance, which has generated a flood of legislation and regulations, requires lawyers to have extensive knowledge and therefore to become more specialized.<sup>16</sup>

These changes in the practice of law led to the emergence of new breed of lawyers who provide legal advice on complex commercial issues and who work in large law firms. They are far removed from traditional lawyers, who work as solo practitioner or in small practices and whose main role is to provide representation in local courts on diverse legal issues.<sup>17</sup>

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<sup>15</sup> KRASH (2008), *The Changing Legal Profession*, the Washington Lawyer, January 2008.

<sup>16</sup> SPAR (1998), *A World of Lawyers: the Internationalization of Legal Practice*, Center for Information Policy Research, Harvard University, Cambridge, Massachusetts, August 1998.

<sup>17</sup> WTO-CTS (1998), *Legal Services*, Council for Trade in Services Special Session, Background Note by the Secretariat, S/C/W/43, 6 July 1998.

The modernization of legal practice started in the United States in the late nineteenth century. Prior to this, American lawyers had worked as solo practitioners or in small firms of two or three lawyers. Economic growth has gradually resulted in more complex legal and business problems that in turn led to changes in the legal practice and the emergence of law firms based on the “Cravath system”.<sup>18</sup>

Under this system, law simultaneously became a business and a profession, even for lawyers who were not practicing corporate law. Since then many law firms have evolved from small, parochial partnerships into large complex, multi-purpose, commercially-oriented businesses; mirroring economic growth. This process did not lead to the disappearance of individual and small law firm, but rather to the emergence of another model of lawyering.

The post Second-World-War period saw a significant increase in the number and the size of law firms. Although the majority of lawyers still work in small practices, the most dynamic growth has occurred in large law firms.<sup>19</sup> Originally these firms were concentrated in one jurisdiction; however they gradually expanded and exported the modernization of legal services to other American and foreign jurisdictions, notably in Europe and Asia.<sup>20</sup>

As Trubeck *et al* describe<sup>21</sup>, economic growth in the EU and transformations brought about by the establishment of the EU internal market created new demands for legal services related to ever-expanding regulation (EU primary and secondary law, European Court of Justice case law) as well as decision-making in Brussels. Furthermore, the liberalization or restructuring of European economies has meant that companies have required sophisticated legal advice. Finally, the opening of borders and technological changes mean that more and more business in Europe is conducted in several national jurisdictions simultaneously, thereby requiring advice on the legal situation in various EU Members States.

In this context the “old European” mode of production was ill-equipped to meet these emerging needs. The system was essentially composed of lawyers who operated as solo practitioners or in small firms that specialized in specific area and where legal practice was mainly oriented around litigation. Lawyers played a restricted role in the general affairs of businesses and the idea of the lawyer as general business advisor or the law firm as a conglomerate of specialties was slow to develop. By contrast, American law firms were able to concentrate their legal expertise in many fields. Their services ranged from the preparation of legislation and administrative regulations and lobbying to other forms of non-judicial advocacy. Furthermore, these large law firms developed a capacity to analyze and compare diverse and competing legislation and develop strategies that exploited this complexity and worked to the benefit of their clients. As a result the American law firms were able to seize a significant share of the European legal market. At the same time, a new generation of lawyers, who had been trained in American law firms who brought their skills with them when they

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<sup>18</sup> GALANTER/ PARLAY (1991), *Tournament of Lawyers: the Transformation of the Big Law Firm*, The University of Chicago Press, Chicago London, pp. 35-76.

<sup>19</sup> FLOOD/ SOSA (2008), *Lawyers, Law Firms and the Stabilization of Transnational Business*, Northwestern Journal of International Law & Business, Vol. 28, No. 3, Spring 2008, pp. 489-526.

<sup>20</sup> MARTIN (2007), *Liberalization and Cravathism: How Liberalization Triggered the Reorganization of the Legal Profession in Germany and Japan*, Stanford Journal of International Law, Vol. 43, No. 1, Winter 2007, pp. 169-199; HILDEBRANDT INTERNATIONAL/ CITYGROUP PRIVATE BANK (2007), *Client Advisory*, March 2007, p.5-6.

<sup>21</sup> TRUBECK/ DEZALEY/ BUCHANAN/ DAVIS (1994), *above note 13*, pp. 426-436.

joined European firms, thus helping to create new, European-controlled, modern law firms.<sup>22</sup> Furthermore, European lawyers were obliged to adapt and modernize their services in order to be able to compete with American law firms and accounting firms. In the United Kingdom, law firms have followed the pattern established in the United States, with the emergence of a few large companies that dominate the corporate law. However, continental Europe did not follow the same path. Taking Germany as an example Flood and Sosa argue that the German legal market is not dominated by a specific type of law firm. Rather, they say, it can be described as a mix of different sizes of firms, ranging from large through mid-sized to small law firms, which all provide the same type of legal services but at different scales.<sup>23</sup>

Therefore, economic development has led to the emergence of new model of legal services that is oriented towards providing legal advice to business rather than the traditional model of representing clients at local courts. Although the process originated in the United States it extended to Europe where lawyers developed their own expertise. The dramatic growth of trade and investment has led to an increase in the movements of the factors of production with a concomitant increase in demand for legal advice on the law related to multiple jurisdictions. As their clients expand internationally, lawyers are requested to provide advice on business matters in foreign locations, which involve the application of regulation that extend well beyond the scope of domestic law.

Furthermore, globalization has increased economic activities in regions that lack expertise in business law, generating exports opportunities for American and European lawyers.<sup>24</sup> In some jurisdictions (notably Asia), this process has involved a transfer of skills and the development of local expertise.<sup>25</sup> As a result, Chinese and Japanese law firms are able to advise their clients on investment in Africa and Latin America in the same way as their Western counterparts.<sup>26</sup> Likewise, there are examples of Pakistani firms opening branches firms in China and United Arab Emirates.<sup>27</sup>

## **B. The Internationalization of the Legal Practice**

In addition to the modernization of legal services, the emergence of borderless commerce and the demand for multi-jurisdictional advice has obliged legal practitioners to internationalize their practice. Beyond the expansion of their telecommunications capacity and an increase of their travel, lawyers have formed regional and worldwide alliances with firms in other countries, and/or by establishing foreign branches (where permitted) and/or diversified the qualifications of their legal teams in order to function effectively in more diverse legal systems and a greater variety of cultural settings.<sup>28</sup>

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<sup>22</sup> *Idem.*

<sup>23</sup> FLOOD/ SOSA (2008), *above note 19*, p. 13.

<sup>24</sup> MOORE (2007), *The Business of Law: Economic Globalization and Its Impact Upon the Legal Profession*, Journal of New-York State Bar Association, Vol. 79, No. 4, May 2007, pp. 35-39.

<sup>25</sup> For China see LIU (2008), *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, Law & Society Review, Vol. 42, No 4, pp. 771-804.

<sup>26</sup> THE ECONOMIST (2010), *Not Entirely Free, Your Honor*, 29 July 2010.

<sup>27</sup> CATTANEO/ WALKENHORST (2010), *Legal Services: Does more Trade Rhyme with Better Justice?*, O. Cattaneo/ M. Engman/ R. Stern/ S. Saez (eds), International Trade in Services: New Trends and Opportunities for Developing Countries, World Bank, pp. 67-99.

<sup>28</sup> GREER (1997), *Professional Regulation and Globalization: Toward a Better Balance*, J. Ross Harper (ed.), Global Law in Practice: 50<sup>th</sup> Anniversary of the International Bar Association, Kluwer Law International and International Bar Association, pp. 169-183, p. 172.

The main challenge for cross-border legal services is the specific nature of local law and its organization. Legal systems, more than any other activity, are anchored in local traditions; with consequently big differences between States. Comparative lawyers have identified seven distinct main legal families: French, German, Common Law, Russian, Islamic, Hindu Law, and Muslim Law.<sup>29</sup> However, even within these families there are significant differences.

The local character is specific to legal services, which unlike some other professional services such as medicine or engineering, are not primarily based on a technology or science that transfers easily across national boundaries. This can lead to many different sets of laws, regulations and practices, which in turn complicate trade in legal services, since it is extremely difficult for lawyers to be proficient in the laws of more than one jurisdiction.<sup>30</sup> For lawyers, this means that they have to organize regular collaboration with their foreign counterparts.<sup>31</sup> To meet the demand for international legal services, law firms have developed different types of organization, ranging from informal or formal networks to the organic growth of law firms (by branch openings or by merger or acquisitions with local firms).

Most law firms start to internationalize their practice through referrals, *i.e.* a law firm in one country refers its clients to a law firm in another country. Initially these referrals are based on personal knowledge and reciprocity. There is no bureaucratic procedure or coordination. If the flows of referrals move in one direction but not in the other, it may result in a change of partners.<sup>32</sup> This structure is well-suited to clients who only occasionally need legal service in foreign jurisdictions. Although the work may not be on-going, it may require substantial resources and referral often turns out to be the most efficient solution.<sup>33</sup> Generally, small independent firms adopt this type of working. It can take the form of an *ad-hoc* relationship or of a loose, informal network.<sup>34</sup> The *Interlex Group* is an example of such an organization.<sup>35</sup> It is also sometimes adopted by big law firms, which may combine the opening of branches in some jurisdictions with the so-called “best friends” network in other jurisdictions. Slaughter and May provides an example.<sup>36</sup> It has limited its investment to a few locations (Brussels, Hong Kong, New-York, Paris and Singapore), but describes itself as part of a small network of prestigious firms in other countries.<sup>37</sup> As the demand for international legal services increased the network of relationships started to become more exclusive and formalized in the 1990s. Examples of these new organizations are *Lex Mundi*, *Multilaw*, *CMS* or *MSI*.<sup>38</sup>

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<sup>29</sup> DAVID (1985), *Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law*, (les grands systèmes de droit contemporains) translated and adapted by John E.C. Brierley, 3<sup>rd</sup> ed., London Stevens.

<sup>30</sup> WTO-WPDR (2012b), *Regulatory Issues in Sectors and Modes of Supply*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/W/48, 13 June 2012.

<sup>31</sup> CALOKEN (2000), *Globalization and the Future of the International Practice of Law from a European Perspective*, European Journal of Law Reform, Vol. 2, No. 4, 2000, pp. 493-495.

<sup>32</sup> MORGAN/ QUACK (2006), *above note 14*, p.11.

<sup>33</sup> ABEL (1994), *Transnational Law Practice*, Case Western Law Review, Vol. 44, No. 2, 1994, pp. 737-870.

<sup>34</sup> FAULCONDBRIDGE/ BEAVERSTOCK/ MUZIO/ TAYLOR (2008), *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, Northwestern Journal of International Law and Business, Vol. 28, No 3, 2008, pp. 455-488, p.746.

<sup>35</sup> INTERLEX: <http://www.interlexgroup.com>, (last visit: 1.10.2012).

<sup>36</sup> BEAVERSTOCK/ SMITH/ TAYLOR (1999), *The Long Arm of the Law: London Law Firms in Globalising World*, Environment and Planning, Vol. 31, No 10, 1999, pp. 1857-1876, p. 1861.

<sup>37</sup> SLAUGHTER AND MAY: <http://www.slaughterandmay.com/where-we-work.aspx> (last visit: 1.10.2012).

<sup>38</sup> LEX MUNDI: <http://www.lexmundi.com>, MUTLILAW: <http://www.multilaw.com>, CMS: <http://www.cmslegal.com>, MSI: <http://www.msiglobal.org> ((last visit: 1.10.2012).

Another way for law firms to develop their international practice is by opening their own offices in other jurisdictions. This can take the form of new branches that are staffed by expatriate and local lawyers, mergers and acquisitions with local law firms, or by a combination of both processes. The opening of branches in other jurisdictions is not a new phenomenon. For instance, several American law firms had opened branches in Europe (notably Paris) before World War Two.<sup>39</sup> However, the 1990s saw a significant increase in the number of new branches, as well as new locations.

Worldwide, the most important international legal arenas are in the United States, Europe and the Asia Pacific region.<sup>40</sup> A large proportion of firms' branches are in financial centers like New York, London, Frankfurt, Hong-Kong, Singapore or Tokyo. Other important locations are regulatory centers like Washington or Brussels.<sup>41</sup> Eastern European cities in the former Council for Mutual Economic Assistance (Comecon) countries are also in need of international legal services as a result of privatization processes.<sup>42</sup> Furthermore, emerging economies such as China or Russia have also become attractive places for the establishment of foreign affiliates. For instance, in mainland China, in 2002 there were 91 foreign representative offices; by 2011 the number had arisen to 208.<sup>43</sup> The opening of international branches is not the prerogative of big American or British law firms. In Europe for example, numerous mid-sized or small firms, have also followed the same path, albeit not in the same proportions.<sup>44</sup>

As Silver *et al.* argue, not only has the number of foreign affiliates increased significantly, but so has their practice. Initially American law firms provided legal advice on American law, relying exclusively on their American-educated and qualified lawyers, in the so called "follow your client" approach. In the 1990s, these firms changed their strategy and extended their practice to include local law. Through hiring local lawyers they could offer integrated legal services related to both host and home country law. The way in which law firms engaged in globalization combined a process of dissemination and adaptation to local culture, leading Silver *et al.* to coin the term "glocalization".<sup>45</sup> In this regard, it is worth noting that the most successful global law firms are not those that impose one single culture, but rather those that harmonize many cultures around shared core values and a consistent approach to clients.<sup>46</sup>

This process could only begin when the regulatory environment made such changes possible. For instance, until 1992 it was not possible for American firms based in the United Kingdom to hire local lawyers.<sup>47</sup> The removal of such regulatory barriers in the United Kingdom as well

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<sup>39</sup> SILVER (2000), *Globalization and the US Market in Legal Services- Shifting Identities*, Law and Policy in International Business, Vol. 31, No 4, 2000, pp. 1093-1115.

<sup>40</sup> FAULCONDBRIDGE/ BEAVERSTOCK/ MUZIO/ TAYLOR (2008), *above note 34*, p. 461.

<sup>41</sup> VAN CRIEKENGEN/ DELCROLY / LENNERT/ CORNUT/ VANDERMOTTEN (2005), *Local Geographies of Global Players: International Law Firms in Brussels*, Journal of Contemporary European Studies, Vol. 13, No. 2, 2005, pp. 173-187.

<sup>42</sup> FAULCONDBRIDGE/ BEAVERSTOCK/ MUZIO/ TAYLOR (2008), *above note 34*, p. 461.

<sup>43</sup> CHINA BRIEFING (2012), *Foreign Firms in China- 2012 Listing*, February, [www.china-briefing.com](http://www.china-briefing.com) (last visit on the 1.10. 2012).

<sup>44</sup> THE LAWYER (2012), *The European 100: Taking the Continent's Pulse*, [www.thelawyer.com](http://www.thelawyer.com) (last visit: 1.10.2012).

<sup>45</sup> SILVER/ DE BRUIN/ RABINOWITZ (2009), *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, The Georgetown Journal Legal Ethics, vol. 22, No 4, Fall 2009, pp. 1431-1471.

<sup>46</sup> HILDEBRANDT INTERNATIONAL/ CITYGROUP PRIVATE BANK (2008), *Client Advisory*, January 2008.

<sup>47</sup> ABEL (1994) *above note 32*, pp. 789-795.

as in other important jurisdictions including Germany or Japan played an important role in the internationalization of legal services.<sup>48</sup> However, there are still significant regulatory barriers to cross-border legal services in many jurisdictions that prevent the development of transnational legal services.

## II. REGULATORY BARRIERS TO TRADE IN LEGAL SERVICES

The regulatory obstacles to the provision of cross-border legal services remain considerable in many jurisdictions. Obstacles come in many forms ranging from differences in ways to regulate legal services to obsolete regulation or simply protectionism from local lawyers.

A major barrier to trade in legal services is differences between jurisdictions in how legal services are regulated. Generally, the objective of regulation of the legal professions is to correct market failures and to preserve the public interest in *e.g.* the administration of justice. However, the way these objectives are achieved is decided locally and can vary from one jurisdiction to another, which results in restrictions for foreign legal practitioners. For instance, the qualification required to ensure quality may differ from one country to another and may result in problems with the recognition of the qualifications acquired in other countries. For example in Spain, no practical training is required following the completion of the academic qualification to become a lawyer (*abogado*).<sup>49</sup> On the other hand, in Austria five years of vocational training are required in order to become a lawyer (*Rechtsanwalt*). This situation has resulted in a case coming before the ECJ. This case resulted from the refusal by the Austrian authorities to recognize the legal qualification acquired in Spain by an Austrian citizen, which breached the Directive on the recognition of qualifications.<sup>50</sup>

Obsolete regulation may also affect the development of the legal services sector. Regulation of legal services has not followed the same path in different jurisdictions, which in turn may impede trade in services. While regulation in jurisdictions like the United States or the EU take into account the emergence of a new breed of lawyers, other jurisdictions remain focused on the traditional role of providing legal representation. This can restrict the access of foreign lawyers. These impediments generally relate to residency requirements, the form of practice, the name of law firms or advertising restrictions. For instance, in South Korea or China, foreign lawyers are required to reside in the country for at least six months.<sup>51</sup> Similarly, in Turkey there are restrictions related to the name of law firms, which must include the name of one resident foreign lawyer in the firm's name. This requirement obliges the branch office to change the name of the firm every time a partner moves in or out of the office and prevents foreign firms from benefitting from their reputation.<sup>52</sup>

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<sup>48</sup> MARTIN (2007), *above note 20*.

<sup>49</sup> However, this situation changed in 2011, where direct access will no longer be permitted.

<sup>50</sup> **Koller**, C-118/09, *Robert Koller v. Rechtsanwaltsprüfungscommission beim Oberlandesgericht Graz*, [2010], ECR I-13627.

<sup>51</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *Foreign Legal Consultant Act*, 5 February 2010, Article 29.

<sup>52</sup> LAURENS (2011), *Turkey: the Legal System*, The Law Society, International Division, 29 November 2011.

Protectionism is another important factor that prevents the development of transnational legal services and examples abound.<sup>53</sup> Some restrictions affect the access of foreign lawyers. For instance, in India there is a total ban on the practice of law by foreign lawyers.<sup>54</sup> In South Korea or China, foreign law firms cannot hire domestic lawyers and cannot enter into partnership with local law firms.<sup>55</sup> Protectionist attitudes can also be found in OECD countries. It is not unusual to see nationality requirements for non-EU lawyers for the practice of EU and host country law in EU Member States such as Austria, Cyprus, Estonia, Hungary, Greece, Malta, Slovakia or Lithuania.<sup>56</sup> In Canada foreign lawyers who want to practice Canadian law face two evaluations - one at federal level, the other provincial - and most fail. Between 1999 and 2009, the Federation of Law Societies received 4,515 applications from foreign advocates and issued only 1,708 certificates.<sup>57</sup> Other protectionist restrictions may be result of a reversal of existing practice. For instance, in Brazil hitherto legal, longstanding formal alliances between local and foreign lawyers are about to be made illegal. Similarly in Venezuela the practice of law by foreign lawyers, which had been welcome, is reported to have become difficult.<sup>58</sup>

### III. TRADE LIBERALIZATION OF LEGAL SERVICES

The internationalization of legal services and the development of corporate law firms have resulted in profound changes in the practice of law giving it towards a more commercial and international focus. The growth and internationalization of economies throughout the world has increased the demand for these legal services. These changes, coupled with a general intolerance of restrictions to competition, have led governments to reconsider the way they regulate the profession.

However, the analysis of the regulation of the legal services needs to take into account the fact that the majority of legal practitioners are not involved in transnational work. In fact, the majority of legal services are provided by small law firms that primarily deal with domestic law. The world's largest top 10 law firms represent around four percent and one percent, respectively, of the profession's output and employment.<sup>59</sup> The majority of lawyers deal with family or criminal matters or real estate transactions, all of which continue to be handled by local lawyers practicing in their local area.<sup>60</sup> In most jurisdictions, the regulation of the legal profession focuses on the work of these professionals.

The aim of the regulation of the legal profession is to correct market failures (such as asymmetry of information, moral hazard or externalities) or to preserve the public function of the profession. The literature divides regulation of the profession into two types.<sup>61</sup>

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<sup>53</sup> STOLLEY PERSKY (2011), *Despite Globalization, Lawyers Find New Barriers to Practicing Abroad*, *Covers Story*, ABA Journal, November 2011 Issue.

<sup>54</sup> KRISHNAN (2010), *Globetrotting Law Firms*, *Georgetown Journal of Legal Ethics*, Vol. 23, No. 1, Winter 2010, pp. 57-102.

<sup>55</sup> EUCK (2008), *Gradual Change*, *Infomag*, N°85, June 2008; WTO-TPRB (2008a), *Trade Policy Review of China*, Secretariat, Report WT/TPR/S/199, 21/23, May 2008, Geneva, p. 184.

<sup>56</sup> WTO-CTS (2005b), *Conditional Revised Offer*, Communication from the European Communities and its Member States, Council for Trade in Services Special Session, TN/S/O/EEC/Rev.1, 29 June 2005.

<sup>57</sup> THE ECONOMIST (2010), *above note 26*.

<sup>58</sup> *Idem*.

<sup>59</sup> CATTANEO/ WALKENHORST (2010), *above note 27*, pp. 69-71.

<sup>60</sup> VAGTS (2000), *The Impact of Globalization on the Legal Profession*, *European Journal of Law Reform*, Vol. 2, No. 4, 2000, pp. 403-490.

<sup>61</sup> EU COMMISSION (2004), *Report on Competition in Professional Services*, Communication from the

The first category includes rules that restrict entry (qualification requirements, reserved activities, membership or business structure). The second type deals with the supply of the service and professional conduct (advertising, fees, names or titles). Furthermore, governments have delegated most of their power to bar associations, which control and regulate the profession.

Regulations are generally justified by the special role of lawyers in society, which is to defend their clients in court and provide legal advice. As experts in the law, lawyers have an important role in the administration of justice and in maintaining the rule of law. They therefore benefit from privileges, such as the right to be independent and the right to confidentiality. However, at the same time they have to comply with strict rules related to independence, dignity, integrity and confidentiality, which go beyond those imposed on other citizens.<sup>62</sup> These elements form the basis for the professionalism of lawyers and lead the profession to consider itself as different, outside of the scope of market rules.

Economic development and the internationalization of legal services have led to reconsideration of the profession and its particular characteristics with respect to commercial realities.<sup>63</sup> If at times the professionalism of lawyers has seemed to be put into question, important decisions have reaffirmed the profession's core principles. For example, in the United States the collapse of Enron and WorldCom highlighted the effect of conflicts of interest. This led to the adoption of restrictive legislations, such as the Sarbanes-Oxley Act of 2002, which prohibits accounting firms that provide auditing services to corporate clients from providing various other professional services, including legal services.<sup>64</sup> In Europe in 2002, in *Wouters*, the ECJ recognized the right for Member States to maintain restrictive rules under the Treaty on the functioning of the European Union (TFEU) regarding the freedom of movement of services (such as restriction on partnership between domestic lawyers and other professionals) if they are necessary to preserve the proper practice of the legal profession as organized in the Member State concerned.<sup>65</sup>

While it is accepted that the core principles of the legal profession may justify special treatment, the legitimacy of that treatment is under ever-closer examination by governments. Regulation of the legal profession is increasingly being assessed in the light of economic considerations that require legal professionals to justify their exemption from trade and competition rules.<sup>66</sup>

The development and the internationalization of economies have led many countries to look again the relevance of regulation concerning legal services. Some States, such as the United

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Commission, COM (2004) 83 final, 9.2.2004, p. 9.

<sup>62</sup> IBA (2000), *Resolution on Professionalism v. Commercialism*, adopted on September 2000.

<sup>63</sup> PATON (2003), *Legal Services and the GATS: Norms as Barriers to Trade*, New England Journal of International & Commercial Law, Vol. 9, No. 2, September 2003, pp. 361-386.

<sup>64</sup> WILLIAM/ NERSESSIAN (2007), *Overview of the Professional Services Industry and the Legal Profession*, Report provided to the Alfred P. Sloan Foundation by the Harvard Law School Center on Lawyers and the Professional Services Industry, 2007.

<sup>65</sup> *Wouters*, C-309/99, *J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belasting adviseurs BV v. Algemene Raad van der Nederlander Ordre van Advocaten*, [2002], ECR I-01577.

<sup>66</sup> GOLDSMITH (2008), *The Core Values of the Legal Profession for Lawyers Today and Tomorrow*, Northwestern Journal of International Law & Business, No 28, Spring 2008, pp. 441-454; TERRY (2009a), *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, Journal of Professional Lawyer, Vol. 2008, p. 189, 2009.

Kingdom<sup>67</sup> or France<sup>68</sup>, have undertaken autonomous liberalization. In addition, the Organization for the Economic Co-operation and Development (OECD) has organized round tables on this topic and issued a report, which provide a synthesis of this process.<sup>69</sup>

However, in most instances liberalization takes place on a bilateral or multilateral basis in the context of trade agreements, where States interested in exporting their legal services negotiate market access for their practitioners. The negotiations that make up these trade agreements provide a platform for discussions on what regulatory changes need to be made to enable foreign lawyers to practice and the terms of liberalization. States then commit themselves to responsibilities they have agreed to undertake.

Until recently, the World Trade Organization's General Agreement on Trade in Services (GATS) provided the main forum for such negotiations. However, the last decade has witnessed a proliferation of t Preferential Trade Agreements (PTAs), which feature liberalization of legal services. It follows that the liberalization of trade in legal services takes place at both multilateral level within the GATS and at regional level within PTAs.

#### IV. THE SCOPE OF THE STUDY

This study aims to analyze the liberalization of legal services at the level of both the GATS and the PTAs from the perspectives of the EU and Switzerland. The question is interesting as both the EU and Switzerland (at least on paper) aim to open up markets for their legal services. They have both been active in the GATS negotiations. Furthermore, both the EU (since 2006) and Switzerland (since 2004) have launched negotiations on the conclusion of the so-called new generation of PTAs with key trade partners, which feature liberalization of trade in services and include legal services.

At the time of writing, the EU had concluded agreements of this type with Mexico, Chile, 15 Caribbean States<sup>70</sup> and South Korea. Furthermore, agreements with Colombia, Peru and Central American State are pending. Finally, the EU is currently negotiating the terms of PTAs with Singapore, Malaysia, Indonesia, India, the Gulf Cooperation Council (GCC)<sup>71</sup>; Canada, Ukraine and the MERCOSUR.<sup>72</sup> All these agreements are expected to feature liberalization of legal services.

Switzerland is also part of this process. As member of the European Free Trade Association (EFTA), Switzerland concluded PTAs with Mexico, Singapore, Chile, South Korea, Canada, Colombia, the GCC, Ukraine, Peru and Hong Kong. Furthermore, the EFTA is currently negotiating the terms of PTAs with the Central American States, India, Indonesia, the Custom

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<sup>67</sup> LEGAL SERVICES BOARD (2012), *History of the Reforms*, [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk) (last visit: 1.10.2012); CLEMENTI (2004), *Review of the Regulatory Framework for Legal Service in England and Wales, Final Report*, December 2004.

<sup>68</sup> RAPPORT DARROIS (2009), *Rapport sur les professions du droit*, March 2009, <http://www.justice.gouv.fr> (last visit 1.10.2012).

<sup>69</sup> OECD (2009), *Competitive Restrictions in Legal Professions*, Policy Round Table, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP(2007)39, 27 April 2009.

<sup>70</sup> The 15 Caribbean States are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Granadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago.

<sup>71</sup> which includes: negotiations with Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

<sup>72</sup> which includes: Brazil, Argentina, Paraguay, Uruguay and Venezuela.

Union (Russia, Belarus, Kazakhstan), Thailand and Vietnam. Outside the EFTA, Switzerland concluded a PTA with Japan and is negotiating the terms of a PTA with China. Some of the agreements contain liberalization of legal services.

The premise of this research is that trade liberalization within the GATS is the basic level of liberalization, while liberalization within the EU internal market is the most advanced level of liberalization. With this as a foundation, this study seeks to analyze the level of liberalization within the EU and Swiss PTAs starting with the GATS, using the liberalization within the EU as reference.

This study starts with an overview of the regulations related to legal services and identification of the most significant barriers to the cross-border legal services that result from these regulations. This provides the basis for an overview of the regulations that would be useful to remove or to adopt in order to facilitate trade in legal services. The second chapter deals with the liberalization of legal services in the context of the GATS. This provides the basis for the third chapter that analyzes trade liberalization that takes place in EU/Swiss PTAs.

# CHAPTER 1: REGULATION AND TRADE LIBERALIZATION IN LEGAL SERVICES

In the past two decades, the regulation of the legal profession in most jurisdictions has been subject to great pressure for change. In most instances, this pressure is result of the progressive internationalization of economies, which has increasingly underlined the need to adapt legal services to the challenges of the XXI century. There are an ever-increasing number of companies and individuals who compete on the international market and need the support of efficient, reliable, cost-effective legal services, able to provide sophisticated services in multiple jurisdictions. These new demands have led to the development of fields such as business and trade law, which require sophisticated legal advice on international business matters as opposed to traditional local court representation activities.<sup>1</sup>

Such changes have led regulatory authorities throughout the world to reconsider the way they regulate legal services in their jurisdictions. Authorities have been facing the arrival of legal practitioners from other jurisdictions, with different legal background, which has entailed, in most instances, the emergence of a new type of lawyering based on commercial considerations. These changes have raised questions about the adequacy of existing regulation and have obliged regulatory authorities to seek a balance between, on the one hand consumer protection, the public interest and local lawyers, and on the other hand the provision of efficient, innovative and cost-effective services by a market that is open to foreign suppliers. This process is referred as *trade liberalization* and includes the removal of regulatory obstacles to cross-border legal practice. However, the elimination of trade barriers in this sector is of no value if domestic regulations contain high level of anti-competitive measures that prevent competition between domestic and foreign lawyers. It therefore follows that trade liberalization must also, to some extent, include the removal of anti-competitive measures that affect the conditions of competition between legal services' suppliers, including foreign lawyers.

In this regard, the EU and Switzerland integrate these different dynamics. Internally, the establishment of the internal market encouraged EU Member States to integrate legal practitioners from other Member States in their jurisdictions. Switzerland is part of this process through a bilateral agreement with the EU.<sup>2</sup> More recently, following the Lisbon Strategy in 2000<sup>3</sup>, the EU has pursued the policy of increasing the free movement of EU lawyers within the EU. At the same time, the European Commission has undertaken the examination of Member States' regulations related to professional services (including legal services) in order to increase competition in these sectors. Switzerland is independently following this process. On the external side, the EU (and its Member States) and Switzerland are involved in the current WTO Doha Round negotiations, which include negotiations on the liberalization of legal services.

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<sup>1</sup> WTO-CTS (1998a), *Legal Services*, Council for Trade in Services Special Session, Background Note by the Secretariat, S/C/W/43, 6 July 1998.

<sup>2</sup> **EU-Switzerland:** Decision 2002/309/EC of the Council and Commission as regard the Agreement on Scientific and Technological Cooperation of 4 April 2002, *Agreement between the European Community and its Member State of the one part, and the Swiss Confederation of the other part, on the free movement of persons*, OJ L 114,30 April 2002

<sup>3</sup> CEU (2000), *Lisbon European Council of 23 and 24 March 2000, Presidency Conclusions*, <http://www.europarl.europa.eu/summits/> (last visit 1.10.2012).

In parallel, since 2006 and the EU Commission Communication *Global Europe*<sup>4</sup>, the EU has been negotiating PTAs that include a legal services component with various countries. Switzerland has followed the same policy through the European Free Trade Association (EFTA).

This trade liberalization that takes place in the framework of the WTO, the PTAs and the EU underlines the significant role that international agreements play in this process, resulting in significant changes to regulations in many jurisdictions. However, it must not be forgotten that the object of trade liberalization remains the domestic regulations of legal services in each country. Therefore the first objective of this chapter is to analyze the main characteristics and rationale of the regulation of legal services. This provides us with the necessary tools for the analysis, in a second part of the chapter, of the impediments to cross-border legal practice that result from these regulations and the tools that have been developed within the GATS, the EU/Swiss PTAs and the Treaty of the functioning of the European Union. This chapter in turn sets the scene for an analysis of the liberalization of legal services within the framework of the GATS and the EU-Swiss PTAs.

## I. THE REGULATION OF THE LEGAL SERVICES SECTOR

There is no universal understanding of the term “regulation”. Generally, it is understood to refer to the actions taken by States’ in response to market distortion. More particularly, in the context of the OECD, it can be defined as the diverse instruments by which governments set requirements on enterprises and citizens. Instruments include laws, formal and informal orders and subordinate rules issued by all levels of government and rules issued by non-governmental or self-regulatory bodies to which governments have delegated regulatory powers.<sup>5</sup> This broad definition covers all aspects of regulatory activities. It is not only limited to the restriction of private choices for a collective good (as it is generally understood), but it also encompasses the process of influencing, controlling and guiding economic and private activities that have an impact on others through various governmental policies and measures.<sup>6</sup>

The legal profession is generally subject to various types of regulations at different levels. At the state level, states’ authorities and/or professional associations rules regulate the provision of legal services in order to protect the public interest or consumers. In addition, in their relationship with their clients, legal professionals are subject to the law applicable to the contract or eventually tort law.<sup>7</sup> At other levels, the legal professions are subject to international agreements such as the GATS (at global level) or the TFEU (at regional level) that deal with trade in services. The international protection of human rights has also an impact on the practice of legal professional.

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<sup>4</sup> EU COMMISSION (2006a), *Global Europe: Competing in the World, A Contribution to the EU’s Growth and Jobs Strategy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 567 final, 4.10.2006.

<sup>5</sup> OECD (1997a), *Report on Regulatory Reforms: Synthesis*, OECD: Paris.

<sup>6</sup> BALDWIN/ CAVE/ LODGE (2011), *Understanding Regulation: Theory, Strategy and Practice*, 2<sup>nd</sup> Edition, Oxford University Press, pp. 2-3.

<sup>7</sup> MOLITERNO/ HARRIS (2007), *Global Issues in Legal Ethics*, American Casebook Series, Thomson West, pp. 11-38.

However, regulation of the legal profession operates fundamentally at a national (and even local) level. Therefore there are significant differences in the way legal services are regulated between jurisdictions. Nevertheless, it is possible to distinguish some common characteristics that will now be analyzed in turn.

## **A. The Main Characteristics of the Regulation of Legal Services**

There are various ways in which the regulatory regime of the legal profession in various States between can be seen. First, States differ in the way the legal system is organized. Legal services may be offered by several professions with different organizations that are subject to different rules. For instance, in Europe, three organizational models can be distinguished. The first group includes States, where there is one single legal profession (the lawyer), which has a broad range of activity. This group consists of Denmark, Finland, Sweden, and Norway. The second group consists of Ireland and United Kingdom that operate a system of common law. In these countries two groups of professionals provide legal services, namely *barristers* and *solicitors*, which each have their own rules and organizations. The third group (Austria, France, Germany, Italy, Spain or Switzerland) consists of States that, alongside lawyers, operate a system of publicly-appointed notaries. Most of these States use the *Latin notary* system.<sup>8</sup> Furthermore, some of those states have special professions that are exclusive to a particular jurisdiction, such as the *avoué* (in France), the *procurador* (in Spain) or the *solicitador* (in Portugal).<sup>9</sup> All these professions are subject to the liberalization process to some extent. However, this study will focus on the activity of lawyers, who are by far the most internationalized profession.

States have also different approaches towards the regulation of the legal profession. Some are liberal with little regulation, while others are more tightly controlled. Again in Europe, three groups can be distinguished based on the level of regulation. The first group includes countries where regulation is light, namely Finland, Sweden and Denmark. The second group consist of countries with higher or intermediate degree of regulation (Belgium, Ireland, Luxemburg, the Netherlands, Switzerland, and United Kingdom). Finally, the third group consists of countries where the level of regulation is high, namely Austria, France, Germany, Greece, Italy, Spain, and Portugal.<sup>10</sup>

Nevertheless despite these differences, it is possible to distinguish some common regulatory features. In most states, the statutory law and/or bar association regulations contain different types of restrictions. In most jurisdictions, regulations define activities that can only be carried out by legal professionals and protect these activities through the enforcement of rules that control and discipline unauthorized professional practice. Another characteristic common to European countries is that, with two exceptions (Sweden and Finland), the legal profession has the monopoly on court activities, while out-of-court activities are liberalized (with the exception of Portugal and Hungary).<sup>11</sup>

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<sup>8</sup> The two other groups (i.e. Common law States and Scandinavian States) have the so-called the *notary public* system. Unlike the Latin notaries, this type of notaries represents only one party in a legal transaction. They do not have to look after the interests of other parties involved in the transactions or the interests of other parties. In this regard, they are more and less comparable to lawyers.

<sup>9</sup> PERTEK (2000), *Les Avocats en Europe*, L.G.D.J., Paris, pp. 24-30.

<sup>10</sup> CLAESSENS (2008), *Free Movement of Lawyers in the European Union*, Nijmegen: Wolf Legal Publishers, pp. 77-139.

<sup>11</sup> NASCIMBENE (2009), *The Legal Profession in the European Union*, Kluwer European Law Collection, Austin, pp. 235-244.

Overall, two types of rules can be distinguished: the rules governing the access to the profession and those related to professional conduct.

## **1. Rules Governing Access to the Profession**

Access to the legal profession is generally restricted to individuals that meet specific licensing and qualification requirements. Regulations define the scope of the reserved activity, professional titles, measures to protect the use of titles as well as the licensing and qualification requirements that must be met in order to practice under these titles.

To be licensed applicants must generally satisfy the same type of conditions. First, they must register in the bar association or the competent professional organization. To be accepted, the applicant must fulfill a certain number of criteria. While nationality requirements are being progressively removed in various jurisdictions, residency requirements remain. Furthermore, personal requirements such as being of good character also remain important. These include the requirements to be in possession of full civil rights, to have no criminal records or to have not been declared bankrupt and to conduct themselves in a morally proper way. Finally, registration with the competent professional association is generally subject to the adoption of professional indemnity or liability insurance.

Besides licensing requirements, access to the legal profession is subject to qualification requirements. These usually include the requirement to have a law degree. In Europe, the duration of studies varies from four to five years. However, it is generally considered that the academic qualification is not enough for the practice of law and an additional period of training is required following the award of the law degree. The length of the training period varies considerably from one jurisdiction to another. For instance, until 2011 there was no training period required in Spain (a law degree was sufficient), in Greece this period extends to 18 months while in Austria it is five years. The period of training usually ends with a qualifying examination organized by bar associations in order to ensure that candidates are sufficiently prepared and trained.<sup>12</sup>

## **2. The Rules on Professional Conduct**

Another type of regulation deals with the provision of services or professional conduct. In all European states, bar and professional associations have adopted rules related to professional ethics that are laid down in codes of conduct. These codes set out the fundamental principles of the profession, the ethical standards of professional conduct and the lawyers' rights and duties. At international level, different bar associations have released documents that specify professional standards. These documents should be considered as guidelines based on universally recognized principles. These principles are:

- independence;
- avoidance of conflict of interest;
- the obligation to behave in the interest of clients;
- confidentiality and professional secrecy;
- the obligation to behave with honesty, integrity and fairness;
- fair treatment of clients in relation to fees;

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<sup>12</sup> PETERSON/ FINK/ OGUS (2003), *Economic Impact of Regulation in the Field of Liberal Profession in Different EU Member States*, Vienna Institute of Advanced Studies, Study for the European Commission, DG Competition, January 2003, p. 46.

- loyalty to the client, the lawyer's professional competence;
- respect towards professional colleagues;
- respect for the rule of law and the fair administration of justice;
- self-regulation of the legal profession.<sup>13</sup>

Without defining them precisely, the ECJ has recognized the legal values of these principles as justifying infringements to trade and competition in legal services.<sup>14</sup> In addition, at international level, they have been recognized explicitly by the United Nations<sup>15</sup> and the Council of Europe.<sup>16</sup>

These fundamental principles result in a certain number of obligations for legal practitioners. Bar or professional associations are responsible for monitoring their members and eventually sanctioning any breach of their obligations. Sanctions may range from admonition to striking off. In the event of a violation of professional secrecy the sanctions may go further. In some European countries (e.g. Belgium, Finland, France, Germany or Greece) infringements may result in criminal sanctions.<sup>17</sup>

The core values of the legal profession may also materialize in regulations that limit lawyers practice. The most relevant examples are the regulations related to advertising, fee setting and form of practice. In most European States informative advertising is accepted provided that it is truthful and preserves the dignity of the profession. On the other hand, aggressive, misleading and comparative advertising is not allowed. Touting for clients is also generally prohibited.

European States have different approaches to fee-setting that range from the freedom on a fee, to the obligation to comply with maximum fees (Italy) and minimum fees (Austria, Germany, Greece and Italy). An intermediate position is the adoption of non-binding recommended fees (Austria, Finland or Portugal). Contingency fees are generally prohibited.

Finally, all jurisdictions have rules on grouped legal practice, although there are different approaches to the principles of independence and the avoidance of conflict of interest. For instance, in Europe, the practice of law with other domestic lawyers in the form of an association is generally accepted. In contrast, associations with other professionals are prohibited. Incorporation is forbidden in several countries (Greece, Italy, Germany, Belgium, Portugal or Spain).<sup>18</sup> Some states go a step further and allow the formation of limited companies (Denmark, Estonia, Finland, France, parts of Switzerland, Sweden and the United Kingdom). In this case, the regulation may be designed to restrict access to the company's capital by excluding or limiting the participation of non-legal professionals.

<sup>13</sup> CCBE (2008a), *Charter of Core Principles of the European Legal Profession and Code of Conduct of European Lawyers*, 29. 11. 2008; IBA (2006), *IBA Resolution on General Principles for Legal Profession*, September 2006; UIA (2002b), *Turin Principles of Professional Conduct for the Legal Profession on the 21st Century*, Sydney, 27 October 2002.

<sup>14</sup> See for instance: **Reisebüro Broede**, C-3/95 *Reisebüro Broede v. Sandker*, [1996] ECR I-6511, para. 38; **Wouters**, C-309/99, *J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belasting-adviseurs BV v. Algemene Raad van der Nederlander Ordre van Advocaten*, [2002], ECR I-01577, para. 97.

<sup>15</sup> OHCHR (1990), *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September.

<sup>16</sup> COUNCIL OF EUROPE (2000), *Recommendation 2000/21 on the Freedom of Exercise of the Profession of Lawyers*, adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> Meeting of the Ministers' Deputies.

<sup>17</sup> NASCIMBENE (2009), *above note 11*.

<sup>18</sup> PETERSON/ FINK/ OGUS (2003), *above note 12*, p. 48.

Furthermore, in all cases, these regulations limit the control of the company to members of the profession. In addition, regulations in most of European states prohibit the formation of companies with other professions (e.g. accountant). However, some states (France, Germany, the Netherlands and Spain and the United Kingdom) authorize it to varying extents. Finally, European states (with the exception of Germany, Greece, the Netherlands and United Kingdom) do not allow legal professionals to practice their profession as an employee of a commercial company.<sup>19</sup>

### 3. Professional Associations

A notable feature of the legal profession is self-governance within the limit of public order. In practice, this means that members of the profession (generally the bar association) regulate and control the conduct of its own members, independent of government control. It is a form of professional independence.<sup>20</sup> In most cases such bodies operate on a national or local basis. Their role is to safeguard the independence and interests of lawyers and improve professional standards through the adoption or the implementation of regulations, supervising the conduct of their members and if necessary, applying sanctions.<sup>21</sup> They also have the duty to train lawyers and test their legal knowledge in order to improve the quality of legal services. Generally such professional bodies are a legal entity under public law. However, in common law countries, they are governed by private law. Registration with the competent professional organization is usually mandatory in order to be able to practice with the title of lawyer.<sup>22</sup>

It is worth mentioning that in Europe pure self-governance does not exist, as the rules enacted by bar associations are always combined with statutory provisions.<sup>23</sup> Therefore, the regulation of legal profession is characterized by a combination of direct government regulation and rules adopted by self-regulatory professional bodies. Generally governments define the statutory and procedural framework to achieve policy objectives and delegate to professional bodies or bar associations the power to formulate the rules (code of conduct) that govern the activities of their members.

This study will look in more detail at the distinctions between the measures enacted by bar association through delegated power from and rules adopted independently. These differences have implications for the scope of application of trade rules (namely the GATS, PTAs and TFEU) and competition rules (TFEU or national rules).<sup>24</sup> The following table shows the regulatory organizations of the legal professions in various EU Member States.

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<sup>19</sup> NASCIBENE (2009), *above note 11*, pp. 235-244.

<sup>20</sup> MOLITERNO/ HARRIS (2007), *above note 7*, p.23.

<sup>21</sup> OHCHR (1990), *above note 15*, pt. V.

<sup>22</sup> NASCIBENE (2009), *above note 11*, pp. 235-244.

<sup>23</sup> CCBE (2008b), *Comments on the OECD Report on "Competitive Restrictions in Legal Professions"*, 26.06.2008.

<sup>24</sup> See *infra* pp. 47-50.

**Table 1 Government and Bar Association rules in some EU Member States<sup>25</sup>**

| Country                               | Level of regulation |          | Implementation of regulation by |          | Disciplinary sanctions decided by |          | Membership Bar Asso. |
|---------------------------------------|---------------------|----------|---------------------------------|----------|-----------------------------------|----------|----------------------|
|                                       | Gov.                | Bar Ass. | Gov.                            | Bar Ass. | Gov.                              | Bar Ass. |                      |
| <b>Austria</b><br><i>Rechtsanwalt</i> | x                   | x        | x                               | x        | x                                 | x        | <i>mandatory</i>     |
| <b>Belgium</b><br><i>Advocate</i>     | x                   | x        | x                               | x        | -                                 | x        | <i>mandatory</i>     |
| <b>Denmark</b><br><i>Advokat</i>      | x                   | x        | x                               | x        | -                                 | x        | <i>mandatory</i>     |
| <b>Finland</b><br><i>Lawyer</i>       | x                   | x        | x                               | -        | -                                 | -        | <i>not mandatory</i> |
|                                       | x                   | x        | -                               | x        | -                                 | x        | <i>mandatory</i>     |
| <b>France</b><br><i>Avocat</i>        | x                   | x        | n.a.                            | n.a.     | n.a.                              | n.a.     | <i>mandatory</i>     |
| <b>Germany</b><br><i>Rechtsanwalt</i> | x                   | x        | x                               | x        | x                                 | x        | <i>mandatory</i>     |
| <b>Greece</b><br><i>Dikigoros</i>     | x                   | x        | x                               | -        | -                                 | x        | <i>mandatory</i>     |
| <b>Italy</b><br><i>Accocato</i>       | x                   | x        | x                               | n.a.     | n.a.                              | n.a.     | <i>mandatory</i>     |
| <b>Ireland</b><br><i>Solicitor</i>    | x                   | x        | x                               | x        | x                                 | x        | <i>not mandatory</i> |
|                                       | x                   | x        | x                               | x        | x                                 | x        | <i>mandatory</i>     |
| <b>Luxemburg</b><br><i>Acocat</i>     | x                   | x        | -                               | x        | -                                 | x        | <i>mandatory</i>     |
| <b>Netherlands</b><br><i>Advocaat</i> | x                   | x        | x                               | x        | x                                 | -        | <i>mandatory</i>     |
| <b>Portugal</b><br><i>Advogado</i>    | x                   | x        | x                               | n.a.     | n.a.                              | n.a.     | <i>mandatory</i>     |
| <b>Spain</b><br><i>Abogado</i>        | x                   | x        | x                               | n.a.     | n.a.                              | n.a.     | <i>mandatory</i>     |
|                                       | x                   | x        | x                               | n.a.     | n.a.                              | n.a.     | <i>mandatory</i>     |
| <b>Sweden</b><br><i>Advokat</i>       | x                   | x        | x                               | x        | x                                 | x        | <i>mandatory</i>     |
| <b>UK</b><br><i>Solicitor</i>         | x                   | x        | -                               | x        | x                                 | x        | <i>not mandatory</i> |
|                                       | x                   | x        | x                               | x        | -                                 | x        | <i>mandatory</i>     |

The regulations of legal professionals and the power of bar associations have been criticized because of their impact on competition and trade conditions. Although there is no doubt about their impact, the problem stems from the justifications for restrictions, which need to be examined.

<sup>25</sup> PETERSON/ FINK/ OGUS (2003), *above note 12*, p. 45.

## B. The Rationale for Regulating Legal Services

The rationale for regulation in legal services sector is generally explained by the public interest theories and/or by private interest theories.<sup>26</sup> Public interest theories adopt a social welfare perspective and see regulation as being driven by both economic considerations (correction of market failure) and other non-economic factors (distributional goals or paternalism) that may drive public interest regulation. In contrast, private interest theories argue that regulation is better explained by rent-seeking behavior, effective lobbying and regulatory capture.<sup>27</sup>

### 1. Public Interest Theories of Regulation

When assessing whether there is a need for regulation, economists assume a free, unregulated market, which provides the best economic solution with optimal allocation of resources and the correct combination of price and quality. In the case of “perfect competition” participants are price-takers and the welfare of producers cannot be improved without a consumer surplus, or *vice-versa*. However, in practice these conditions *stricto sensu* can never be met or it is highly questionable whether they will because markets create distortions. Therefore free markets do not provide solutions to all economic problems. Economists call this “market failures”, which provides the justification for regulatory interventions to preserve the public interest.

In the case of legal services, a free legal market without regulatory intervention would lead to a situation where property rights were neither defined nor guaranteed, which could result in an “arms race”. To prevent this happening, governments create a legal system (that define the rights and the obligations of citizens) and establish a dispute resolution mechanism (to protect these rights). These actions establish the conditions for “legal security”.<sup>28</sup> In this context public interest ensures the availability of high-quality legal services and access to these services for those in need. However, an unregulated legal market is subject to significant market failures that need regulatory intervention in order to guarantee the public interest. The economic literature generally identifies three types of market failure: asymmetric information, negative externalities and the undersupply of public goods. In addition to market failure, other non-economic considerations such as distributional goals and paternalism may also require regulatory intervention.

#### a. Asymmetric Information

Economists distinguish three types of goods. The first, referred as *search goods* can be assessed by the consumer before purchase. Examples of such goods include the majority of basic commodities such as sugar, sour, clothes or furniture. There is little uncertainty for consumers in the purchase of these goods. They know what they are buying and simply search for the lowest price, hence the name *search good*. This is different to *experience good*, whose

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<sup>26</sup> OGUS (1994), *Regulation, Legal Form and Economic Theory*, Clarendon Press, Oxford: Oxford University Press, pp. 3-4.

<sup>27</sup> For a synthesis on legal services, see STEPHEN/ LOVE (2000), *Regulation of the Legal Profession*, Boudewijn Bouckaert & Gerrit De Geest (eds), *Encyclopaedia of Law and Economics*, Cheltenham: Edward Elgar, pp. 987-1017.

<sup>28</sup> BAARSMA/ FELSÖ/ JANSSEN (2008), *Regulation of the Legal Profession and Access to Law: an Economic Perspective*, SEO Report no. 2008-1, Amsterdam: SEO, May 2008.

quality can only be assessed by the consumers after purchase and consumption.<sup>29</sup> Examples of such goods include wine, restaurant meals, hotels, music records, movies, second-hand cars. The purchase of these products can entail high up-front costs related to the search for quality. They are called *experience goods* because the experience is more cost-effective and cheaper than the search. The third type of good is *credence goods*, whose quality can almost never be assessed by the consumer either by prior observation nor after consumption.<sup>30</sup> Most non-network services (health services, financial services, car repair, airline services) fall in this category. They involve high pre-and post-purchase costs related to the search for quality due to the imbalance of information. Therefore most consumers must have faith in the professionals that provide the service, and/or the process regulating the profession, hence the name *credence goods*.

An imbalance of information is inherent in legal activities, which thus fall into the category of *credence goods*. When they represent or advise clients, legal practitioners sell specialist knowledge that the clients do not possess. It is therefore very difficult for clients to assess the quality of the service. This problem is amplified by the lack of clear relationship between the lawyers' efforts and the outcome of the case. A good lawyer can lose a bad case and a bad lawyer can win a good case.<sup>31</sup>

There are two potential negative consequences resulting from the asymmetry of information: *adverse selection* and *moral hazard*. The first affects the clients' choice of lawyer. In purchasing a credence good, clients are unable to distinguish between high- and low-quality providers before taking the decision to hire one. Because of the asymmetry of information, they are unwilling to pay more than what they consider to be an average price. Therefore their choice will be essentially based on the cost. If the cost of providing a high-quality service is actually greater than the cost of low-quality services, the price that consumers are willing to pay will drive high-quality service providers out of the market. As a result, quality will fall and only cheap, low-quality services will be available. Economists describe this deterioration in quality as *adverse selection*.<sup>32</sup> The traditional solution to this problem is regulation of market access requirements in the form of qualification or licensing.

The second problem related to asymmetric information arises after the client has selected a supplier and is referred to as *moral hazard*.<sup>33</sup> It results from the principal-agent relationship, when the client (the principal) and the lawyer (the agent) have a conflict of interest. On the one hand, clients purchase legal services in order to have their problem solved, but they cannot assess the quality of the lawyer's work and cannot express the price/quality relation they desire. On the other hand, lawyers have a dual role: they must make the diagnosis ("agency function") and sell the treatment ("service function"). The consequence is that the agent (the lawyer) has an incentive to over-supply quality in order to charge a higher price, even if another cheaper solution exists. In addition, the lawyer has the opportunity to supply services that the client does not need (supplier-induced demand).<sup>34</sup> This situation requires

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<sup>29</sup> NELSON (1970), *Information and Consumer Behaviour*, Journal of Political Economy, Vol. 78, No.2, March-April 1970, pp. 311-329.

<sup>30</sup> DARBY/ KARNI (1973), *Free Competition and the Optimal Amount of Fraud*, Journal of Law and Economics, Vol. 16, No. 1, April 1973, pp. 67-88.

<sup>31</sup> COPENHAGEN ECONOMICS (2006), *The Legal Profession: Competition and Liberalization*, January 2006.

<sup>32</sup> AKERLOF (1970), *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, Quarterly Journal of Economics, Vol. 84, No. 3, August 1970, pp. 487-500.

<sup>33</sup> ALCHIAN/ DEMSETZ (1972), *Production, Information Costs, and Economic Organization*, The American Economic Review, Vol. 62, No. 5, December 1972, pp. 777-795.

<sup>34</sup> STIGLER (1971), *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science,

regulation to ensure that suppliers do not exploit their informational advantage. It generally takes the form obligations stipulated in a code of conduct (e.g. avoidance of conflict of interest, minimum or recommended fee requirement or prohibition on advertising). Moreover, compliance with these requirements is closely monitored by bar associations.

However, the legal service market is not necessarily homogeneous and the economic literature highlights that asymmetric information problems are mitigated in the case of repeat purchasers.<sup>35</sup> This is the case of corporate clients that frequently buy legal services and are thus able to acquire experience and knowledge of the market. In addition, these organizations often employ in-house legal executives that are able to assess the quality of external legal services. From the lawyers' perspective, there is also risk losing future business if they behave opportunistically. Another incentive to act in the client's best interest is the maintenance of their reputation, via social networks. Therefore, the need for regulation is far more relevant to small law firms dealing with individual consumers or small companies than for big law firms doing business with corporate clients.<sup>36</sup> These considerations are particularly relevant to cross-border legal services that are mostly related to commercial questions and whose customers are generally corporate clients.

## **b. Negative Externalities**

A second argument for regulation of the legal services sector is based on the need to avoid *negative externalities*. This refers to the situation where the supply of a service may not only have an impact on the purchaser of the service, but also on third parties. The external effects of legal services relate to problems with the quality of the service that go beyond the direct consumers and generate negative externalities for the general public. For instance, poor legal advice on the terms of a contract may not only affect the purchasers of the legal service, but also their clients.

Similarly, inaccurate verification of property rights by a notary may have implications that extend beyond the impact on the owner of the rights. The free market does not take into account these negative externalities in the decision-making process. Therefore regulation is introduced to mitigate the effect of negative externalities. It generally takes the form of licensing requirements (qualification, training period and examination) and the attribution of exclusive rights to certain professionals (such as the monopoly on legal representation in court and notary services), which aim to ensure high standards of service.

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Vol. 2, No.1, Spring 1971, pp. 3-21.

<sup>35</sup> TREBILCOCK (1982), *Competitive Adverstitising*, Evans, R. & Trebilcock Michael J. (eds), Lawyers and the Consumer Interest: Regulating the Market for Legal Services, Butterworths, London, pp.; HUDEC/TREBILCOCK (1982), *Lawyer Advertising and the Supply of Information in the Market for Legal Services*, University of Western Ontario Law Review, Vol. 20, No. 1, 1982, pp. 53-99.

<sup>36</sup> STEPHEN (2001), *An Economic Perspective on the Regulation of Legal Services Markets*, Evidence submitted to the Justice 1 Committee's Inquiry into Regulation of the Legal profession, September 2001.

### c. Undersupply of Public Goods

Economists distinguish a third market failure, which is related to the supply of public goods. A public good is distinct from a private good in two respects. First, it is non-rivalrous: the consumption of the good by one individual does not diminish the utility of the good for another individual. Second, it is non-excludable: it is impossible to exclude non-paying individuals from consumption.<sup>37</sup>

Legal services may not only have negative externalities, but also positive externalities that are of great value to society and are consistent with the economic definition of public good. For instance, lawyers play an important role in the administration of justice. Through their expertise and their activities they reduce the cost of judicial administration. In addition, through case law they create value for third parties, who will learn from the legal precedent without paying for it. At the same time, the intervention of lawyers or notaries in transfers of ownership helps to ensure the legal certainty of deeds and reduces the cost of enforcement. Without some form of regulatory intervention there is a risk that this public good could be under-produced or inadequately supplied. In certain situations, there might be important reasons for governments to protect the vulnerable, inexperienced parties in a dispute. Thus, for complex or important cases, regulations may require unqualified parties to have legal representation professionals to get legal assistance. In addition, in order to ensure people with low incomes are able to access legal services, governmental intervention can guarantee equal access for all. These can take the form of a legal aid or price intervention such as setting maximum fees.

In the debate on the liberalization of legal services, one of the main arguments put forward by bar associations is that the legal profession supplies services of non-economic value. This refers to their role in the administration of justice and upholding of the rule of law.<sup>38</sup> They argue that the regulatory framework applicable to lawyers simply promotes and protects fundamental values rather than trying to ensure economic efficiency and competitiveness. This, they say, makes them different to other service sectors and justifies different treatment.<sup>39</sup> Nevertheless, it is reasonable to argue that the provision of services related to the administration of justice and the rule of law falls into the category of public good that could justify regulation in economic terms.<sup>40</sup>

The objective of preserving public goods is crucial in the regulation of the legal profession. Most importantly regulation seeks to safeguard the independence of the profession and client confidentiality. The establishment of bar associations that are independent of state intervention is the most salient example of this. Similarly, restrictions on the partnerships with non-lawyers or the prohibition on working for non-lawyers also aim to protect the independence of lawyers. Other types of restrictions aim to ensure the availability and accountability of legal professionals (e.g. nationality or residency requirements or restrictions on incorporation).

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<sup>37</sup> PINDYCK/ RUBINFELD (2009), *Microeconomics*, 7<sup>th</sup> ed, Upper Saddle Prentice Hall S River, New Jersey pp. 672-678.

<sup>38</sup> See for instance: IBA (2000), *Resolution on Professionalism v. Commercialism*, September 2000; CCBE (2005d), *Comments on Commission Progress Report on Competition in Professional Services*, 19.11.2005.

<sup>39</sup> CCBE (2008b), *above note 23*.

<sup>40</sup> OECD (2009), *Competitive Restrictions in Legal Professions*, Policy Round Table, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP(2007)39, 27 April 2009.

## 2. Private Interest Theories of Regulation

Unlike public interest theories, many commentators argue that regulation is not driven by the pursuit of public interest, but by the particular concerns of interest groups that can influence government. Private interest theories combine elements from various other theories such as *inter alia*: the *economic theory of regulation*, the *theory of regulatory capture*, the *public choice theory* and the *theory of competition among interest groups*. The common feature of these theories is that interest groups influence political decisions in order to seek profit or financial advantages for themselves.

The *economic theory of regulation* assumes that actors are inherently self-serving and seek to maximize their own material self-interests.<sup>41</sup> Based on the *economic theory of regulation*, the *theory of regulatory capture* argues that regulation is designed and acquired by private sector and operates for its benefits. Under pressure from lobbyists<sup>42</sup> and/or through lack of information<sup>43</sup>, the regulatory agencies tend to design regulation that serves the private rather than public interests. In *public choice theory*, regulation is the result of effective lobbying.<sup>44</sup> As politicians must seek re-election they are reluctant to introduce changes that would have adverse effects on the economic position of professional groups. The question is simply which groups the politicians will favor.<sup>45</sup> Proponents of the *competition among interest groups*<sup>46</sup> argue that regulation is the result of competition for political influence between different interest groups. Where there is intense competition, political pressure will be less important.

According to *public choice theory*, the legal profession is in a strong position to lobby government in order to influence the outcome of regulations and statutes. Since elected politicians must seek re-election, they must pay attention to influential interest groups, particularly those composed of important opinion-makers.<sup>47</sup> The legal profession is such a powerful interest group: they are small, well-organized and able to cope with the free riding problem through compulsory membership of professional bodies.<sup>48</sup> Furthermore, the legal profession may abuse its information advantage to prevent the government, which exercises regulatory oversight, from blocking disproportionate anti-competitive rules. In this sense, self-regulation has been described as the ultimate form of *regulatory capture*.<sup>49</sup> Professional bodies can act as legitimized cartel, with the ability to determine or influence the regulatory framework in ways that work to the benefit of the sector.

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<sup>41</sup> STIGLER (1971), *above note 34*; PELTZMAN (1976), *Towards a More General Theory of Regulation*, Journal of Law and Economic, Vol. 19, No. 2, 1976, pp. 211-240.

<sup>42</sup> POSNER (1974), *The Theories of Economic Regulation*, Bell Journal of Economics and Management Science, Vol. 5, No. 2, 1974, pp. 335-338.

<sup>43</sup> OSLON (1965), *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press.

<sup>44</sup> BUCHANAN (1987), *The Constitution of Economic Policy*, The American Economic Review, vol. 77, No. 3, June 1987, pp. 243-250.

<sup>45</sup> GROSSMAN/ HELPMAN (2001), *Special Interest Politics*, Cambridge and London, MIT Press.

<sup>46</sup> BECKER (1983), *A Theory of Competition among Pressure Groups for Political Influence*, Quarterly Journal of Economics, Vol. 98, No. 3, August 1983, pp. 371-400.

<sup>47</sup> PETERSON/ FINK/ OGUS (2003), *above note 12*.

<sup>48</sup> VAN DEN BERGH/ FAURE (1991), *Self-Regulation of the Professions in Belgium*, International Review of Law and Economics, Vol. 11, No. 2, September 1991, pp. 165-182.

<sup>49</sup> KAY (1998), *The Forms of Regulation*, Seldon, A. (eds.), Financial Regulation – or Overregulation, Institute of Economic Affairs, pp. 33-42.

These arguments support the application of private interest theories to regulation of the legal profession. Nevertheless, some commentators have argued that the theoretical predictions lack empirical support.<sup>50</sup> This does not mean a total absence of empirical studies. The most relevant report is the study by the Viennese Institute for Advanced Studies (the so-called *HIS study*), which was prepared for the European Commission.<sup>51</sup> This study compared the regulation of the liberal professions (including the legal professions) in various EU Member States and analyzed their economic impact. One of the findings of the report was there was a positive relationship between the level of regulation and the profitability of the profession, which suggests that greater regulation leads to higher profits and therefore supports the private interest theory. However, these findings have been criticized as an unreliable basis for policy decisions.<sup>52</sup> More recently rent-seeking behavior has been proven in the case of lawyers in the United States.<sup>53</sup> It is worth mentioning that the difficulty of demonstrating *rent-seeking* behavior is mainly found at the domestic level. In contrast, it is far more obvious in the context of trade liberalization of legal services, as is the case of the liberalization of legal services in India.<sup>54</sup>

This overview shows that regulation of the legal profession is essentially local with differences between jurisdictions. Despite these differences, it is possible to distinguish two types of commonly adopted rules: rules on market access (such as reserved activities, licensing and qualification requirements) and rules related to professional conduct (such as rules on business form, advertising and fees). Regulations are adopted both to safeguard the public interest and sometimes to preserve private interests. However, the local nature of the legal services means that there are substantial differences in regulation to take into account local customs and values. This in turn can complicate trade in legal services and can result in restrictions on cross-border legal practice and competition.<sup>55</sup>

The importance of the sector coupled with its modernization and internationalization have obliged policy makers to reconsider how to regulate the sector in order to meet the challenges of the twenty-first century. If regulation remains important in order to correct market failures and protect the public good, current regulations may not necessarily be the most appropriate. The challenge for governments is to strike the correct balance between the need to maintain a high level of regulation in order to preserve legitimate objectives and at the same time to adapt this regulation to the reality of the modern legal market. This is the underlying objective of the liberalization process that is analyzed in the following section.

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<sup>50</sup> STEPHEN/ LOVE (2000), *above note 27*, p. 1001; VAN DEN BERGH/ MONTAGNIE (2006), *Competition in professional services markets: are Latin notaries different?*, Journal of Competition Law and Economics, Vol. 2, No 2, 2006, pp. 189-214.; KILLIAN (2003), *Rethinking deregulation*. Presentation 1st International Legal Ethics Conference, Exeter, 7 July 2003.

<sup>51</sup> PETERSON/ FINK/ OGUS (2003), *above note 12*.

<sup>52</sup> OECD (2009), *above note 40*, pp. 26-27; RBB Economics (2003), *Economic Impact of Regulation in Liberal Profession. A Critique to the HIS Report*, 9 September 2003.

<sup>53</sup> WINSTON/ CRANDALL (2007), *Aided and Abetted: Lawyers' Rents and Government Policy*. Paper presented on October 11th at the conference 'Cost-benefit analysis of regulations: lessons learned, future challenges', Northwestern University, School of Law, the Searle Center.

<sup>54</sup> KRISHNAN J. (2010), *Globetrotting Law Firms*, Georgetown Journal of Legal Ethics, vol. 23, No 1, Winter 2010, pp. 57-102, pp. 61-65.

<sup>55</sup> WTO-WPDR (2012b), *Regulatory Issues in Sectors and Modes of Supply*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/W/48, 13 June 2012, pp. 7-10.

## II. LIBERALIZATION TRADE IN LEGAL SERVICES

In general terms, liberalization of trade in legal services can be understood as the removal or reduction of State regulations or practices that restrict cross-border legal practice. Depending on the nature of the restrictions, trade liberalization may require either the reduction of regulation (e.g. the removal of nationality requirements) or the change of regulation (e.g. the adoption of a foreign legal consultant regime or the development of a mechanism for the recognition of qualifications). Trade liberalization should not be confused with deregulation, which refers specifically to the reduction or elimination of regulation.<sup>56</sup> Instead, liberalization encompasses the adoption of regulatory regime or new rules that promote trade and the removal of or changes to existing rules or practices. It is one component of a broader process known as *regulatory reform*, which aims to adapt States' regulations to the needs of modern economies.

Trade liberalization of legal services is not an isolated process. Rather, it is part of a more global approach by an increasing number of national governments that seek ways to adapt to the new challenges brought about by technological changes and the globalization of the economy. The first steps towards the regulatory reform of legal services date back to 1994 and OECD discussions on the liberalization of professional services<sup>57</sup>, which was followed by numerous other meetings on the same topic. The OECD discussions on the liberalization of legal services are particularly relevant as they reflected the views of policy-makers from the most developed economies. Moreover, as their recommendations were not binding, discussions were more detailed. The OECD was the first international organization to discuss the liberalization of legal services in depth and its recommendations have significantly influenced similar discussions in the context of negotiations within the GATS or PTAs.

With respect to the EU, a process of regulatory reform was launched in 2000 with the Lisbon Strategy. The objective was to build the EU as “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater cohesion”.<sup>58</sup> The Lisbon strategy was the starting point of a process, which has entailed, among other things, the intensification of trade liberalization of legal services both within the EU itself and externally. Externally, progress has been made through the GATS or PTAs to improve market access conditions for EU lawyers in key emerging markets. Similarly, Switzerland launched a regulatory reform program in 2004, which sought to improve market access for Swiss companies in key markets through the GATS and PTAs.<sup>59</sup>

Trade liberalization can be unilateral. Individual states may autonomously decide to remove or change the regulation that affects trade in legal services during a process of regulatory reform. However, in most instances, liberalization occurs on a bilateral or multilateral basis within trade agreements between States with different levels of market openness. The first significant steps in the liberalization of legal services were seen in the 1970s in the EU with the emergence of ECJ case law and subsequent developments. Outside the EU, legal services

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<sup>56</sup> KRAJEWSKI (2003), *Regional and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, Kluwer Law International, The Hague/ London/ New-York, pp. 1-40.

<sup>57</sup> OECD (1995), *Liberalization of Trade in Professional Services*, OECD Publishing.

<sup>58</sup> CEU (2000), *above note 3*

<sup>59</sup> FEDERAL COUNCIL (2005), *The 2004 Foreign Economic Policy Report: The Strategic Focus of Swiss Foreign Economic Policy*, 12 January 2005, <http://www.seco.admin.ch> (last visit: 1.10.2012).

trade liberalization has essentially developed in the context of the WTO. Since 1995 the GATS has been the centerpiece for liberalization in trade in services at international level. However, the last decade has witnessed the proliferation of PTAs, which generally feature service liberalization. This shows that legal services trade liberalization takes place at both multilateral (within the WTO) and regional level (within PTAs).

The preliminary stage of liberalization requires the identification of measures that impede cross-border legal practices. This enables the development of instruments to address these trade barriers. Therefore, before analyzing the rules contained in different trade agreements, the following sections give an overview of the most significant obstacles to trade and competition in the legal services sector.

## **A. The Most Significant Impediments to Cross-Border Legal Practice**

In general, restrictions on cross-border legal practice derive directly or indirectly from the regulation of the profession. However, they may be other causes such as difficulties in accessing information about the regulatory framework in foreign jurisdictions, the problems caused by divergent national regulations, problems related to the behavior of national authorities or uncertainty caused by the complexity of some cross-border situations.

The first detailed, multilateral discussions on barriers to trade in legal services took place under the aegis of the OECD in 1995<sup>60</sup>, followed by two other workshops in 1996<sup>61</sup> and 1997<sup>62</sup>. The purpose of these meetings was to identify the most significant barriers to trade in professional services (including legal services), to understand their justification and try to find less burdensome alternatives. In the EU context, in 2002 the EU Commission released “The State of the Internal Market for services” report, which identified the most significant barriers affecting the supply of services including legal services in the internal market.<sup>63</sup> The work carried out by the OECD and the EU Commission provides a sound basis for the analysis of the measures affecting cross-border legal services used in the WTO negotiations. However, this work did not include all WTO Members. They focused on developed countries and failed to take into account the regulatory regimes in developing countries.

This section identifies the most frequent and important barriers to cross-border legal practice. It provides the basis for an analysis of the contribution of trade instruments designed to overcome these obstacles. However, it must be stressed that this section only covers the most significant barriers and leaves aside lesser restrictions such as taxation issues or cultural problems.

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<sup>60</sup> OECD (1995), *above note 57*.

<sup>61</sup> OECD (1996), *International Trade in Professional Services: Assessing Barriers and Encouraging Reform*, OECD Publishing.

<sup>62</sup> OECD (1997d), *International Trade in Professional Services: Advancing Liberalization through Regulatory Reform*, OECD Publishing.

<sup>63</sup> EU COMMISSION (2002a), *Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services*, presented under the first stage of the Internal Market Strategy for Services, COM (2002) 441 final, 30.07.2002.

## 1. Transparency

An important theme that emerged from EU consultations on barriers to trade in services within the EU was the difficulty of accessing information about the regulatory framework of other Member States.<sup>64</sup> Lawyers are subject to the rules as everyone else and lack of transparency is one of the very first difficulties that they face when they access foreign jurisdictions.

Problems include a lack of information about the application and interpretation of national regulation, identifying the competent authorities at national and regional level, and understanding the procedures that must be followed in order to set up a commercial presence in the host country.<sup>65</sup> As the regulation of the legal profession generally focuses on domestic lawyers it can be difficult for foreign lawyers or law firms to find out how they can obtain a license or whether they need one.<sup>66</sup> Another problem is determining which authority is competent to deal with approval. In some countries (e.g. Singapore) only the government can give approval, while in others (e.g. Japan) the process involves the government and bar associations.

Another transparency problem is uncertainty resulting from the difficulty in determining precisely what foreign lawyers are or are not allowed to do. This problem is particularly relevant in the cases where services are provided on temporary basis, or fly-in fly-out basis.

It can also be difficult to obtain information about the conditions under which a license to practice is granted. In some countries the license application process is relatively informal and foreign lawyers practice at the discretion of a governmental agency. There are no published guidelines or rules governing the conditions for the award of a license or the paperwork that must be submitted in order to receive it.<sup>67</sup>

## 2. Nationality Requirements

The OECD workshops identified nationality restrictions and local presence requirements as key obstacles to the internationalization of legal services. Nationality requirements are generally justified by trade considerations, consumer protection and a desire to safeguard public interest.

### a. Nationality Requirements and Trade Considerations

Nationality restrictions are based on the desire for reciprocal treatment; they aim to ensure equivalent treatment for their nationals on foreign market. Consequently, they discriminate against nationals of certain states. Examples can be found in France or in Belgium, which do not have foreign consultant regime. In these jurisdictions foreign lawyers must take the local bar exam. Although the eligibility conditions for taking the exam are simplified, reciprocity is one of them.<sup>68</sup>

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<sup>64</sup> *Idem*, p.42-45.

<sup>65</sup> WPDR (2012b), *above note 55*, pp. 66-69.

<sup>66</sup> HOOK (2007), *Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services*, Sixth Services Expert Meeting Domestic Regulation and Trade in Professional Services in Paris, OECD and World Bank, p. 17-18.

<sup>67</sup> *Idem*.

<sup>68</sup> CCBE (2005c), *Conditions for the admission of lawyers from non-EU Member States to the title of the local*

Reciprocity can also be a condition for the award of a foreign legal consultant license. For instance in Brazil, a foreign lawyer applying for authorization must prove that there is an instrument of reciprocity for Brazilian attorneys wishing to practice in the applicant's country of origin.<sup>69</sup> Similarly, other States limit access to their legal market as to foreign lawyers who are nationals of states where there is a Free Trade Agreement in force. This is the case in, for example, in Mexico<sup>70</sup> and South Korea<sup>71</sup>.

Nationality restrictions can also serve protectionist purposes. Difference between states in the development of the sector may lead to the least developed state taking a defensive line. In this case, nationality restrictions protect domestic legal sector that is not ready to face foreign competition. This is the situation in India, where legal services can only be provided by Indian nationals who are listed on the advocates roll in the state where the service is being provided.<sup>72</sup>

## **b. Nationality Requirement as Consumer Protection**

Nationality restrictions can also exist to protect consumers against certain risks. They can guarantee accountability of legal professionals by ensuring consumer redress in the event of professional malpractice. They also ensure the ability of professional bodies to enforce standards and discipline professionals. Nationality requirements also aim to ensure knowledge of local rules and customs. Finally, they may be motivated by public interest concerns. For instance Sweden used to implement a nationality requirement in respect of membership in the Swedish bar association. This placed a restriction on the use of the title of "Advokat", who serves important public functions.<sup>73</sup>

In the EU, Member States had nationality requirements to qualify as domestic lawyers or notaries. However, in 1974 the ECJ ruled that such restrictions infringed the rules of the Treaty with respect to lawyers (in *Reyners*<sup>74</sup>) and in 2011 with respect to notaries (in *Commission vs Austria*<sup>75</sup>, *Commission vs Belgium*<sup>76</sup>, *Commission vs France*<sup>77</sup>, *Commission vs Germany*<sup>78</sup>, *Commission vs Greece*<sup>79</sup>, *Commission vs Luxemburg*<sup>80</sup> and *Commission vs Portugal*<sup>81</sup>). Consequently, the nationality requirement for the practice of law has been removed. On the other hand, requirements still apply to third countries in some EU Members

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*legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own title home*, 25.01.2005.

<sup>69</sup> WTO-TPRB (2009a), *Trade Policy Review of Brazil*, Secretariat Report, WT/TPR/S/212, 2 February 2009, Geneva, p. 142.

<sup>70</sup> WTO-TPRB (2008b), *Trade Policy Review of Mexico*, Secretariat Report, WT/TPR/S/195, 11 December 2008, p. 134.

<sup>71</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *Foreign Legal Consultant Act*, 5 February 2010, Articles 6 and 16.

<sup>72</sup> WTO-TPRB (2007), *Trade Policy Review of India*, Secretariat Report, WT/TPR/S/182, 29 November 2007, p. 147.

<sup>73</sup> However, this restriction was abolished the 1 July 2002.

<sup>74</sup> *Reyners*, C-2/74, *Jean Reyners v. Belgian State*, [1974], ECR 631.

<sup>75</sup> *Commission v. Austria*, C- 53/08, *European Commission v. Republic of Austria*, [2011], ECR I-0000.

<sup>76</sup> *Commission v. Belgium*, C- 47/08, *European Commission v. Kingdom of Belgium*, [2011], ECR I-0000.

<sup>77</sup> *Commission v. France*, C- 50/08, *European Commission v. French Republic*, [2011]. ECR I-0000.

<sup>78</sup> *Commission v. Germany*, C- 54/08, *European Commission v. Federal Republic of Germany*, [2011], ECR I-0000.

<sup>79</sup> *Commission v. Greece*, C- 61/08, *European Commission v. Hellenic Republic*, [2011], ECR I-0000.

<sup>80</sup> *Commission v. Luxemburg*, C- 51/08, *European Commission v. Grand Duchy of Luxemburg*, [2011], ECR I-0000.

<sup>81</sup> *Commission v. Portugal*, C- 47/08, *European Commission v. Portuguese Republic*, ECR I-0000.

States (e.g. Austria, Cyprus, Estonia, Hungary, Greece, Malta, Slovakia or Lithuania<sup>82</sup>). This situation has resulted in absurd situations such as *Bigaeva vs Greece*<sup>83</sup>, where a third country citizen who had acquired all the necessary domestic Greek legal qualifications was denied the right to sit for the bar examination and access to the domestic legal profession, on the grounds that she was not a Greek/ EU citizen, while at the same time, EU lawyers who did not have specific knowledge of Greek law were entitled to become Greek lawyers as their qualification was recognized.

### 3. Residency and Local Presence Requirements

Local presence requirements refer to the maintenance of a personal or professional residence in the host country as a condition for the supply of professional services. They generally require a local presence for a significant period of time, either before (in this case they are known as prior residence requirements) or after a license is awarded.

Like nationality restrictions, the justification for such requirements is consumer protection and safeguarding the public interest. They aim to ensure that the legal professional can be held accountable in the event of malpractice or misconduct. They make it possible to identify, locate and pursue professionals who may be guilty of malpractice. It also enables professional associations to maintain standards. More generally it ensures the general and professional knowledge of local rules, customs and culture.

Unlike nationality restrictions, local presence requirements are non-discriminatory. In addition, they serve legitimate regulatory concerns. However, they represent a serious obstacle to trade in legal services, especially when services are provided on a temporary basis, as is frequently the case in this sector.

Residency requirements can take various forms. An example, is prior residency. For instance, in Belgium foreign lawyers must have been domiciled in the country for six years before they can be admitted to the local legal profession.<sup>84</sup> It confers an advantage on national suppliers, who by definition meet the requirement. Another example is the permanent residency requirement. This is another obstacle for foreign suppliers who have to take up residency in the host country, while domestic suppliers do not. In the case of natural persons this may lead to the loss of home country residency.<sup>85</sup> In Brazil, foreign lawyers wishing to establish a consultancy or consultant partnership in foreign law, must among other things be able to prove permanent residency in the country.<sup>86</sup> Other countries require foreign lawyers to have a local presence in the country for a certain period of time. This is the case in China<sup>87</sup> or in Korea<sup>88</sup>, where lawyers must reside in the country at least six months of the year.

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<sup>82</sup> WTO-CTS (2005b), *Conditional Revised Offer*, Communication from the European Communities and its Member States, Council for Trade in Services Special Session, TN/S/O/EEC/Rev.1, 29 June 2005.

<sup>83</sup> *Bigaeva vs Greece*, application No 26713/05, ECHR Chamber Judgment, 28 May 2009.

<sup>84</sup> CCBE (2005c), *above note 68*.

<sup>85</sup> WTO-CTS (1998a), *above note 1*, p. 10.

<sup>86</sup> WTO-TPRB (2009a), *above note 69*.

<sup>87</sup> WTO-TPRB (2008a), *Trade Policy Review of China*, Secretariat, Report WT/TPR/S/199, 21/23 May 2008, Geneva, p. 183.

<sup>88</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *above note 71*.

In the EU, the ECJ ruled that residency requirement infringed the Treaty rules on the freedom to provide services in *Van Binsbergen*<sup>89</sup> and in *Klopp*<sup>90</sup>. In *Van Binsbergen*, a lawyer who had previously represented a client in a case was subsequently denied the right to represent the same client on the ground he had transferred his residence from the Netherlands to Belgium. In *Klopp*, a German practicing law in Germany, applied to practice in France. He was denied the right to establish a branch office, on the grounds that under French law, he could only establish chambers in one place, which must be within the French territorial jurisdiction. Therefore, Mr. Klopp had to choose between practicing in France or in Germany.

#### 4. Quotas/Economic Need Test

Since the *Klopp*<sup>91</sup> case in 1984, quantitative restrictions on the number of branches of foreign law firms have become rare in developed countries. However, they can still be found in more protectionist jurisdictions, which still bar access to foreign law firms. Jurisdictions such as Malaysia have territorial limitations on where foreign lawyers are authorized to practice.<sup>92</sup> In other countries, quotas may take the form of an “economic need” test. For instance in China, a “social economic needs test” was introduced that give the Ministry of Justice broad discretion in assessing the need for additional branches. In addition a foreign law firm can only open an additional branch if the established office has been practicing in China for “three full consecutive years”.<sup>93</sup> Until recently, in Japan foreign law firms were effectively prohibited from establishing more than one office, a restriction that did not apply to domestic firms.<sup>94</sup>

#### 5. Prohibitions on Incorporation

Measures limiting or excluding the right to incorporate the business are relatively common in the legal services sector.<sup>95</sup> In most countries only certain business structures are allowed. Incorporation is widely prohibited and professionals are often required to practice as individuals or in partnership with other lawyers. In places where incorporation is allowed locally registered lawyers (which excludes other professional and foreign lawyers) must hold the majority of share capital or voting rights.

Such measures generally aim to protect consumers by ensuring the accountability, independence and ethical integrity of professionals. Joint stock, limited liability companies or other such forms of company are seen as reducing the accountability of lawyers *vis-à-vis* their clients by limiting their personal liability in cases of professional fault or malpractice. However, these rules may have an impact on trade in legal services.

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<sup>89</sup> *Van Binsbergen*, C-33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974], ECR 1299.

<sup>90</sup> *Klopp*, C-107/83, *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, [1984], ECR 2971.

<sup>91</sup> *Idem*.

<sup>92</sup> APEC LEGAL SERVICES INITIATIVES (2009), *APEC Economy: Malaysia; Jurisdiction: West Malaysia*, <http://www.legalservices.apec.org> (last visit 1.10.2012); LAW COUNCIL OF AUSTRALIA (2011a), *Country Fact Sheet: Malaysia*, 11 July.

<sup>93</sup> WTO-TPRB (2008a), *above note 87*.

<sup>94</sup> MINISTRY OF JUSTICE OF JAPAN (1986), *Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers*, Act No. 66 of 1986, 1 April 1987, Article 9.

<sup>95</sup> PORET (1997), *Issues for Consideration*, International Trade in Professional Services, Advancing Liberalization through Regulatory Reform, OECD Proceedings, pp. 19-26.

Some of these rules are discriminatory. Thus in some countries, foreign law firms cannot establish themselves in any of the forms available to domestic suppliers. For instance, in Japan, until recently, foreign law firms could not incorporate, unlike Japanese firms. As only corporate structures may open branch offices, foreign law firms are prohibited from establishing more than one office.<sup>96</sup>

Yet without being discriminatory, restrictions on incorporation can have a more significant impact on foreign law firms. This is essentially due to the fact that legislation varies from one jurisdiction to another. For instance, law firms established as a limited liability partnership in their home country may face difficulties in becoming established in a state where this structure does not exist. Such firms may have to create a new legal vehicle in order to practice in the other jurisdiction, raising costs and increasing the difficulty of integrating the branch into the wider partnership. The same is true of the multi-disciplinary partnerships (MDPs), which are prohibited in most jurisdictions but permitted in some others.<sup>97</sup> In the EU, this was one of the issues raised in the *Wouters* case, where the prohibition of multi-disciplinary partnerships in Netherlands (but not for instance in Germany) was seen as a restriction on the free movement of services, though justified in order to protect public policy objectives.<sup>98</sup>

## 6. Restrictions on Ownership and Investment

These limitations are relevant to both the accountancy and legal services sectors. They are generally applied in a non-discriminatory manner and relate to the requirement to hold a local license that applies to anyone wishing to practice in the jurisdiction regardless of the country of origin. However, it *de facto* excludes foreign investors who do not possess the required license or could only obtain it at great costs.<sup>99</sup>

Different limitations can be distinguished depending on whether they relate to ownership or investment issues. With regard to ownership, some measures can limit the participation of foreign capital by specifying a maximum percentage for foreign shareholdings. Another example is a requirement that the majority of the company's management or a substantial part of the capital is in the hands of locally qualified professionals.<sup>100</sup> In Europe where incorporation is permitted, there are restrictions on foreign equity participation. For instance in Spain or Austria equity participation is limited to 25% of the law firm's capital.<sup>101</sup> In Thailand, the law both prohibits foreign equity participation in Thai law firms in excess of 49 % (with the exception of the United States) and does not allow foreign nationals to practice in the country.<sup>102</sup> In other countries Foreign Direct Investment (FDI) can be conditional. This is the case in Mexico, where the National Foreign Investment Commission must approve foreign investment in legal services of more than 49 %.<sup>103</sup> Worldwide, the most frequent situation is a limitation on foreign equity.

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<sup>96</sup> These restrictions was revised in June 2012, see MATSUTANI (2012), *Foreign law firms aim for equal treatment: revision to expansion rule might be too little, too late*, The Japan Times, 5 April 2012.

<sup>97</sup> New South Wales, Germany and Washington DC.

<sup>98</sup> *Wouters*, above note 14, pt. 247.

<sup>99</sup> PORRET (1997), above note 95.

<sup>100</sup> SACCHETTI (1997), *Restrictions on Ownership and Investment and Alternative Approaches*, International Trade in Professional Services, Advancing Liberalization through Regulatory Reform, OECD Proceedings, pp. 41-44.

<sup>101</sup> NASCIMBENE (2009), above 11.

<sup>102</sup> USTR (2011), *2011 National Trade Estimate Report on Foreign Trade Barriers*, Ambassador Kirk, Office of the United State Trade Representative, March 2011, p. 348.

<sup>103</sup> WTO-TPRB (2008b), above note 70, p.134.

These measures are generally taken to preserve the independence, objectivity and integrity of the profession. They also aim to ensure the ability of professionals to uphold standards and maintain their ethical integrity. Finally these measures are designed to protect consumers and the public interest.

## **7. Restrictions on Partnership between Foreign and Locally Qualified Professionals**

Some countries prohibit partnerships or joint ventures or other form of association between foreign and local professionals. The inability to form partnerships is generally coupled with the prohibition on foreign law firms to hire local lawyers. These restrictions are particularly problematic for foreign law firms, because they make it practically impossible for them to provide comprehensive integrated legal advice on matters, which may involve the application of the host state law.<sup>104</sup>

Such restrictions can result from a general prohibition on multi-disciplinary practice, whereby partnership is permitted only between locally-qualified professionals within the same profession. In this sense, they do not discriminate against foreign professionals as such but aim to preserve the independence, competence and ethical integrity of the professional. However, they can result in a refusal to recognize foreign lawyers as “lawyers”. Consequently, foreign lawyers fall under the general prohibition of practicing law in partnership with anyone who is not a qualified lawyer.<sup>105</sup>

Another reason for this prohibition stems from the desire to protect an undeveloped industry. In this case, there is general tendency to prohibit any kind of foreign equity investment, or any other relationship between local and foreign lawyers.<sup>106</sup> China provides a good example. Under Chinese law foreign law firms cannot invest in Chinese law firms, operate on an associate basis, establish joint offices, dispatch personnel to work in a Chinese law firm, or manage, operate, or control any equity interest in a Chinese law firm.<sup>107</sup> In addition, foreign branches may not employ licensed Chinese lawyers.<sup>108</sup> However, they can engage in short-term or long-term activities with Chinese law firms. These Chinese regulations have been severely criticized by major exporters of legal services, as they have a serious negative impact of their activities in the country.<sup>109</sup> The situation would be the same for any country that limits partnerships with local law firms or restricts the employment of locally licensed professionals.

These restrictions are among the most significant barriers faced by law firms that would like to provide global, integrated legal services. They prevent law firms who are acting as foreign legal consultant from extending their activities to host country law by associating or employing locally qualified lawyers.

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<sup>104</sup> WTO-CTS (1998a), *above note 1*, p. 9.

<sup>105</sup> *Idem*.

<sup>106</sup> KAWAMURA (1997), *Restrictions on Partnerships between Foreign and Locally Qualified Professionals and Alternative Approaches, Comments from the Asian Perspective*, International Trade in Professional Services, Advancing Liberalization through Regulatory Reform, OECD Proceedings, pp. 63-70.

<sup>107</sup> MINISTRY OF JUSTICE OF THE REPUBLIC OF CHINA (2002), *Execution of the Regulation on the Administration of Foreign Law Firms' Representative offices in China*, July 4, 2002, Articles 30 and 40.

<sup>108</sup> WTO-TPRB (2008a), *above note 87*, p.184.

<sup>109</sup> EUCCC (2003), *The European Business in China*, Position Paper 2011/2012, 13<sup>th</sup> edition, pp. 57-55 [www.europeanchamber.com.cn](http://www.europeanchamber.com.cn) (last visit: 1.10.2012).

Employment and association with local lawyers is regarded as the most efficient solution for foreign law firms to offer integrated legal services (a one-stop-shop) on the different legislation and adapt to the needs of globalized of economies.<sup>110</sup>

Paradoxically, in other jurisdictions the situation is reversed and foreign lawyers are obliged to associate with local lawyers. For instance in Indonesia, foreign lawyers must be sponsored and employed by local firms, but cannot be a partner or form a formal partnership (regardless of the activity). In addition, foreign lawyers may not provide services in any other form of commercial association with local lawyers. More generally, foreign law firms are not permitted to establish a commercial presence or to offer advisory services in foreign and international law.<sup>111</sup>

## 8. Restrictions on the Name

Name restrictions can affect both law firms and individual lawyers. These restrictions are often designed to protect consumers from potentially misleading information. As far as individual lawyers are concerned, there can be restrictions on the use of their title. These aim to distinguish foreign lawyers from local practitioners. Generally foreign legal practitioners have to practice under the title they use in their home country. Some jurisdictions such as Japan<sup>112</sup> or South Korea<sup>113</sup> require foreign lawyers to add specific extra indications.

For law firms operating in multiple jurisdictions name restrictions are also a relevant issue, because their reputation is a large part of their business. Therefore internationally-recognized law firms cannot benefit from their name if there are not able to use it, or can only use it in the jurisdiction they operate in. These restrictions can be justified to a certain extent on the grounds of consumer protection. However, the main difficulty stems from differences in requirements between one jurisdiction and another.

For instance in the United Kingdom foreign law firms are free to choose their names (under the condition they are not misleading), while in Turkey foreign law firms must include the name of one of the resident lawyers. This means that the name has to change every time a lawyer moves in or out of the office.<sup>114</sup> In France non-EU firms are not permitted to establish branch offices under their own names.<sup>115</sup> Thus, even if they do not prevent trade *per se*, these measures can affect law firms doing business in foreign jurisdictions.

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<sup>110</sup> SILVER/ DE BRUIN/ RABINOWITZ (2009), *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, The Georgetown Journal Legal Ethics, vol. 22, No 4, Fall 2009, pp. 1431-1471.

<sup>111</sup> LAW COUNCIL OF AUSTRALIA (2011b), *Country Fact Sheet: Indonesia*, 11 July; LAW SOCIETY OF ENGLAND AND WALES (2010), *Indonesia: Legal Services Market Report*, December 2010.

<sup>112</sup> MINISTRY OF JUSTICE OF JAPAN (1986), *above note 94*, Articles 46 and 47.

<sup>113</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *above note 71*, Article 27.

<sup>114</sup> LAURENS (2011), *Turkey: the Legal System*, The Law Society of England and Wales, International Division, 29 November 2011, <http://international.lawsociety.org.uk/> (last visit: 1.10.2012).

<sup>115</sup> HOOK (2007), *above note 66*, p. 21.

## 9. Access to Local Practice

Another major barrier to the liberalization of trade in professional services is the lack of access to the local practice for foreign professionals. This is due not only to overt discrimination such as nationality requirements, but overly onerous local examination or retraining requirements. Various means for easing access by foreign legal service professionals to local practice can be identified,<sup>116</sup> some of them will be explored in the following sections.

### a. Aptitude Test

This procedure aims to check the aptitude of foreign qualified professionals before authorizing them to practice in the host state (international, home and host country law). It is a compromise between the need to ensure quality and the provision of market access to foreign lawyers. On the one hand, it enables host authorities to verify the competence of foreign lawyers and, on the other hand, it requires foreign lawyers to meet the full range of examination requirements applicable to local candidates. An example of such an aptitude test is the ‘Qualified Lawyers Transfer Test’, which enables certain foreign lawyers to qualify as solicitors in England and Wales.<sup>117</sup>

### b. The Foreign Legal Consultant Regime

New York was the first state in the United States to adopt the legal consultant licensing regime in 1974. It has since been endorsed by the American Bar Association, which recommended its ‘Model Rules on the Licensing of Legal Consultants’ to all jurisdictions. Twenty-six jurisdictions in the United States have now adopted a regime. Furthermore it forms the basis for the GATS approach to legal services and is applied in other jurisdictions throughout the world.

The legal consultants’ licensing regime enables foreign lawyers to practice outside their home jurisdiction on the basis of their home country expertise. It recognizes that practice experience and certification in the home jurisdiction qualifies a lawyer to carry out the same activities in the host jurisdiction. Foreign legal consultants are treated as members of the bar of the state and may render opinions on the law of their home countries or any other jurisdictions. On the other hand, they may not provide advice on United States or New York law or prepare legal instruments relating to the conveyance of real estate located in the United States.

Generally, if foreign lawyers do not face major problems with respect to qualification requirements, there are more significant restrictions related to licensing requirements. For instance, in order to distinguish them from local lawyers, most countries do not allow foreign lawyers to present themselves as members of the local profession, but instead require the use of their home professional title.<sup>118</sup>

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<sup>116</sup> NICHOLAS-GERVAIS (1997), *Issues for Consideration*, International Trade in Professional Services, Advancing Liberalization through Regulatory Reform, OECD Proceedings p. 125-131.

<sup>117</sup> For further details see *The Qualified Transfer Test*, <http://www qltt.co.uk/> (last visit 10.07.2012).

<sup>118</sup> GELOSO GROSSO (2004), *Managing Request-Offer Negotiations under the GATS: The Case of Legal Services*, OECD Trade Policy Working Paper No. 2, p. 25.

Other requirements for foreign lawyers include registration with the local bar (Germany) and/or an additional professional examination (France, Italy or Belgium).<sup>119</sup>

Finally, several countries require post-qualification experience, which can vary dramatically from one country to another. For example, Oman requires 10 years of experience, while in Saudi Arabia and Taiwan it is five years and three years in Japan.<sup>120</sup>

### **c. Practice under Home Country Title**

In liberal jurisdictions (such as Finland) the right to provide legal advice or the right to represent a client in legal proceedings is not regulated as such. The only restriction relates to the use of the title *Advocat*, which is exclusive to members of the Finnish Association of Advocates. Other legal practitioners may practice (provide legal advice and representation) in Finland but only under their home country title. In other jurisdictions (e.g. Switzerland) practice under home country title is limited to providing legal advice.

In the EU context, EU Member States have adopted the Directive 98/5 *on the practice of profession of lawyer in another Member State*.<sup>121</sup> Article 1:1 states that, “The purpose of this Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained”<sup>122</sup>. Under Article 5, EU lawyers are authorized to practice in other Member States under their home country professional title. They may provide advice on the law of their home Member State, Community law, international law and the law of the host Member State. With regard to representation in court, the host state may require EU lawyers from other Member States to work in conjunction with host country lawyers (Article 5:3). It should be noted that Article 10:1 entitles lawyers who have been practicing under their home country professional title in the host Member State for at least three years to be accepted as a host country lawyer.

### **d. Recognition**

In broad terms, recognition can be defined as the acceptance that the regulatory conditions for services required in one country (home country) are equivalent to the conditions necessary in another country (host country).<sup>123</sup> It can take the form of unilateral or mutual recognition. Unilateral recognition is undertaken by the competent authorities in the host country and consists of comparing home and foreign professional qualifications and assessing the level of equivalence according to unilaterally determined criteria. It only offers a partial solution to the problem as it does not generally provide unconditional access to the host country legal market.

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<sup>119</sup> CCBE (2005c), *above note 68*.

<sup>120</sup> See HOOK (2007), *above note 66*, p. 25.

<sup>121</sup> Directive 98/5 EC of the European Parliament and the Council of 16 February 1998, *to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>122</sup> Directive 98/5 EC of the European Parliament and the Council of 16 February 1998, *to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>123</sup> NICOLAIDIS (1997b), *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, Regulatory Reform and International Market Openness, Paris: OECD Publications, 1996. Reprinted as part of the Jean Monnet Paper Series, Cambridge, MA: Harvard Law School.

In addition, the arbitrary, *ad hoc* character of the procedure means that the assessment is not objectively predictable.<sup>124</sup> Examples of such procedures can be found in the foreign legal consultant regime, whereby host state authorities independently recognize the qualifications of foreign lawyers. However the scope of their practice is limited to the provision of legal advice related to home country law.

In order to mitigate the problem of arbitrariness and eventually extend the scope of practice of professionals, states can negotiate a mutual recognition agreement with other states. Under the terms of this agreement each party recognizes the qualifications and/or license of professionals from the other party as equivalent to those of its own citizens. The scope of recognition and procedures can vary depending on what and how the various parties are willing to recognize. It can include professional education, experience or formal licensing including examination and membership of professional associations. The procedure can take the form of automatic or conditional recognition. Examples of such agreements in the legal services sector are scarce. The best-known is the EU Directive 2005/36 EC *on the Recognition of Professional Education*.<sup>125</sup> This directive provides a mechanism for full recognition (EU lawyers can practice under home state and host state law) within the Community. However, it also allows Member States to establish supplementary measures in the form of an adaptation period or an aptitude test before granting the right to practice.<sup>126</sup> To date the majority of EU Member States have adopted the aptitude test mechanism.

#### **e. The Temporary Supply of Services**

Lawyers often provide legal services on a temporary basis (in commercial negotiations or arbitration) in another state. Some jurisdictions simply prohibit the provision of legal services on a temporary basis (as is the case in Germany, Greece and Denmark for non-EU lawyers).<sup>127</sup> Another frequent limitation is the residency requirement. Depending on the length of residence required, it may severely affect the provision of temporary services. The permanent residency requirement in Brazil makes legal services supplied on temporary basis impossible, while the six months residency requirement in China and South Korea makes it very difficult.

Some jurisdictions have set up a mechanism to facilitate the provision of legal services on a temporary basis. For instance, in Australia there is a general prohibition on the practice of law unless the practitioner is an Australian-registered foreign lawyer or an Australian legal practitioner. However, an overseas-registered foreign lawyer is not subject to the general prohibition on practicing law in Australia provided that they practice for fewer than 90 days in any 12 month period, are not subject to restrictions under national law, do not maintain an office for the purpose of practicing foreign law and do not become a partner or director of a law practice in Australia.<sup>128</sup>

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<sup>124</sup> NICOLAIDIS (1997a), *Mutual Recognition Arrangements and Other Approaches, Promising Approaches and Principal Obstacles to Mutual Recognition*, International Trade in Professional Services, Advancing Liberalization through Regulatory Reform, OECD Proceedings.

<sup>125</sup> Directive 2005/36 EC of the European Parliament and of the Council of 7 September 2005, *on the Recognition of Professional Qualification*, OJ L 255/22.

<sup>126</sup> Article 14 Directive 2005/35.

<sup>127</sup> CCBE (2005), *above note 68*.

<sup>128</sup> LAW COUNCIL OF AUSTRALIA (2008), *Foreign Lawyers and the Practice of Law in Australia*, A Law Council of Australia Information Paper, 15 September.

In the EU, Member States have adopted Directive 77/249, which deals with the provision of legal services on a temporary basis by EU lawyers in other EU jurisdictions.<sup>129</sup> While the TFEU provides for the free movement of EU citizens, the Directive does not address the length of stay (unlike the GATS or PTAs), but rather the conditions of practice. It does not specifically address the type of practice that is authorized (i.e. home country, host country and international law), but rather focuses on the type of legal activity (i.e. the provision of legal advice or representation services). Under Article 4:4, the provision of legal advice is generally subject to home state licensing and code of conduct requirements. Similarly, under Article 4:1 legal representation is also subject to host state licensing requirements, with certain exceptions. Furthermore, under Article 4:2 EU lawyers are subject to the rules of host Member States rules related to professional conduct. Finally, it should be noted that the Directive authorizes EU Member States to require lawyers from other EU Member States to work in conjunction with domestic lawyers for activities related to the representation of a client in legal proceedings (Article 5:1).

Restrictions on the movement of legal professionals can also affect the quality of personnel in branch offices. For instance, in China each branch office of a law firm must be managed by a different partner, which can turn out to be very expensive. Other rules limit the capacity of law firms to staff their offices with lawyers from their own countries, for example in Russia where intra-corporate transfers are limited to one year. There can also be re-qualification requirements for all lawyers working in branch offices regardless of their activities (e.g. the provision of home country or international law advice), as in Hong Kong.<sup>130</sup>

## **10. Double Deontology: Conflicting Ethical Codes**

In all jurisdictions lawyers must follow a code of conduct that governs the provision of legal services. These rules are designed to protect the public against unprofessional conduct and maintain high ethical standards. They generally focus on the lawyer-client relationship and include rules about its form (such as court appointments or agreements) and fiduciary responsibilities (e.g. competence, diligence, confidentiality, conflict of interest and fees). Furthermore, the code of conduct generally contains rules related to advertising and marketing, court duties and the lawyer's functions and responsibilities. Finally, all codes of conduct contain rules on enforcement of ethical and professional standards. Various sanctions are generally applicable to lawyers such as admonition, reprimand, disbarment, suspension or even criminal sanctions.<sup>131</sup>

While the principles found in the code of conduct are similar in the majority of jurisdictions worldwide, their application can differ greatly. Problems emerge when different codes conflict and lawyers find themselves in violation of the code whatever action they take. This situation is referred to as double deontology. A catalyst is cross-border activity, which occurs when a legal professional practices in two or more countries. Issues that had hitherto appeared marginal have progressively caught the attention of regulators as international legal practice has expanded.

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<sup>129</sup> Directive 77/249 EEC of The Council of European Communities of 22 March 1977, *to facilitate the effective exercise by lawyers of freedom to provide services*, 26 March 1977, OJ L 78/17.

<sup>130</sup> HOOK (2007), *above note 66*, p. 23

<sup>131</sup> GOLDSTEIN (2002), *Professional Legal Ethics: a Comparative Perspective*, CEELI Concept Paper Series, 8 July 2002.

Double deontology involves conflicting approaches to various rules of conduct. An example is the independence of lawyers or the duty of confidentiality, which has at times required the adoption of international standards.

### **a. Independence**

The basic premise of the lawyer-client relationship is that lawyers owe their clients a duty of loyalty. Lawyers must be free from any political, economic or intellectual influence in executing their legal services. Without this independence the quality of the work cannot be guaranteed. It follows that the principle of independence requires that lawyers always act in the interest of their clients and in the absence of conflicting self-interests, undue influences or any other concerns that may interfere with client's best interest or the lawyer's professional judgment.

However, some jurisdictions see certain types of activity and the handling of certain matters as being incompatible with the independence of lawyers, while other jurisdictions see no conflict at all. For instance, in some jurisdictions it is forbidden for a lawyer who has been admitted to the bar to employ another lawyer who has also been admitted. Similarly, they cannot be employed by a corporation (as in-house counsel) as this is seen as compromising their independence. Thus in most civil law jurisdictions in-house lawyers are not given the privilege of confidentiality because of their lack of independence. Recently, at the EU level, the ECJ (in *Akzo*) maintained the principal by denying the legal professional privilege to an in-house lawyer in cartel investigations.<sup>132</sup> In contrast, other jurisdictions do allow lawyers to be employed. Some of these jurisdictions acknowledge lawyers' privilege (protection of independence and confidentiality) only in cases where the lawyer works for a client other than their employer, while other jurisdictions also grant this protection for work performed for the employer. For instance, in the United States and the United Kingdom courts have extended the lawyer-client privilege to in-house counsel as long as the in-house lawyer provides services rather than functioning in a non-legal business capacity.<sup>133</sup> However, a problem emerges when, for instance, an American qualified in-house counsel who has to follow their rules of conduct, works in a corporation in a jurisdiction that does not grant legal privilege to in-house counsel. If a procedure (like cartel investigations) is launched, lawyers may be obliged to disclose information, while at the same time they have a duty of confidentiality under their code of conduct.

### **b. Confidentiality**

The duty of confidentiality is based on the lawyer's role of receiving information from their clients that the client would not disclose to anyone else and their duty to treat this information in confidence. Confidentiality represents not only a duty to maintain clients' confidence, but it also provides protection against compelled disclosure of information related to the lawyer-client relationship. These two aspects of confidentiality are central to professional practice in most countries. However, there are differences in confidentiality rules between systems that emphasize client rights and those that place more emphasis on the lawyer's public obligations in the administration of justice.<sup>134</sup> The problem of double deontology emerges when one

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<sup>132</sup> *Akzo*, C- 550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission*, [2010], ECR I-8301.

<sup>133</sup> MOLITERNO/ HARRIS (2007), *above note 7*, pp. 114-140.

<sup>134</sup> HELLWIG (2003), *The Legal Profession in Europe: Achievements, Challenges and Chances*, *German Law Journal*, Vol. 4, No 3, 2003, pp. 263-276.

jurisdiction has reporting/disclosure requirements (such as those found in the Sarbanes-Oxley Act), while other jurisdictions have secrecy/confidentiality obligations. For example, Hellwig describes the situation of a German lawyer practicing in the United Kingdom. In this jurisdiction, lawyers are obliged to report cases where money laundering or other crimes are suspected. In this case the German lawyer was jailed for refusing to disclose information deemed confidential under German law.<sup>135</sup> Similarly, Ginsberg reports a 1996 case of foreign lawyers in China, when the Chinese Ministry of Justice required foreign law firms to submit client questionnaires that included confidential client information, which conflicted with the American duty of confidentiality.<sup>136</sup>

### **c. International Standards for Lawyers**

In the absence of an international, harmonized code of conduct, bar associations have had to develop a mechanism to solve the problem related to the conduct of lawyers practicing internationally. The first type of regulatory intervention is the adoption by some jurisdictions of unilateral choice-of-law rules. For instance, the American Bar Association has adopted the Model Rule 8.5 in order to resolve double deontology issues for American lawyers practicing overseas. However, this option does not entirely solve the problem as other jurisdictions apply different choice-of-law rules.<sup>137</sup>

The International Bar Association (IBA) has also attempted to respond to the needs of international lawyers. Their first effort was the IBA *International Code of Ethics*, adopted in 1956 and revised in 1988. This code was superseded by the IBA *International Principles on Conduct for the Legal Profession* adopted in May 2011.<sup>138</sup> These ten principles are common to the worldwide legal profession. They do not aim to cover all areas of lawyers' conduct in detail, but rather to reflect the common ground that underlies the various national and international rules that govern conduct, principally in relation to clients.<sup>139</sup> They are more a set of professional concepts than rules designed to provide meaningful guidance in case of rule conflicts.<sup>140</sup> Furthermore these principles are not binding.

At regional level, the Council of Bars and Law Societies of Europe (CCBE) adopted a Code of Conduct in 1988 (revised in May 2006)<sup>141</sup>. This is a more elaborate instrument that governs European lawyers. It has been adopted and integrated by bar associations in EU Member States (and other European countries such as Switzerland) and is binding.

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<sup>135</sup> *Idem*.

<sup>136</sup> GINSBERG (2004), *An Ethical Dilemma of American Attorney in China: The Conflict Between the Duty of Confidentiality to Clients and the Requirement of Disclosure to the Chinese Government*, in M. C. Daly & J. Goebels (eds), *Rights, Liability, and Ethics in International Legal Practice*, 2<sup>nd</sup> ed., August 2004, pp. 397-433, pp. 403-406.

<sup>137</sup> ROGERS (2009), *Lawyers without Borders*, *University of Pennsylvania International Law Review*, Vol. 30, No. 4, 2009, pp. 1035-1086.

<sup>138</sup> IBA (2011), *IBA International Principles on Conduct for the Legal Profession*, adopted at the Warsaw Council Meeting, 28 May 2011. It bears mention that apart of the IBA, the Union Internationale des Avocats (UIA) developed in 2002, *the Turin Principles of Professional Conduct for the Legal Profession on the 21st Century*, above note 13.

<sup>139</sup> IBA (2011), above note 137, Introduction, pt. 2-3.

<sup>140</sup> DALY (1999), *The Dichotomy Between Standards and Rules. A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by US and Foreign Lawyers*, *Vanderbilt Journal of Transnational Law*, Vol. 32, no. 4, October 1999, pp. 1117-1136, p. 1158.

<sup>141</sup> CCBE (2006), *Code of Conduct of European Lawyers*, 19 May 2006.

It was hoped that it could serve as a basis for a professional code of conduct that would apply to lawyers from WTO states.<sup>142</sup> However, this has not proved a viable option to date. Moreover, the European code does not provide solutions to all problems of international legal practice, such as those related to conflicting deontology.<sup>143</sup>

A coordinated cross-border enforcement mechanism, which goes beyond increased communication and dialogue, is needed. As Rogers describes, national authorities operate in domestic political and legal contexts. In the event that these authorities have to impose discipline based on the code of conduct of another jurisdiction, they may be unable to apply rules whose content may be both difficult to understand or contrary to their own rules. Therefore there is an emerging need for inter-jurisdictional cooperation so that authorities are able to discipline members based on the ethical rules of another jurisdiction.<sup>144</sup> The development of cooperation between American and European disciplinary bodies shows that some authorities have acknowledged this problem.

## **B. Impediments to Competition in the Legal Services Market**

The efficient functioning of international legal markets can be hampered by anticompetitive practices of private firms or professional associations. These practices include hard-core cartels, abuse of dominant positions or attempts to monopolize a market. These activities seriously undermine the efforts of law firms or lawyers to enter new markets. Sound competition law and advocacy can play an important role in providing the appropriate conditions for genuine market access.<sup>145</sup> However, with the exception of the EU, only national authorities are able to establish a competition law regime, which means that there are significant differences between states. While it is well-established in most developed countries that rules of competition apply to the legal profession, the same is not true in most developing countries. It follows that the discussions at international level on the application of competition law to the legal profession are twofold. On the one hand, it includes discussions among developed countries on the way to improve their regulations in order to prevent anti-competitive practices while, on the other hand, it entails the promotion of the application of sound competition law through PTAs in jurisdictions that do not have such regime, fostering regulatory reform in State partners.

At international level discussions date back to the mid-1980s, when an OECD report was published on the link between competition law and professional services.<sup>146</sup> It found that many professions were not subject to competition law and identified various practices that could be identified as anticompetitive. In 1997 the OECD Report on Regulatory Reform in Professional Services<sup>147</sup> assessed these anticompetitive practices as a basis for regulatory reform and discussions on further improvements.

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<sup>142</sup> TOULMIN (1991), *A Worldwide Common Code of Professional Ethics?* Fordham International Law Journal, Vol. 15, No. 5, pp.673-698, p.674-675.

<sup>143</sup> HELLWIG (2008), *At the intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation*, Northwestern Journal of International Law & Business, No. 27, No. 3, Fall 2008, pp. 395 - 401.

<sup>144</sup> ROGERS (2010), *Cross-Border Bankruptcy as a Model for Regulation of International Attorneys*, in Making Transnational Law Work in a Global Economy: Essays in Honor of Detlev Vagts, Cambridge University Press, pp. 630-654, 645-648.

<sup>145</sup> OECD (2008), *Taking Stock of Regulatory Reform: a Multidisciplinary Synthesis*, OECD Publishing.

<sup>146</sup> OECD (1985), *Competition Policy and the Profession*, OECD Publishing.

<sup>147</sup> OECD (1997b), *The OECD Report on Regulatory Reform, Volume I: Sectoral Studies*, OECD Publishing, pp. 117-154.

Since then, roundtable discussions on *Competition in Professional Services* took place in 1999<sup>148</sup>, followed in 2007 by further discussions on *Competitive Restrictions in the Legal Professions*.<sup>149</sup>

At the EU level, the EU Commission issued reports in 2004<sup>150</sup> and 2005<sup>151</sup> on competition and professional services, which included an analysis of the legal professions in EU Member States. In Switzerland, the State Secretariat for Economic Affairs ordered a study that analyzed the regulation of the legal profession in three Swiss cantons.<sup>152</sup> These reports aimed to provide the foundation for legal service regulatory reforms in developed countries such as EU Member States and Switzerland.

At the same time, the liberalization of legal services is influenced by PTA negotiations with developing countries. These discussions can identify and improve restrictive measures which, although they may be necessary to maintain quality of service or to prevent consumer injury, may at the same time limit competition. Restrictions that affected competition in the legal services market were identified. Some of these restrictions may limit market access (exclusive rights and entry restrictions), while others affect the supply or conduct of legal services (restrictions on fee-setting, advertising and the form of the practice). As the description of the EU process demonstrates, these restrictions affect both competition and trade.

## 1. Exclusive Rights

In most jurisdictions national lawyers have exclusive rights to provide representation in court. In some cases, these exclusive rights may extend to the provision of legal advice. Furthermore, entry into the legal profession may be reserved for individuals meeting certain quality standards and subject to quantitative restrictions. For instance, notaries from Latin countries enjoy a monopoly on *inter alia* the drafting and verification of certain legal documents and may provide real estate services.

While these restrictions are necessary to correct market failures, ensure quality and protect consumers against incompetent practitioners, they can also severely limit the access of qualified new entrants or the development of new products. In particular, differences between jurisdictions on what activities are defined to be the subject of exclusive rights may affect cross-border legal practice.

Several proposals to mitigate the impact of such measures have been put forward. These include limitations on the scope of exclusive rights to situations that require extensive and broad legal professional training. Other proposals aim to remove traditional distinctions between closely related fields, for example in jurisdictions where the provision of legal

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<sup>148</sup> OECD (2000), *Competition in Professional Services*, Policy Round Tables, Directorate for financial and Enterprise Affairs, Competition Committee, DAF/COMP (2000)2, 22 February.

<sup>149</sup> OECD (2009), above note 40.

<sup>150</sup> EU COMMISSION (2004a), *Report on Competition in Professional Services*, Communication from the Commission, COM (2004) 83 final, 9.2.2004.

<sup>151</sup> EU COMMISSION (2005b), *Professional Services- Scope for More Reform: Follow-up to the Report on Competition in Professional Services*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2005) 405 final, 5.9.2005.

<sup>152</sup> STEPHEN/ BURNS (2007), *Liberalization of Legal Services*, A. Brunetti & S. Michal (eds), *Services Liberalization in Europe: Case Studies*, Studies on behalf of the State Secretariat for Economic Affairs SECO, Bern.

services is divided into lawyers who can provide representation in court and those that can only provide legal counsel.<sup>153</sup>

OECD discussions highlighted the need to focus regulation of the legal profession on the protection of small-scale consumers. However, sophisticated commercial purchasers (e.g. large corporations) generally have legal departments that are in a position to assess their own needs and the quality of the services they purchase.

In the EU, the scope of exclusive rights has been examined both in the context of the application of competition law and trade in legal services. In *AM & S*<sup>154</sup> and *Akzo*<sup>155</sup>, the issue was whether legal privilege (the exclusive rights of the legal profession) extended to in-house lawyers in anti-trust proceedings. In *Akzo*, the ECJ ruled that despite difference of definition between Member States, legal privilege does not extend to in-house lawyers in EU anti-trust proceedings.<sup>156</sup> As for trade in legal services, differences in the scope of legal privilege between EU Member States may still be a barrier to trade (see *Säger*<sup>157</sup> and *Reisebüro Broede*<sup>158</sup>).

## 2. Entry Restrictions

In addition to exclusive rights, there may be qualitative or quantitative entry restrictions. Qualitative restrictions relate to qualification requirements such as the level or period of education and training and/or taking a professional examination. Alternatively, they may relate to licensing requirements or personal characteristics, such as citizenship and residency, language skills or moral integrity. Like exclusive rights these restrictions are necessary to maintain a high quality of service and protect consumers. However, they can affect competition in professional services by placing a limit on the number of suppliers in the market. Combined with the issue of exclusive rights, these measures can seriously affect competition and prevent the entry of new providers or new types of products into the market.

The general view resulting from OECD discussions was that entry restrictions that are unrelated to quality should be eased or eliminated. Where there is no alternative to exclusive rights, the entrance requirements into the profession holding the right should be commensurate with what is required to perform the service competently. Where competencies for different services differ widely, new professions should be created with different entrance requirements.<sup>159</sup>

The discussions also revealed that in some OECD countries entry into the legal profession is restricted as the number of law schools is limited (Ireland) or accreditation is restricted to a few schools (the United States). However, in other countries (Brazil, Poland and South Korea) the opposite is true: the pass rate to be accepted to the bar is artificially low. This suggests that there is a risk that regulations are abused to control entry for the profit of legal professionals rather than for the protection of the consumer. Therefore removing the legal profession's

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<sup>153</sup> OECD (1997b), *above note 147*, p. 126.

<sup>154</sup> *AM & S*, C- 155/79, *AM & S v. Commission*, [1982], ECR 1575.

<sup>155</sup> *Akzo*, *above note 131*.

<sup>156</sup> *Idem*, para. 114-115.

<sup>157</sup> *Säger*, C-76/90, *Manfred Säger v. Denmeyer & Co. Ltd*, [1991], ECR I-4221.

<sup>158</sup> *Reisebüro Broede*, *above note 14*.

<sup>159</sup> OECD (2000), *above note 148*, pp. 5-10.

control over the entry process is also seen as an important issue.<sup>160</sup> Finally, a range of proposals were put forward that aimed to increase the number of qualified providers by opening up access to the domestic market to professionals from other jurisdictions that have been assessed to have proven competence. For example, in federal states such as Germany or Switzerland lawyers from one state, with the same qualification, cannot practice in another state in the same country.<sup>161</sup> The same logic applies to the recognition of foreign qualifications.

In the EU context, the ECJ examined the question of entry restrictions to the legal profession under both competition and trade regimes. In *Mauri*, the ECJ dealt with a complaint about the composition of the committee responsible for the state bar examination in Milan, which allegedly did not allow an impartial assessment or provide a mechanism for proper competition. The ECJ held that competition law did not apply in this case as the Italian government had delegated its powers.<sup>162</sup> With respect to trade rules a series of ECJ cases dealt with recognition issues such as *inter alia* a failure to take into account existing qualifications (*Vlassopoulou*<sup>163</sup>) or existing academic diplomas (*Morgenbesser*<sup>164</sup>).

### 3. Restrictions on fee-setting

Fees paid by consumers for legal services can be based on hourly rates, the value of the case or a fixed fee. They can also be contingent on the outcome of the case. Restrictions on fee-setting can take several forms: mandatory fixed fees, mandatory maximum or minimum fees, recommended fees or restrictions on making the fee dependent on the outcome of the case.

Until recently, the most common form of fee regulation in OECD countries was the mandatory fee schedule. However, various competition authorities challenged these restrictions as anti-competitive and against the public interest. Consequently, while they still exist in states such as Italy, Germany, Turkey or the Czech Republic, they have become recommended fee schedules in most jurisdictions. Unlike mandatory fees, these are not binding, but serve as a guideline. However, some competition authorities still consider them to have a similar effect as the mandatory fee schedule. They base their arguments on the fact that it is unlikely that the fee actually charged will differ from that recommended.<sup>165</sup> There is clearly room for improvement. Finally, it should be noted that most regulations do not allow fees to be dependent on the outcome of the case. Although the practice is common in American jurisdictions, it is prohibited in most European jurisdictions and reforms seem unlikely in the near future.

The aim of these restrictions is to correct market failures or to serve a distributional purpose. It is argued that fee regulation is a useful tool to prevent adverse selection, which may result in a reduction in the number of high-quality service providers. Fixed or minimum fees may overcome this problem and maintain the quality of services. Fee regulation may solve the problem of moral hazard, where professionals may be tempted to provide unnecessarily high-

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<sup>160</sup> OECD (2009), *above note 40*, p. 11.

<sup>161</sup> OECD (1997b), *above note 147*, pp. 134-135.

<sup>162</sup> **Mauri**, C-250/03, Giorgio Emanuele Mauri v. Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano, [2005], ECR I-1267.

<sup>163</sup> **Vlassopoulou**, C- 340/89, Irène Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden- Württemberg, [1991], ECR 2357.

<sup>164</sup> **Morgenbesser**, C-313/01, Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova, [2003], ECR I-13467.

<sup>165</sup> EU COMMISSION (2004a), *above note 150*, pp.12-13.

quality services and charge excessive fees when the client would adequately be served by lower quality services at a lower price. Maximum fee restrictions aim to protect consumers against such risks. Finally, maximum fee restrictions can help to ensure that poor or middle-income consumers are able to afford high-quality services.

On the other hand, restrictions can severely affect competition between legal professionals and affect social welfare. Fixed or minimum prices prevent consumers from benefiting from lower prices in a competitive market. This is particularly true for certain standardized services, which are easily comparable. In addition, the removal of restrictions on fee setting may not only improve price competition, but also lead to a more efficient and innovative legal market. The general view is that rules that limit competitors from lowering prices are the most difficult to justify as being in the public interest.<sup>166</sup>

In the EU context, restrictions on fee-setting in Italy have resulted in several cases that have come before the ECJ. In *Arduino*<sup>167</sup> and *Hospital and Others*<sup>168</sup>, the ECJ rejected the application of EU competition law to the case on the grounds that Italian bar association did not publish a fee scale autonomously, but through delegated governmental power. In contrast, in *Cipolla* the adoption of minimum fees was found likely to render access to the Italian legal services market more difficult for lawyers from other EU Member States who would infringe TFEU rules.<sup>169</sup> More recently, in *Commission v Italy*, the ECJ ruled on whether the maximum fee infringed TFEU rules on the free movement of lawyers. In this case, the EU Commission failed to demonstrate that this system affected adversely access to the Italian legal services market under conditions of normal and effective competition and the claim was dismissed.<sup>170</sup>

Apart from specific cases related to legal services, the EU Commission found that the recommended minimum fee scale implemented by the Belgian Architects' Association had infringed TFEU rules on competition, a ruling that is relevant to the legal profession.<sup>171</sup>

#### 4. Advertising Restrictions

The promotion of legal services, particularly cross-border legal services, can be a key stage in access to new markets. It is essential for companies to be able to advertise their specialist know-how and capabilities, as these are the principal factors that differentiate them from the competition.<sup>172</sup> In addition, advertising can foster competition in the sector. It informs consumers about the different services available, the conditions under which they are provided and consequently helps consumers to make a better-informed decision. It also enables them to compare providers and contributes to enhanced market competition.

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<sup>166</sup> OECD (2009), *above note 40*, pp. 40-48.

<sup>167</sup> **Arduino**, C-35/99, Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA, [2002], ECR I- 1529.

<sup>168</sup> **Hospital Consulting**, C-386/07, Hospital Consulting Srl, ATI HC, Kodak SpA, Tecnologie Sanitarie SpA v. Esaote SpA, ATI, Ital Tbs Telematic & Biomedical Service SpA, Draeger Medica Italia SpA, Officina Biomedica Divisione Servizi SpA, [2008], ECR I-67.

<sup>169</sup> **Cipolla**, joint cases C-94/04, C- 202/04, Frederico Cipolla v. Rosaria Fazari and Stefano Marcino and Claudia Capodarte v. Roberto Meloni, [2006], ECR I-1142, para. 57-59.

<sup>170</sup> **Commission v. Italy**, C- 565/08, *Commission of the European Communities v. Republic of Italy*, [2011], ECR I-0000, para. 53.

<sup>171</sup> **Belgian Architects**, COM/38.549, Commission Decision of 24 June 2004 relating to a proceeding under Article 81 of the EC Treaty, Brussels 24 June 2004.

<sup>172</sup> EU COMMISSION (2002a), *above note 63*, pp. 27-30.

Finally, it can be used to inform consumers about new services or new providers, thereby stimulating innovation and the entry of newcomers.

However, advertising and marketing are subject to heavy regulation in the legal profession. In some cases, all advertising is prohibited (e.g. Lithuania), but in most cases restrictions apply to at least some aspects of advertising. Some deal with the form advertisements can take. For example, they prohibit the use of specific media or methods such as radio or television advertising or ‘cold calling’. Others restrictions limit the content of advertisements. While so-called informative advertising is generally allowed, price-based advertisements, comparisons with other practitioners and sometime even the mention of a specialization is prohibited (e.g. Greece). In certain cases advertising regulations are unclear, which in itself may deter legal professionals from using certain methods.<sup>173</sup>

Restrictions are generally claimed to be necessary to preserve the integrity and independence of the profession. They are also seen as a means to protect the public against incompetent providers or charlatans. The asymmetry of information between professionals and consumers means that consumers must be protected against the use of false and potentially misleading advertising. However, the restrictions may also seriously affect trade and competition. Numerous studies have demonstrated the effects of advertising restrictions on prices in the legal services sector. They all reach the same conclusion, which is that advertising restrictions result in consumers paying higher prices. In contrast, conclusions related to the effects of restrictions on quality are less unanimous.<sup>174</sup> It appears that restrictions on price advertising are an area where the rules could be relaxed.

However, in the United States, the Supreme Court (in the *California Dental Association* case) held that although the removal of price-related advertising restrictions might have an anti-competition effect, they also stressed that they could have a pro-competition effect. The ruling concluded that a more extended examination of the effect of these restrictions was necessary.<sup>175</sup>

OECD work on competition and the legal profession concluded that there is no justification for prohibiting advertising that is relevant, truthful and not misleading. Rules that prevent truthful advertising were said to be difficult to justify as being in the public interest. The OECD supported the application of competition laws that challenged these restrictive regulations.<sup>176</sup>

In the EU context, in the *EPI Code of Conduct* case, the EU Commission ruled on the Code of Conduct adopted by the Institute of Professional Representatives before the European Patent Office, which featured a provision prohibiting comparative advertising. The EU Commission held that such a prohibition was incompatible with the rules of the TFEU. It nevertheless recognized that the profession had a long tradition of virtually total prohibition of individual advertising and the supply of unsolicited services. Consequently, a move to total freedom risked confusing the public and damaging the image of the profession. Therefore the EU

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<sup>173</sup> EU COMMISSION (2004), *above note 150*, p. 13-15.

<sup>174</sup> For an overview see STEPHEN/ LOVE (2000), *above note 27*; INDECON (2003), *Indecon's Assessment of Restrictions in the Supply of Professional Services*, prepared for the Competition Authority (Ireland) by Indecon: International Economic Consultants- London Economics, March 2003.

<sup>175</sup> **California Dental Association**, *California Dental Association v. Federal Trade Commission*, Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 97-1625. Argued January 13, 1999- Decided May 24, 1999.

<sup>176</sup> OECD (2009), *above note 40*, p.12.

Commission granted a transitional period for the adoption of the ruling. This ruling demonstrated that the prohibition was not exempt from the application of competition law.<sup>177</sup> Beyond the legal profession, in *Doulamis*, the ECJ dealt with the case of restrictions on the provision of factual information about dental care services. The ECJ held that the case did not fall within TFEU competition rules.<sup>178</sup>

## 5. Restrictions on the Form of Practice

For a long time lawyers have been required to practice as individuals or in partnership with others in the same profession. At the same time regulations have restricted the composition of the partnership. Restrictions can take the form of prohibitions on incorporation or opening branch offices. Other restrictions relate to partnerships and corporate or employment relationships with non-legal practitioners. They may take the form of a prohibition of partnership between legal professionals, such as Legal Disciplinary Practices (partnerships between solicitors and barristers). However, in almost all jurisdictions they take the form of prohibitions on partnership with non-legal professionals (Multi-disciplinary Practices). Furthermore regulation may prohibit law firms from being owned and/or managed by non-lawyers.

The justification for these restrictions on the formation of companies is that unlimited liability has a strong disciplinary impact on professionals grouped in a partnership. The fear is that the practitioner's duty to their clients might be compromised if they are able to limit or share financial liability for malpractice, or if they are under the control of someone who is not subject to professional ethical requirements. In addition, restrictions on partnerships with non-legal professionals are based on the argument that the independence of lawyers and the avoidance of conflict of interest will be put at risk if they work with professionals that do not have similar ethical requirements.

On the other hand, these restrictions affect competition and have a negative impact on consumers. Bringing together the know-how of members of different professions within the same partnership would enable them to offer 'full services' to consumers. It also prevents consumers from benefiting from economies of scale. Furthermore, the internal exchange of information reduces the number of individual contacts between consumers and professionals saving transaction costs. All these benefits may lead to lower prices for the consumer and may promote innovation.

In the EU context, the ECJ in *Wouters* examined the question of partnerships between lawyers and other professionals. More precisely, it examined the regulation adopted by the bar of the Netherlands that prohibited partnerships between lawyers and accounting companies in the light of TFEU Treaty competition and trade rules. While it recognized that this prohibition affected competition and trade in legal services within the EU, it held that these restrictions were necessary for the proper practice of the legal profession as organized in the Member States concerned.<sup>179</sup>

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<sup>177</sup> **EPI Code of Conduct**, C- 1999/494, Commission Decision of 7 April 1999 relating to a proceeding pursuant to Article 85 EC Treaty, OJ L 106 1999, 23 April 1999.

<sup>178</sup> **Doulamis**, C- 446/05, Ioannis Doulamis v. Union des Dentistes et Stomalogistes de Belgique & Jean Totolidis, [2008], ECR I-1377.

<sup>179</sup> **Wouters**, above note 14, para. 73-110 and para. 119-123.

## **C. Trade Liberalization of Legal Services**

The modernization and internationalization of world economies have brought about the emergence of new types of legal services focused on sophisticated legal advice rather than local court activities. These changes in the legal profession have led many countries to reconsider the way in which they regulate the sector. It is generally agreed that trade liberalization plays a major role in this process.

As preliminary step, trade liberalization requires the identification of measures that are obstacles to cross-border legal practice. The previous sections identified the most significant barriers. Some of these measures, such as nationality requirements, are discriminatory and prevent cross-border activities. Other measures are non-discriminatory, but are seen as overly onerous. Finally, other issues, such as the failure to recognize foreign qualifications, go beyond the removal of discriminatory and non-discriminatory measures and require the development of specific rules.

The second step of the liberalization process consists of the development of instruments to mitigate the effects of these measures. Two sets of instruments can be distinguished: trade and competition and to a certain extent they have been integrated into trade agreements. This section first delimits the scope of each, before analyzing their implementation in the GATS and EU/EFTA/Swiss PTAS.

### **1. Trade and Competition Rules**

States use two sets of instruments to address measures affecting trade: trade and competition rules. Trade rules affect cross-border activities. Their purpose is to make the regulatory regime applicable to foreign suppliers more transparent. They are also designed to eliminate discriminatory measures and unnecessarily onerous non-discriminatory measures. Furthermore, some trade rules are aimed at improving recognition of foreign licenses and qualifications in order to foster cross-border trade.

In contrast competition instruments address rules adopted by private entities (e.g. bar associations) that affect competition in the domestic market. These rules come under national law. They address discriminatory and non-discriminatory measures that affect both competition between domestic suppliers and competition between domestic suppliers and foreign suppliers who are authorized to supply the domestic market.

Therefore, instruments addressing either trade or competition in the legal services sector may be covered by two different regimes with different consequences. Moreover, the scope of application of the respective regimes is not always straightforward. This is typically the situation for non-discriminatory measures, which may fall within the scope of both trade and competition rules. The importance of this distinction is becoming increasingly important as the WTO Secretariat points out, barriers to trade (discriminatory measures) have been lowered in a number of countries.<sup>180</sup> Consequently, the main criteria that can distinguish between which regime has been applied is the entity that adopted the measures.

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<sup>180</sup> WPDR (2012b), *above note 55*, p. 8.

The distinction between national regulations applicable to the legal profession, regulations adopted by bar associations through delegated powers and regulations enacted independently by bar associations has implications for the application of the trade, competition or trade liberalization regime.

For example, with regard to competition instruments, the ECJ in *Wouters* refined the scope of application of competition law to bar association regulations. This ruling found that competition provisions do not apply when a Member State has delegated regulatory power defined in terms of public interest criteria, but determines the essential principles with which the rules must comply and retains its decision-making powers. However, this does not apply when regulations are adopted independently by the professional association; in this case competition rules do apply.<sup>181</sup>

The situation is reversed in the application of trade instruments. These apply to both national legislation and bar association regulations enacted through delegated powers. The question remains of whether trade instruments apply to rules adopted independently by professional associations, which are designed to regulate service provision.<sup>182</sup> In the EU context, the ECJ confirmed that trade rules do apply in this situation on the grounds that the removal of obstacles to the freedom of movement of persons at a national level is compromised if associations or organizations not governed by public law can create their own barriers.<sup>183</sup> In the WTO context, Article I: 3 of the GATS states that the agreement applies to both measures taken by central, regional or local government and authorities, and measures taken by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. It follows that the GATS does not apply to regulations autonomously adopted by bar associations without delegated powers.

The previous sections have identified the most significant measures affecting trade and competition in legal services. These measures fall within the scope of one of the two regimes as shown in the following table:

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<sup>181</sup> *Wouters*, above note 14, para. 68-70; *Arduino*, above note 167.

<sup>182</sup> *Idem*.

<sup>183</sup> See *Walrave*, C-36/74, *Walrave v. Union Cycliste Internationale*, [1974], ECR 1405, para.17, 23 et 24; *Donà*, C- 13/76, *Donà v. Montero*, [1976], ECR 1333, para. 17 et 18; *Bosman*, C- 415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, [1995], ECR 4921, para. 83-84; *Angonese*, C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000], ECR I-4139, para.32.

**Table 2 Trade Liberalization of Legal Services**

| Trade Liberalization of Legal Services     |                                                  |                               |                                             |                    |                              |  |
|--------------------------------------------|--------------------------------------------------|-------------------------------|---------------------------------------------|--------------------|------------------------------|--|
| Trade Rules                                |                                                  |                               |                                             | Competition Rules  |                              |  |
| Transparency                               | Discriminatory Measures                          | Non-Discrimination Measures   | Access to local practice by Foreign lawyers | Market Access      | Conduct                      |  |
| Access to information                      | Nationality Requirements                         | Restriction on Name           | Limited Licensing                           | Exclusive Rights   | Restriction on Fee-setting   |  |
| Information on licensing procedure.        | Local/Residency requirement                      | Restriction on Fee-setting    | Full Licensing                              | Entry Restrictions | Prohibition of incorporation |  |
|                                            | Quota/ ENT                                       | Prohibition of in-corporation | Double deontology                           |                    | Restriction on Advertisement |  |
|                                            | Prohibition of in-corporation                    | Restriction on Advertisement  |                                             |                    |                              |  |
|                                            | Restriction on Fo-reign Investment               |                               |                                             |                    |                              |  |
|                                            | Restrictions on Partnership with foreign lawyers |                               |                                             |                    |                              |  |
| Restriction on employment of local lawyers |                                                  |                               |                                             |                    |                              |  |

The table shows that there are four types of barriers to cross-border legal practice: lack of transparency, discriminatory and non-discriminatory measures, and the failure to take into account existing licenses, qualifications or codes of conduct. Trade instruments address these barriers in various ways. They aim to promote transparency, eliminate any form of discrimination and, with respect to non-discriminatory measures, seek less onerous alternatives. Those related to recognition address the failure to recognize existing foreign competence. Finally, competition instruments can be applied to measures enacted by private entities that affect competition on the domestic market. Therefore five types of rules – translated into five principles – can be distinguished.

These principles were identified by the OECD as key elements for assessing the market openness of a regulatory system<sup>184</sup>:

1. Transparency
2. Non-discrimination
3. Avoidance of unnecessary barriers to trade
4. Recognition
5. Application of Competition Principles.

These elements underpin the structure of the GATS, PTAs and the TFEU to varying extents. Agreements such as the GATS or EU/EFTA/Swiss PTAs focus primarily on regulations related to transparency and non-discrimination; they place less emphasis on those related to the avoidance of unnecessary trade restrictions and recognition. At a deeper level the TFEU incorporates the foregoing elements and goes further through a focus on the avoidance of unnecessary trade restrictions and the application of competition principles. Consequently, the framework for analysis must be made clear depending on whether liberalization is being discussed under the GATS, PTAs or the TFEU.

## **2. Liberalization under the GATS and EU/EFTA/Swiss PTAs**

The GATS and EU/Swiss PTAs address, to a greater or lesser extent all five principles. However, the incorporation of competition issues into the WTO framework was rejected by some members together with other so-called *Singapore issues* (government procurement, trade facilitation, trade and investment, trade and competition). However, chapters on competition issues have been integrated in EU/EFTA/Swiss PTAs.

### **a. Transparency**

Transparency principles in trade agreements include two sets of obligations. The first deals with the availability of information concerning legislation and regulation. The second addresses procedural requirements for their administration, based on the premise that how rules are applied is as significant as the rules themselves.<sup>185</sup> Both the GATS and PTAs feature these obligations.

#### *i) Transparency under the GATS*

The GATS contains two provisions on transparency. Article III deals with the availability of information on legislation and regulations, while Article VI: 1–3 addresses procedural requirements for the administration of these measures.

Article III addresses transparency at intergovernmental level. It specifies four types of general obligations that are applicable regardless of whether the WTO has undertaken specific commitments. These are:

1. To *promptly publish* or *otherwise make publicly available* (e.g. on the Internet), all relevant measures of general application related to trade in services (Article III:1–2).

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<sup>184</sup> OECD (2008), *above note 145*, pp. 33–44.

<sup>185</sup> WTO-WGTI (2002), Transparency, Note by the Secretariat, Working Party on the Relationship between Trade and Investment, WT/WGTI/W/109, 27 March 2002.

2. To *notify* the Council for Trade in Services of any new laws or any changes to existing laws, regulation or administrative guidelines, which affect trade in the services sector covered by specific commitments (Article III: 3).
3. To *respond promptly* to all requests by any WTO Members for specific information on all relevant measures of general application related to trade in services (Article III: 4).
4. To *establish enquiry points* to provide specific information to WTO Members, on all relevant measures of general application related to trade in services (Article III: 4).

Article VI contains provisions to improve transparency in the relationship between domestic regulatory authorities and private entities. Unlike Article III it does not specify general obligations; it only applies in service sectors where specific commitments have been undertaken. Article VI: 1–3 specifies requirements for the administration of domestic regulations that affect trade in services.

1. The *general principle*: measures of general application affecting trade in services must be administered in a reasonable, objective and impartial manner (Article VI: 1).
2. The establishment or maintenance of *independent judicial and administrative review and appeals processes* for the review of administrative decisions affecting trade in services (Article VI: 2).
3. Where authorization is required for the supply of a service, the obligation to *provide information* on the reasons for the decision on the application and the obligation to *respond promptly* to requests for information about the status of application (Article VI: 3).

In addition Article VI: 4(a) states that “With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.” As a result ongoing negotiations are taking place under the auspices of the Working Party on Domestic Regulation (WPDR).<sup>186</sup>

#### *ii) Transparency in EU/EFTA/Swiss PTAs*

Recent EU PTAs (*EU-Korea*, *EU-Colombia-Peru* and *EU-CA*) go further than the GATS regime. Parties are obliged to *publish in advance* measures that may have an impact on the agreement, enable interested parties to *comment* on these measures and to *take into account the comments* received. They also implement points of contact that enable service providers to access information (in the GATS these are limited to governmental relations). Finally, the EU-Korea PTA goes further than Article VI: 1–3 of the GATS and specifies procedural transparency obligations even in service sectors where no commitments have been made.

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<sup>186</sup> WTO-WPDR (2011d), *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Chairman’s Progress Report, Working Party on Domestic Regulation, S/WPDR/W/45, 14 April 2011.

In contrast, EFTA agreements generally do not go much further than the GATS. Unlike the EU PTAs, EFTA agreements do not enable investors to comments on measures related to agreements. In addition, they usually do not provide for the establishment of enquiry points. On the other hand, the EFTA PTAs generally improve on the GATS procedural obligations on transparency by extending the scope of requirements to service sectors where parties have not made specific commitments.

## **b. Non-discrimination**

Three provisions in the GATS deal with non-discrimination issues. Article II (Most-Favored-Nation Treatment) addresses discrimination between WTO members. Article XVI (Market Access) and Article XVII (National Treatment) deal with discrimination between domestic and foreign suppliers. Article XVI features an exhaustive list of discriminatory and non-discriminatory measures that are prohibited, while other discriminatory measures are listed in Article XVII.

Article II is of general application in the sense that it applies to all services sectors and all WTO members, unless the sector is included in the list of exemptions (Article II: 2). In contrast, Articles XVI and XVII apply only to service sectors in which WTO members have undertaken specific commitments. They prohibit the adoption of discriminatory measures in these sectors unless the new restrictions are listed in a schedule of specific commitments. Therefore the schedule of commitments applicable to each WTO Member determines the sectors to which Article XVI and XVII apply and what restrictions are applied. In service sectors where there are specific commitments, WTO Members are free to maintain market access restrictions (Article XVI) or discriminatory restrictions (Article XVII), but have an obligation to include them in the schedules of commitments. If a WTO Member makes a commitment in one service sector and then maintains or enforce restrictions that go beyond this commitment it may become the subject of a Dispute Settlement procedure. Therefore these commitments make Members responsible and ensure certainty and predictability of service sector liberalization. Consequently, they provide protection for service suppliers in other WTO Member States.

The objective of GATS negotiations on market access is, on the one hand, to maximize the number of WTO Members making commitments and, on the other hand, to negotiate the removal of restrictions. Following the Uruguay Round, 76 out of a total of 153 WTO Members undertook commitments in the legal services sector. However, most of them have listed significant restrictions related to market access and national treatment.<sup>187</sup>

Under Article XIX of the GATS, within five years of its entry into force of the WTO Agreement Members were obliged to begin negotiations with the aim of increasing trade liberalization. Consequently, in 2001 in the framework of the Doha Round, WTO Members began so-called “market access negotiations”. This process will continue until the conclusion of the Doha Round, but the impact on the legal services sector is not expected to be far-reaching.<sup>188</sup>

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<sup>187</sup> WTO-CTS (2010d), *Legal Services*, Background Note by the Secretariat, Council for Trade in Services Special Session, S/C/W/318, 14 June.

<sup>188</sup> WTO-CTS (2011b), *Negotiations on Trade in Services*, Report by the Chairman Ambassador Fernando de Mateo to the Trade Negotiations Committee, Council for Trade in Services Special Session, TN/S/36, 21 April.

In parallel, an increasing number of WTO Members are negotiating improvements of their GATS commitments in the context of PTAs. Recent studies tend to confirm the trend and conclude that commitments undertaken in the context of PTAs not only go further than those contained in the GATS schedules, but also those under discussion in current GATS negotiations. Furthermore they have resulted in commitments by WTO Members who had not taken part in GATS negotiations (e.g. Caribbean states).<sup>189</sup> Legal services are no exception and substantial improvements to the commitments undertaken in the GATS context exist in both EU and Swiss PTAs.

### **c. The Avoidance of Unnecessary Trade Restrictions**

The *avoidance of unnecessary trade restrictions* are addressed within the framework of Article VI:5 entitled *domestic regulation* and limited to qualification and licensing requirements and procedure as well as technical standards. Pursuant to Article VI: 5 GATS in service sectors where they have undertaken commitments, WTO Members shall not apply licensing and qualification requirements and technical standards that nullify and impair such commitments with requirements that are more burdensome than necessary to ensure the quality of the service. The scope of this obligation is nevertheless limited to cases that could not reasonably have been expected of that Member at the time the specific commitments in those sectors in were made (Article VI:5 (a) ).

In addition, Article VI: 4 gives a mandate to the Council for Trade in Service to establish bodies to develop necessary disciplines on measures relating to licensing/qualification requirements and procedures and technical standards in order to ensure that they are not burdensome than necessary to ensure the quality of the service (Article VI:4 (b)). As a result ongoing negotiations are taking place on the development of disciplines for necessity tests within the Working Party on Domestic Regulation (WPDR). However, the strong opposition of important WTO Members<sup>190</sup> to the incorporation of a necessity test in the disciplines on domestic regulation makes the development of necessity test within the GATS extremely unlikely, despite the mandate of Article VI:4.

Generally, PTAs do not provide for substantial improvements in this sector and in most instances refer to the work undertaken within the GATS. Therefore, as Sauvé/Mattoo points out, the lack of significant improvements on domestic regulation issues under the PTAs, tends to show that the PTAs in the field have ceased to assume the role of rule-making laboratories.<sup>191</sup>

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<sup>189</sup> ROY/ MARCHETTI/ HOE (2007), *Services Liberalization in the new Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?*, World Trade Review, Vol. 6, No 2, pp. 155-192; ROY (2011), *Services Commitments in Preferential Trade Agreements: An Expanded Dataset*, WTO Staff Working Paper ERSD-2011-18, 9 November 2011.

<sup>190</sup> WTO-WPDR (2011c), *View on the Issues of the Necessity Test in the Disciplines on Domestic Regulation*, Working Party on Domestic Regulation, Communication from Brazil, Canada and the United States, S/WPDR/W/44, 22 March.

<sup>191</sup> SAUVÉ/MATTOO (2011), *Chapter 12: Services*, J-P Chauffour & J-C Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook*, World Bank, pp. 235-274, p. 247-248.

#### **d. Recognition**

GATS Articles VI and VII address procedural recognition issues. Beside transparency and necessity requirements stipulated in Article VI: 1–5, Article VI: 6 requires WTO Members to establish ‘adequate procedures’ for verifying the competence of professionals although without defining what these procedures should be.

Article VII is not an obligation but rather grants permission for the recognition of the education, experience, requirements met, or licenses or certification granted in a particular country. It is an exception to the Most-Favored-Nation principle (Article II), which prohibits discrimination between WTO Members. However, to correct the exception, Article VII: 2 requires WTO Members that have an agreement of recognition or who independently grant recognition to offer any other WTO Member the opportunity to demonstrate that it meets the same requirements and should benefit from the same treatment. It could be said that Article VI sets the procedural conditions for recognition, while Article VII provides conditions for the derogation from Most-Favored-Nation principles. It should be noted that in the context of the recognition of professional services that Guidelines on Recognition in Accountancy have been developed.<sup>192</sup>

#### **e. Competition**

In 2004, a large number of WTO Members rejected the incorporation of competition issues – with other so-called *Singapore issues* (government procurement, trade facilitation, etc.). Consequently there is no WTO agreement on competition and no agreement is expected. However, competition rules do exist in other WTO agreements such as the GATS.<sup>193</sup> In contrast, EU and EFTA/Swiss PTAs do include chapters on competition that apply to the whole agreement, in addition to competition rules that form part of the services chapter.

##### *i) Competition provisions in the GATS*

Competition rules are found both in provisions that apply to all services and to specific sectors. In general, “conditions of competition” criteria are used to define treatment at national level (Article XVII), which is accorded when the competition conditions are similar in the host country and that of other WTO Members. In addition, Article VIII deals with Monopolies and Exclusive Suppliers. It requires parties to PTAs that have exclusive service suppliers in their territories to refrain from actions that substantially prevent competition between service suppliers (both domestic and foreign). Finally sector-specific provisions on competition exist in the Annex on telecommunications services.

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<sup>192</sup> WTO- CTS (1997), *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/38, 28 May.

<sup>193</sup> ANDERSON/EVENETT (2006), *Incorporating Competition Elements into Regional Trade Agreements*, Paper prepared for the Inter-American Development Bank and World Trade Organization project titled Regional Rules in the Global Trading System, 17 July.

## ii) Competition provisions in PTAs

Like the GATS, EU and EFTA/Swiss PTAs contain provisions that address competition issues in their service chapters. Some provisions address all service sectors such as provisions on National Treatment and Monopolies and Exclusive Suppliers, while others are sector-specific related to telecommunications, financial and maritime transport services.<sup>194</sup>

Unlike the WTO agreements, EU and EFTA/Swiss PTAs generally contain a chapter dealing with competition issues, which feature the same type of rules. They define the types of practices that may affect trade between parties. They also have provisions on the implementation of competition policy, which require signatories to have established competition authorities and enacted competition law. They set out procedural requirements on transparency, non-discrimination, timeframes and other procedural requirements related to fairness. Furthermore, PTAs address, on a best-effort basis, the relationship between competition authorities through provisions on cooperation, information exchange and notification. Finally, some PTAs recognize the need for technical assistance. Generally these provisions are non-binding as they are excluded from the scope of dispute settlements.

This overview has shown that most trade liberalization efforts in legal services address transparency and non-discrimination issues. Provisions dealing with other trade issues, namely the *avoidance of unnecessary trade restriction*, *recognition* and the *application competition principles* provide a basis for further, future developments.

## 3. Liberalization under the TFEU

The Treaty on the functioning of the European Union (TFEU) is a far more sophisticated agreement than the GATS or PTAs. Consequently, it includes most of the principles of market openness. Furthermore, obligations are not only contained in the TFEU itself (primary law), but also in the regulations resulting from it (secondary law). Moreover, obligations resulting from both primary and secondary laws are enforceable before the ECJ, whose jurisprudence has greatly influenced the liberalization process within the EU. With regard to trade liberalization of legal services, several provisions apply: those on the free movement of workers (Articles 45–48), on the right of establishment (Articles 49–55) and on the free movement of services (Articles 56–62). ECJ case law relates to the application and interpretation of these provisions and has paved the way for trade liberalization in the legal services sector, although it should be noted that cases have primarily addressed the right of establishment and the free movement of services.

### a. Transparency

Article 15 of the TFEU enshrines transparency as a general principle, although it specifically addresses EU institutions. Unlike the GATS, the TFEU does not contain provisions that specifically address transparency in trade in services. Furthermore, it was only recently that the ECJ first applied<sup>195</sup> the general principle of transparency and it appeared in the operative

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<sup>194</sup> TEH (2009), *Competition Provisions in Regional Trade Agreements*, A. Estevadeordal/ K. Suominen/ R. Teh (eds), *Regional Rules in the Global System*, Cambridge University Press, pp. 418-419.

<sup>195</sup> **Commission v. Italy**, C- 260/04, *Commission of the European Communities v. Republic of Italy*, [2007], ECR I-7096, para. 24.

part of the judgment.<sup>196</sup> Subsequently, the ECJ has developed jurisprudence on transparency requirements that derive from the principle of non-discrimination based on nationality (Articles 49 and 56).<sup>197</sup>

With regard to trade in services, the entry into force of Directive 2006/123<sup>198</sup> *on the services in the internal market* (the “Services Directive”) was a fundamental step towards the adoption of meaningful transparency obligations concerning trade in services. With the exception of notary services (Article 2: 2 (I)), all legal services fall within the scope of the Directive.

Like the GATS, the Directive specifies obligations on the availability of information about legislation and regulation and the procedural requirements for the administration of these measures. However, the scope of the Directive is much broader. Not only does it contain obligations at governmental level (like the GATS), but it also specifies the transparency obligations of both services providers and the recipients of these services.

With regard to obligations at governmental level, like Article III of the GATS, the EU Directive specifies an obligation to establish a single point of contact (Article 6). It also contains provisions on the type of information that must be accessible to providers and recipients (Article 7)<sup>199</sup>, requires mutual assistance in the supply of information about service providers (Article 28: 1 and 29) and requires authorities to provide a quick response to requests for information from other authorities (Article 28: 5). It also lays down the foundation for effective cooperation between authorities in order to ensure the supervision of services providers and the service they provide (Articles 30–33).

With respect to service providers, Article 10: 2 requires that the conditions for authorization to practice must be clear and unambiguous, objective, made public in advance, transparent and accessible. Article 22 lists the information that must be made available to the recipients of services. The Directive also contains obligations related to discrimination and proportionality, which are described in the following sections.

Finally, with respect to legal services, it should be noted that the EU Commission has a webpage dedicated to the conditions of practice for EU lawyers in Member States.<sup>200</sup>

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<sup>196</sup> PRECHAL/ DE LEEUW (2008), *Transparency: A General Principle of EU Law*, U. Bernitz, J. Nergelius & C. Gardner (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, pp. 201-242.

<sup>197</sup> **Sporting Exchange**, C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, [2010], ECR I-4695, para. 40-41; **Engelmann**, C-64/08, *Engelman*, [2010], ECR I-0000, para. 50. **Costa Cifone**, C- 72/10 and C- 77/10, *Marcello Costa and Ugo Cifone*, [2012], ECR I-0000, para. 72-74.

<sup>198</sup> Directive 2006/123 EC of the European Parliament and the Council of 12 December 2006, *on services in the internal market*, 27 December 2006, OJ L 376/36.

<sup>199</sup> Such as procedures and formalities to be completed in order to provide services; the contact details of competent authorities; the means of redress in the event of dispute or contact details of the associations or organization other than competent authorities from which services providers or recipients may obtain practical assistance.

<sup>200</sup> EU COMMISSION (2004b), *European Judicial Network in Civil and Commercial Matters: Legal Professions*, 17.08.2004, <http://ec.europa.eu/civiljustice/.htm> (last visit on 1.10.2012) (last visit: 1.10.2012).

## **b. Non-discrimination**

The non-discrimination principle is addressed in general by Article 18 of the TFEU. This Article prohibits any discrimination on grounds of nationality within the scope of the Treaty. The principle is also contained in provisions related to the free movement of workers (Article 45(2)), the right of establishment (Article 49(2)) and the free movement of services (Article 57(2)). Furthermore with respect to secondary law, Directive 2004/38 goes into more detail on this principle.

The ECJ has also ruled on several cases related to non-discrimination. Early cases dealt with direct (or overt) discrimination. In 1974 (*Reyners*) the ECJ ruled that Belgian law, which only authorized Belgian nationals to become lawyers breached Article 49.<sup>201</sup> In the same way, in 2011 the ECJ ruled that the nationality requirements for notaries were also contrary to Article 29.<sup>202</sup> In other cases, the ECJ extended the prohibition on discrimination to indirect discriminatory practices. These involve measures that seem non-discriminatory but which actually have a great impact on nationals of other EU Member States. In *Van Binsbergen* the ECJ ruled that residency requirements for the provision of legal advices on a temporary basis were contrary to Article 57 on the free movement of services.<sup>203</sup> In the same way, the ECJ ruled in *Klopp* that the French requirement to only maintain chambers in one location in order to practice breached Article 49 on the right of establishment.<sup>204</sup>

However, it must be stressed that discriminatory measures can still be justified on the grounds of public or general interest. For direct discriminatory measures, derogations are limited to those mentioned in Articles 52(1) and 62. For indirect discriminatory measures, the ECJ recognizes that there is non-exhaustive list of national interests (such as consumer protection or the administration of justice) that may justify derogations to the non-discriminatory principle. Thus, for instance in *Gullung*, the ECJ ruled that the requirement for all lawyers to be registered with a bar association before being allowed to practice could be justified on the grounds of ensuring the observance of moral and ethical principles and disciplinary control of the activity of lawyers.<sup>205</sup> Nevertheless, to be declared compatible with TFEU obligations, derogations for both direct and indirect discrimination must be appropriate to the declared objective and not go beyond what is necessary to attain it.

## **e. Avoidance of Unnecessary Trade Restrictions**

In the light of EU obligations the analysis of measures at a national level has shifted from an assessment of non-discriminatory practices to a market access approach which examines *the avoidance of unnecessary trade restrictions*. In the 1990s ECJ jurisprudence progressively extended the scope of the Treaty to non-discriminatory national measures (direct or indirect) that hamper market access.

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<sup>201</sup> *Reyners*, above note 74.

<sup>202</sup> *Commission v. Austria*; *Commission v. Belgium*; *Commission v. France*; *Commission v. Germany*; *Commission v. Greece*; *Commission v. Luxemburg*; *Commission v. Portugal*, above note 75 to 81.

<sup>203</sup> *Van Binsbergen*, above note 89.

<sup>204</sup> *Klopp*, above note 90.

<sup>205</sup> *Gullung*, C292/86, *Claude Gullung v. Conseil de l'ordre des avocats de Colmar et de Sauverne*, [1988], ECR I-111.

Beginning with *Säger*<sup>206</sup> concerning the free movement of services, the ECJ applied the same reasoning to the right of establishment provisions in *Kraus*<sup>207</sup> that had been confirmed and fine-tuned in *Gebhard*.<sup>208</sup> Later, the approach was extended to other freedoms (the free movement of workers,<sup>209</sup> citizens<sup>210</sup> and capital<sup>211</sup>).

The result of these changes is that unless Member States can justify their conduct, any national rule that prohibits or restricts freedom of movement breaches the TFEU. Consequently the focus is no longer on whether the measure in question discriminates, but rather on whether it affects trade and if it is justified. To comply with the obligations of the Treaty it must fulfill four conditions, namely: it must be applied in a non-discriminatory manner, it must be justified by imperative requirements that are in the general interest; it must be appropriate to the achievement of the objective being pursued and it must not go beyond what is necessary to attain the objective.<sup>212</sup>

In addition to obligations originating in the Treaty and EJC jurisprudence, a set of secondary laws have been enacted in order to facilitate the free movement of lawyers. These are Directive 98/5 EC<sup>213</sup> derived from the right of establishment provisions and Directive 77/249 EEC<sup>214</sup> derived from free movement of services provisions, together with the associated case law.

#### d. Recognition

In addition to questions related to the free movement of people, the ECJ has had to deal with issues concerning the free movement of qualifications, in other words recognition issues. It quickly became apparent that the principle of non-discrimination might itself constitute an obstacle to free movement<sup>215</sup> as if foreign lawyers were treated in exactly the same way as domestic lawyers (i.e. without taking into account qualifications acquired in their home country) they would be discriminated against as they would have to start the whole process of qualification again in the host state.

In 1977, the ECJ in *Thieffry*<sup>216</sup> ruled on the refusal by the Parisian bar association to admit a Belgian lawyer on the grounds that he did not have French law degree. Their decision was taken despite that fact that the lawyer's Belgian law degree was recognized as equivalent to a French law degree and the lawyer had passed the French bar exams. The ECJ ruled that this

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<sup>206</sup> *Säger*, above note 157.

<sup>207</sup> *Kraus*, C-19/92, *Diter Kraus v. Land Baden-Württemberg*, [1993], ECR I-1663.

<sup>208</sup> *Gebhard*, C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995], ECR I-4165.

<sup>209</sup> *Commission v. Denmark*, C-464/02, *Commission of the European Communities v. Kingdom of Denmark*, [2005], ECR I-7929.

<sup>210</sup> *Tas-Hagen*, C-192/05, *Tas-Hagen Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, [2006], ECR I-10451.

<sup>211</sup> *Commission v. Portugal*, C-367/98, *Commission of the European Communities v. Portuguese Republic*, [2002], ECR I-4731.

<sup>212</sup> *Gebhard*, above note 208, para. 37.

<sup>213</sup> Directive 89/5 EC of the European Parliament and the Council of 16 February 1998, *to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>214</sup> Directive 77/249, above note 128.

<sup>215</sup> BARNARD (2010), *The Substantive Law of the EU: the Four Freedoms*, 3<sup>rd</sup> ed., Oxford University Press, pp. 295-355.

<sup>216</sup> *Thieffry*, C-71/75, *Jean Thieffry v. Conseil de l'ordre des avocats de Paris*, [1977], ECR 756.

constituted an unjustified restriction on the right of establishment. In 1991 the ECJ went a step further in *Vlassopoulou*<sup>217</sup>, where a Greek lawyer who worked in Germany advising on Greek and EU law had her application to join the local bar association rejected on the grounds that she did not have a German qualification. The ECJ ruled that even in the absence of discrimination on the basis of nationality, national qualification requirements could impede citizens of other Member States exercising their right of establishment. The principle was clearly demonstrated by national rules that took no account of the knowledge and qualifications already acquired in another Member State.<sup>218</sup>

The ruling went on to mention that Member States must take into consideration the professional qualifications of citizens of other Member States by comparing the diplomas, certificates, other formal qualifications and relevant professional experience with the professional requirements laid down in national rules. If the comparison demonstrates that the holder has knowledge and qualifications that are at least equivalent to national diplomas, then the host state is obliged to recognize the diploma. On the other hand, if the comparison reveals that the applicant only partially meets the necessary requirements the host Member State can require the applicant to demonstrate that they have since acquired the relevant knowledge and qualifications, which then has to be taken into account.<sup>219</sup>

This ruling established the principle of recognition. It has since been developed and harmonized in secondary law. Directive 89/48<sup>220</sup> subsequently replaced by Directive 2005/36<sup>221</sup> dealt specifically with the recognition of professional qualifications. These Directives are supplemented by ECJ case law. However, they do not necessarily cover all issues related to recognition. In other cases, the principles established by the ECJ in *Vlassopoulou* can be applied, as was the case in 2003 in *Morgenbesser*<sup>222</sup> or in 2009 in *Pesla*.<sup>223</sup> As it stands at the moment, EU lawyers may gain admission to the profession in other EU Member States as local lawyers through two procedures: three years of practice in the Member State (Directive 98/5) or recognition of qualifications (Directive 2005/36). In *Ebert*, the ECJ ruled that these two procedures were complementary, which enables lawyers to choose between them.<sup>224</sup>

## e. Competition

Articles 101–109 of the TFEU relate to the application of competition principles. ECJ jurisprudence and Commission decisions related to the regulation of legal services also play a significant role. Regulations related to the form the practice may take<sup>225</sup> and fee-setting<sup>226</sup> have been examined. In this respect, the advocacy role of the EU Commission deserves some attention. The Commission has adopted three reports on competition in professional services:

<sup>217</sup> **Vlassopoulou**, above note 163.

<sup>218</sup> *Idem*, para. 15.

<sup>219</sup> *Idem*, para. 16–22.

<sup>220</sup> Directive 89/48 EEC of the Council of European Communities of 21 December 1988, *on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration*, 24 OJ L 19.

<sup>221</sup> Directive 2005/36, above note 124.

<sup>222</sup> **Morgenbesser**, above note 157.

<sup>223</sup> **Pesla**, C-345/08, *Krzysztof Pesla v Justizministerium Mecklenburg-Vorpommern*, [2009], ECR I-11677.

<sup>224</sup> **Ebert**, C-359/09, *Donat Cornelius Ebert v. Budapest Ügyvédi Kamara*, [2011], ECR I-00269.

<sup>225</sup> **Wouters**, above note 14.

<sup>226</sup> **Arduino**, above note 167; **Cipolla**, above note 169; **Mauri**, above note 162; **Hospital Consulting**, above note 168.

“On Competition in Professional Services”<sup>227</sup>, “Progress By Member States in Reviewing and Eliminating restrictions to Competition in the area of Professional Services”<sup>228</sup> and “The Professional Services – Scope for More Reform: Follow-up to the Report on Competition in Professional Services”<sup>229</sup>.

## D. Conclusion

This chapter on regulation and liberalization aimed to establish the foundation for an analysis of the liberalization of trade in legal services. It began with an examination of existing instruments in the sector, based on the regulations of various EU Member States. It appears that despite differences between Member States in the organization of the legal profession and their approach to regulation, some common features can be identified. Specifically, two types of regulation could be distinguished: those addressing access to the profession (such as reserved activities and licensing requirements) and those dealing with the conduct of legal professionals (such business form, advertising and fees). The justification for the adoption of such regulations is generally given as protection of the public interest (e.g. correction of market failures or protection of non-economic interests) and/or the promotion of private interests (where bar associations play an ambiguous role). However, as regulation of the legal profession is essentially local it may result in impediments to cross-border legal services. Consequently, a certain number of barriers to trade in legal services were identified.

The internationalization and modernization of economies has progressively put into question the adequacy of legal sector regulation. This has obliged governments to reconsider the way they regulate the sector. Liberalization can take place on a unilateral basis in the general context of regulatory reform. However, in most instances it occurs within multilateral or regional agreements that contain various rules to foster trade in services.

This chapter identified five types of rules that are considered as fundamental steps in the liberalization of legal services: improvements in the transparency of the regulatory regime, the elimination of discriminatory measures, the avoidance of unnecessary barriers to trade, the recognition of qualifications and the application of competition law.

The scope of these rules differs depending on the depth of integration of agreements. A comparative analysis of the GATS, PTAs and the TFEU shows that the GATS and PTAs revolve around the development of rules on transparency and non-discrimination, while the development of rules related to the avoidance of unnecessary restrictions, recognition and the application of competition principles is still at an early stage. However, the process continues to evolve and the experience of the EU on the liberalization of legal services may serve as a reference for further improvements. This is the point that is addressed in the following chapter – starting with an analysis of the liberalization of trade in legal services within the GATS.

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<sup>227</sup> EU COMMISSION (2004), *above note 150*.

<sup>228</sup> EU Commission (2005a), *Progress By Member States in Reviewing and Eliminating restrictions to Competition in the Area of Professional Services*, Commission Staff Working Document, COM (2005) 405 final, 5.9.2005.

<sup>229</sup> EU Commission (2005b), *above note 151*.

## CHAPTER 2: THE GATS AND LEGAL SERVICES

The General Agreement on Trade in Services (GATS) is the first multilateral trade agreement to cover trade in services. It is the result of the Uruguay Round negotiations, which concluded in 1995. Before the GATS, all agreements related to trade in services took place on a regional basis, the EU and the North American Free Trade Agreement (NAFTA) being the most comprehensive. The Preamble of the GATS states its objectives; these include the promotion of the economic growth of all trading partners and developing countries. The GATS was designed to be a multilateral framework of principles and rules for trade in services. It aimed to expand trade in services under conditions of transparency and progressive liberalization, through successive rounds of multilateral negotiations. At the same time, the Preamble recognizes the right of WTO Members to regulate and introduce new regulation on the supply of services in their territories in order to meet national policy objectives.

The GATS seeks to strike a balance between two principles: the progressive liberalization of services, and the right of WTO Members to introduce regulation in order to meet national policy objectives. These two principles are reflected in its structure, which contains provisions that enable WTO Members to tailor their liberalization efforts, and provisions that establish a framework for negotiations on further liberalization. The GATS contains four types of rules related to: general obligations, specific commitments, negotiations and institutional provisions.

*General obligations* apply to all WTO Members regardless of whether they have undertaken specific commitments. In the context of this study the most relevant provisions are Article II concerning Most-Favored-Nation Treatment (MFN), Transparency (Article III) and Recognition (Article VII). Some general obligations are tied to specific commitments, i.e. they are only binding in sectors where specific commitments have been made. These are referred as *conditional general obligations*. This underscores the complementary function of GATS provisions, which aim to ensure that liberalization measures (negotiated and inscribed in individual schedules of commitments) are not undermined by inadequate domestic regulation. The typical example is the Domestic Regulation provision (Article VI), which requires the Council for Trade in Services to ensure that non-discriminatory regulations are transparent and “not more burdensome than necessary to ensure the quality of the service”.

The second types of GATS rules are provisions on *specific commitments*. Liberalization operates essentially through these commitments, which revolve around the question of discrimination. These rules constitute the core of the negotiations between WTO Members. They enable Members to tailor their liberalization efforts to their level of development: each Member may liberalize the service sector it deems appropriate (as result of negotiations with other Members) and may choose the way to do it as a result of negotiations within the WTO. Liberalization measures are registered in the schedule of commitments, which vary from one WTO Member to another and form part of the GATS by virtue of Article XX: 3 (Schedules of Specific Commitments). The GATS requires each Member to negotiate and schedule the liberalization measures they intend to provide to foreign suppliers. *Specific commitments* are limited to three provisions: Market Access (Article XVI), which is an exhaustive list of mostly harmful quantitative measures; National Treatment (Article XVII), which deals with discriminatory treatment for foreign providers; and Additional Commitments (Article XVIII), which enables WTO Members to negotiate commitments for items that do not fall within the scope of Articles XVI and XVII.

The third types of provisions deal with *negotiations*. Thus Article XIX:1 (Negotiation of Specific Commitments) provides that, “no later than five years from the date of the conclusion of the Uruguay round, WTO Members shall enter into successive rounds of negotiations and periodically thereafter with a view to achieving progressively higher level of liberalization”. Consequently, negotiations started in 2001 in the Doha Round and are ongoing. In addition to this general obligation, various other GATS provisions concern negotiations. Article VI: 4 entrusts the Council for Trade in Services, through “appropriate bodies”, with the duty to “develop any necessary disciplines” in the field of domestic regulation. In the same way, Article X: 1 on Emergency Safeguard Measures, Article XIII: 2 on Government Procurement and Article XV:1 on Subsidies provide timeframes (no later than three years following the conclusion of the Uruguay Round) for further negotiations in these fields, often referred as GATS Rules.

Finally, the GATS contains *institutional* provisions (Articles XXII–XXVI). Some of these aim to ensure compliance with the commitments made by Members. For example, Article XXIII sets out a consultation mechanism, while Article XXIII contains provisions for a Dispute Settlement Understanding in the case of non-compliance. Other provisions address the functioning of the GATS itself. Article XXIV entrusts the Council for Trade in Services (and its subsidiary bodies) with the operation of the GATS. Currently there are five subsidiary bodies: the Working Party on Domestic Regulation (WPDR), the Working Party on GATS Rules (WPGR), the Committee on Specific Commitments (CSC), and the Committee on Trade in Financial Services (CTFS). Under the auspices of these subsidiary bodies, Members meet periodically to negotiate the development of disciplines (in the WPDR or WPGR) or negotiate specific issues (in the CSC or CFTS). The Council for Trade in Services itself, which meets in Special Session, is responsible for overseeing the negotiations. Subsidiary bodies report the results of their work to the Council. The CTS is also the place where Members meet to make proposals and discuss various trade issues, which are a valuable source of information on the progress of negotiations.

The previous chapter identified five principles for the liberalization of legal services, namely: transparency; non-discrimination; the avoidance of unnecessary restrictions; recognition and the application of competition principles. The GATS incorporates all these principles to a greater or lesser extent. The exception is competition, which has been ruled out of WTO negotiations. This chapter examines the liberalization of legal services in the GATS context from the perspective of the remaining four principles. It first identifies the scope of the agreement with respect to legal services. It then analyzes the four principles in the context of the GATS framework. Finally, it examines negotiations on legal services that are taking place in the Doha Round of negotiations. It should be noted that the analysis focuses on the main GATS provisions, although there are other rules that could potentially apply to the legal services sector (e.g. Article V<sup>bis</sup> and Article XIV).

## I. The scope of the GATS

The scope of the GATS is defined in Article I: 1, “This Agreement applies to measures by Members affecting trade in services.” This underlines the fact that the GATS is an agreement to regulate government measures affecting trade in services. Therefore a first step is to identify the measures that come under the scope of the GATS. Only then it is possible to determine whether a particular measure infringes GATS rules.

The WTO Appellate Body stressed the importance of this two-step analysis in *Canada-Autos*.<sup>1</sup> The panel had argued that the determination of whether a measure affected trade in services could not be done without examining whether the effect of such a measure was consistent with the Member’s obligations and commitments under the GATS.<sup>2</sup> The Appellate Body rejected this interpretation stating that:

The fundamental structure and logic of Art. I (1), in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the constituency of that measure with any substantive obligation of the GATS can be assessed. (...) We find, therefore, that the Panel should have inquired, as a threshold question, into whether the measure is within the scope of the GATS by examining whether the import duty exemption is a measure “affecting trade in services” within the meaning of Article I. In failing to do so, the Panel erred in its interpretative approach.<sup>3</sup>

Therefore an initial examination must be made of whether a measure affects trade in services. Four distinct elements can be identified: services, trade in (legal) services, measures by Members and measures affecting trade (in legal services).

### A. Services: Definition of Legal Services

The term service is defined in Article I: 3 (b) and (c), which say:

“Services” includes any service in any sector except services supplied in the exercise of governmental authority;

“a service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis nor in competition with one or more services suppliers.

These provisions underline the broad scope of the GATS: the agreement applies to measures affecting trade in services in all sectors except for services supplied in the exercise of governmental authority. In the context of the legal sector, activities related to the administration of justice (such as judges, court clerks, public prosecutors, state advocates) are excluded.<sup>4</sup> In addition, two Annexes exclude some aspects of *Air Transport Services*<sup>5</sup> and *Movement of Natural Person supplying services*<sup>6</sup> from its scope.

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<sup>1</sup> **Canada-Autos**, Appellate Body Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, adopted 19 June 2000, DSR 2000: VI, 2985, Para. 150-152.

<sup>2</sup> **Canada-Autos**, Panel Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000: VII, 3043, Para. 10.234.

<sup>3</sup> **Canada-Autos**, Appellate Body Report, *above note 1*, Para. 150-152.

<sup>4</sup> ADLUNG (2006), *Public Services and the GATS*, Journal of International Economic Law, vol. 9, No. 2, June 2006, pp. 455-485.

<sup>5</sup> § 2 of the Annex on Air Transport Services.

<sup>6</sup> § 2 of the *Annex on Movement of Natural Persons Supplying Services under this agreement*, which provide that “the agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis”.

With the exceptions described above, the GATS covers virtually all types of legal services. The first problem is that this includes the practice of domestic law that most WTO Members do not want to liberalize (e.g. representation before local courts). A second problem is that the documentation that forms the basis for the liberalization of legal services is oriented towards domestic law and do not reflect the reality of cross-border activities. This has required Members to develop a definition of legal services that reflects their transnational nature, which in turn has resulted in diverging understandings between WTO Members. Therefore a large part of the negotiations have focused on agreeing a definition of transnational legal services.

Before we look at the proposals put forward by WTO Members on a new definition of legal services we will first examine the documentation in question.

## **1. Background Information: W/120 and CPC**

When WTO Members agree to liberalize a service sector, they record the sector in the schedule of commitments and define the level of liberalization they are prepared to commit to. In order to enter the sector in the schedule of commitments, Members must have a shared description of services. A document known as the *Services Sectoral Classification List*<sup>7</sup> (W/120) contains a list of services and was intended to establish a common format and terminology. Although this document is not mandatory, most WTO Members have adopted it. W/120 was agreed during the Uruguay Round and is largely based on the *United Nations Central Product System*<sup>8</sup> (CPC).

The W/120 is a far more aggregated classification than the CPC. It contains 12 sectors (11 are specified and one “other”) and more than 150 sub-sectors. On the other hand the CPC classification consists of 10 Sections, 295 Groups, 1,050 Classes and 1,811 Subclasses<sup>9</sup>. Where the W/120 refers to a service in a sub-sector (e.g. legal services), it also mentions the corresponding CPC number, which adds a more detailed description of the service.

In *US-Gambling*, the Appellate Body described both documents and the relationship between them:

W/120 consists of a table of 12 two columns. The left column is entitled “SECTORS AND SUBSECTORS” and consists of a list classifying services into 11 broad service sectors, each divided into several sub-sectors (more than 150 in total). The right column is entitled “CORRESPONDING CPC” and sets out, for nearly every sub-sectors listed in the left-hand column, a CPC number to which that sub-sector corresponds.

(...) the CPC is a detailed, multi-level classification of goods and services. The CPC is exhaustive (all goods and services are covered). The CPC consists of “Sections” (10), “Divisions” (69), “Groups” (295), “Classes” (1,050) and “Subclasses” (1,811). Of the 10 “Sections” of the CPC, the first five primarily classify products.

They are based on the Harmonized Commodity Description and Coding System and are not referred to in W/120. The second five Sections of the CPC primarily classify services, and all references in W/120 are to sub-categories of these five Sections.<sup>10</sup>

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<sup>7</sup> WTO SECRETARIAT (1991), *Services Sectoral Classification List*, Note by the Secretariat, WTO Doc. MNT.GNS/W/120, 10 July.

<sup>8</sup> UNSTATS (1991), *CPC detailed structure and explanatory notes*: <http://unstats.un.org> (last visit: 1.10.2012).

<sup>9</sup> *Idem*. Para. 200.

<sup>10</sup> **US-Gambling**, Appellate Body Report, United States- Measures affecting the Cross-Border Supply of

In this case, the Appellate Body underlined that a reference to a CPC “Group”, in the absence of any indication to the contrary, should be understood as a reference to all “Classes” and “Subclasses” that constituted the Group<sup>11</sup> and stressed that the same was true when Members excluded a service from the scope of a commitment, i.e. when a commitment is made in a subsector identified in W/120 and the excluded service was more disaggregated than that subsector.<sup>12</sup>

Moreover, differences between these two documents gives rise to the question of which should take priority in the case of conflict. In *Canada-Autos*, the Panel ruled that the CPC should prevail.<sup>13</sup> To date, the Appellate Body has not had to pronounce on the issue. However, in its report on *EC-Bananas III*, it made clear that the CPC classification was crucial in classifying services.<sup>14</sup>

Although it is important to have a common format and terminology in scheduling, the use of either the W/120 or the CPC is not mandatory. WTO Members remain free to provide their own definition or classification. However, if they do so, they must provide a definition or classification that is sufficiently detailed to avoid any ambiguity regarding the scope of the commitments.<sup>15</sup>

It is possible that the question of the legal validity of the W/120 might eventually arise. With respect to trade in goods, the equivalent document (the *Harmonized System*) was acknowledged to be legally valid by the Appellate Body<sup>16</sup> who ruled that it must be taken into account whenever an issue regarding the interpretation of a commitment arises. In contrast, the W/120 is seen as supplementary. This means that it can only be cited under the restrictive conditions of Article 32 of the Vienna Convention on the Law of Treaties.<sup>17</sup>

Neither the W/120 nor the CPC sufficiently address the transnational nature of legal services, which has resulted in a lack of coherence and quality in commitments. Various WTO Members have tabled proposals to address the issue and they are examined in the following sections.

## 2. The Definition of Legal Services

The W/120 lists legal services as one of many in the category of Professional Services. The corresponding CPC number is 861. The CPC Group ‘861-Legal Services’ is more detailed and is divided into four Classes:

- 8611 Legal advisory and representation services in the different fields of law
  - 86111 Legal advisory and representation services concerning criminal law
  - 86119 Legal advisory and representation services in judicial procedures concerning other fields of law.

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Gambling and Betting Services, AB-2005-1, W/DS/R (7 April 2005), para.172.

<sup>11</sup> Idem.

<sup>12</sup> **US-Gambling**, Appellate Body Report, *above note 9*, para. 203.

<sup>13</sup> **Canada-Autos**, Panel Report, *above note 2*, para. 10.279-10.282.

<sup>14</sup> **EC-Bananas III**, Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591 para. 224-226.

<sup>15</sup> WTO-SECRETARIAT (1993a), *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, MTN. GNS/W/164, 3 September 1993, paras. 18-19.

<sup>16</sup> **EC-Chicken Cuts**, Appellate Body Report, *European Communities-Customs Classification of Frozen Boneless Chickens Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr. 1, DSR 2005: XIX, 9157.

<sup>17</sup> **US-Gambling**, Appellate Body Report, *above note 9*, para.196-203.

- 8612 Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc  
86120 Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
- 8613 Legal documentation and certification services  
86130 Legal documentation and certification services
- 8619 Other legal advisory and information services  
86190 Other legal advisory and information services

The problem of the CPC definition is that it is essentially oriented towards domestic law and does not reflect the reality of trade in legal services. Consequently, it has not been possible to achieve a common format and terminology; WTO Members have entered legal services in their schedules in various ways and there is a lack of uniformity.<sup>18</sup> This undermines the value of GATS commitments and it is likely that the absence of a definition that reflects the commercial realities of transnational trade in legal services has had a negative impact on the number and the quality of commitments.

Following the Uruguay Round negotiations, 76 Members have undertaken specific commitments in the legal services sector. Only 13 Members have used the classification contained in W/120 (referring to CPC 861) without any modifications, while 3 have used their own method. On the other hand, some 60 Members have preferred to distinguish between (a) host country law (provision of advice/representation); (b) home country law and/or third country law (provision of advice/representation); (c) international law (provision of advice/representation); (d) legal documentation and certification services; and (e) other advisory and information services.<sup>19</sup>

To address the issue, several WTO Members have submitted proposals to the Committee on Specific Commitments and the Council for Trade in Services for alternative definitions. These can be divided into three types: those that aim to modify the W/120 list; those that promote CPC approaches; and finally a joint statement on legal services to define the elements that should be included.

#### **a) Proposals based on the W/120**

Proposals that seek modifications to the W/120 list vary. The United States has proposed a definition that includes the provision of legal advice or legal representation in areas such as providing counsel on business transactions, participation in the governance of businesses, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying.<sup>20</sup> Other proposals, from Australia<sup>21</sup> and Canada<sup>22</sup> suggest *inter alia* the development of common definitions for foreign legal consultancy services and for the practice of international law.

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<sup>18</sup> WTO-CTS (1998a), *Legal Services*, Background note by the Secretariat, Council for Trade in Services, S/C/W/43, 6 July 1998.

<sup>19</sup> WTO-CTS (2010d), *Legal Services*, Council for Trade in Services Special Session, Background Note by the Secretariat, S/C/W/318, 14 June 2010, pp.10-11.

<sup>20</sup> WTO-CTS (2000b), *Legal Services*, Communication from the United States, Council for Trade in Services Special Session, S/CSS/W/28, 18 December 2000.

<sup>21</sup> WTO-CTS (2001g), *Negotiating Proposal for Legal Services, Revision*, Communication from Australia, Council for Trade in Services Special Session, S/CSS/W/67/Suppl.1/Rev, 10 July 2001.

<sup>22</sup> WTO-CTS (2001c), *Initial Negotiating Proposal on Professional Services*, Communication from Canada, Council for Trade in Services Special Session, S/CSS/W/52, 14 March 2001.

Another proposal (from India) suggests that legal services be divided into sub-sectors that focus on individual professions (lawyers, judges, and other legal professional not elsewhere classified).<sup>23</sup>

Finally a more ambitious proposal aims to add 12 new sub-categories of legal services to the W/120, based on the area of law and the type of service. These 12 sub-categories are: home-country law (advisory and representation services); third-country law (advisory and representation services); host-country law (advisory and representation services); international law (advisory, representation and commercial arbitration services); other alternative dispute resolution services; preparation and certification of legal documents; and other legal advisory or consultancy services.<sup>24</sup>

## **b) Proposals based on the CPC**

The EU has proposed a definition based on the CPC<sup>25</sup>. This suggests that all legal services should be defined under CPC 861 (including arbitration and conciliation services) with the exclusion of services provided by legal professionals in a public function. The approach does not distinguish between the provision of legal advice and representation as these are limited by licensing conditions applicable in the WTO Member State (only lawyers duly qualified in the jurisdiction will be able to provide representation services). The same is true for fields of law, which can be limited through licensing requirements imposed on legal services providers, who can only provide legal services in the fields of law for which they are qualified to practice. In this regard, the use of fields of law is only useful to indicate whether the WTO Member considers opening (or not) its market to the provision of legal services in the law of any country (except the host country) for which the foreign lawyer is not qualified to practice. Consequently, according to the EU, the CPC Group '861-Legal Services' remains unchanged.

## **c) The Joint Statement**

Finally a group of WTO Member States has submitted a *joint statement on legal services*<sup>26</sup> to the Committee on Specific Commitments and the Council for Trade in Services. The Joint Statement is based on an International Bar Association resolution in support of a system of terminology for legal services (the IBA Resolution)<sup>27</sup>. The group sees the lack of a well-defined and understood terminology as an obstacle to uniformity in approaches to scheduling commitments, which in itself undermines the value of GATS commitments.<sup>28</sup> This statement proposes common definitions for the elements that comprise Legal Services and takes into consideration the different approaches that WTO Members have used to schedule their specific commitments. A cursory reading of these proposals shows that they tend to

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<sup>23</sup> WTO-CTS (2000a), *Proposed Liberalization of Movement of Professional under the GATS*, Communication from India, Council for Trade in Services Special Session, S/CSS/W/12, 24 November 2000.

<sup>24</sup> WTO-CTS (2002), *Negotiating Proposal: Legal Services Classification Supplement*, Communication from Australia, Council for Trade in Services Special Session S/CSS/W/67/Suppl.2, 11 March 2002.

<sup>25</sup> WTO-CSC (2003), *Classification of Legal Services*, Communication of the European Communities, Committee on Specific Commitments, S/CSC/W/39, 24 March 2003.

<sup>26</sup> WTO-CSC (2005), *Joint Statement on Legal Services*, Communication from Australia, Canada, Chile, The European Communities, Japan, South Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and The United States, Council for Trade in Services Special Session, TN/S/W/37, Committee on Specific Commitments S/CSC/W/46, 24 February 2005.

<sup>27</sup> IBA (2003a), Resolution in Support of a System of Terminology for Legal Services for the Purpose of International Trade Negotiations, Adopted at the IBA Council Meeting, San Francisco, September 2003.

<sup>28</sup> WTO-CSC (2005), *above note 26*.

distinguish between advisory/representation/arbitration services in international/host country/home country laws. In practice, most commitments are made in advisory services in international and home country law. The definitions developed in these proposals are important as they reflect a shared understanding of the different categories of legal services and law. The following table shows the definitions of these different categories.

**Table 3 Definitions of legal services and legal area in WTO**

|                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Legal Services | <p>Legal advisory services include:</p> <ul style="list-style-type: none"> <li>- Provision of advice to and consultation with clients in matters, including transactions, relationships and disputes, involving the application or interpretation of the specified body of law;</li> <li>- Participation with or on behalf of clients in negotiations and other dealings with third parties in such matters;</li> <li>- Preparation of documents governed in whole or in part by the specified body of law, and the verification of documents of any kind for purposes of and in accordance with the requirements of the specified body of law;</li> <li>- Does not include advice, consultation and documentation services performed by service suppliers entrusted with public functions, such as notary services.</li> </ul> <p>Representational services include:</p> <ul style="list-style-type: none"> <li>- Preparation of documents intended to be submitted to courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law;</li> <li>- Appearance before courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law;</li> <li>- Does not include documentation services performed by service suppliers entrusted with public functions, such as notary services.</li> </ul> <p>International arbitration and mediation services include:</p> <ul style="list-style-type: none"> <li>- Serving as an arbitrator in any dispute involving parties from two or more countries, without regard to the body or bodies of law that may ultimately be determined to have a bearing on the dispute;</li> <li>- Serving as a mediator in attempts to resolve any such dispute;</li> <li>- Preparation of documents to be submitted to, preparation for and appearance before, arbitrators, or mediators in any such dispute;</li> <li>- Does not include arbitration and conciliation/mediation services in disputes for which law has not a bearing which fall under services incidental to management consulting. As a sub-category, <i>International legal arbitration and conciliation/mediation services</i> refers to the same services when the dispute involves parties from two or more countries.</li> </ul> |
| Legal Area     | <p>Home country law means:</p> <ul style="list-style-type: none"> <li>- In the context of a WTO Member scheduling commitments, the law of the territory of the specific Member scheduling those commitments.</li> </ul> <p>Host country law includes:</p> <ul style="list-style-type: none"> <li>- In the context of a WTO Member scheduling commitments, the law of the territories of WTO Members and other countries other than the law of the territory of the specific Member scheduling those commitments.</li> </ul> <p>International law includes:</p> <ul style="list-style-type: none"> <li>- Law established by international treaties and conventions, as well as customary law.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

In contrast, the way the EU enters legal services into its schedules has changed. The extent of these changes will be analyzed in further detail at a later stage.<sup>29</sup> However, an interesting point is that EU PTA partners, who generally use the classic GATS definitions, have adopted the EU system in the context of PTAs negotiated with the EU.

## **B. Trade in Legal Services**

Two GATS provisions address the definition of *trade in services*. Article XXVIII (f) states that the term “service of another Member” means a service, “(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member”.

Article I: 2 is more specific and defines four modes of “trade in services”. Applied to legal services, they best describe the way in which these services are traded internationally.

### **1. Trade in Services: the four modes of supply**

#### **a. Mode 1: Cross-border supply**

This mode covers the supply of a service supplied “from the territory of one Member into the territory of another Member” (Article I: 2 (a)). In this case, only the service crosses the border; service suppliers and consumers do not move. For instance, an attorney in France provides advice to a Japanese company in Japan by email.

#### **b. Mode 2: Consumption abroad**

This mode defines the supply of a service “in the territory of one Member to the service consumer of any other Member” (Article I: 2 (b)). In this situation, the consumer of the service goes to the country where the service is provided. For example, a client from India travels to the United Kingdom to buy a legal service provided by a British attorney.

#### **c. Mode 3: Commercial presence**

This mode describes the supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member”. In this situation, the service provider establishes a firm in the territory of another Member in order to supply their services on a permanent basis. For instance, an American law firm establishes a branch office in China.

Article XXVIII (d) specifies that the term “commercial presence” means “any type of business or professional establishment, including through the constitution, acquisition, maintenance of a juridical person, or the creation, maintenance of a branch or representative office”.

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<sup>29</sup> See *below*, pp. 123-126.

Trade in this mode is very similar to the idea of establishment contained in Bilateral Investment Treaties or the investment chapters of PTAs,<sup>30</sup> which cover both establishment and post-establishment phases and apply to both existing and *de novo* agreements. However, establishment within the GATS relies on an “enterprise-based” rather than an “asset-based” definition of investment. Investment or commercial presence within the GATS only applies to business or professional establishments in which the investor has majority ownership or exercises control.<sup>31</sup> In contrast, investment rules are generally based on a broader, asset-based definition that extends to portfolio investments and various form of tangible and intangible property.<sup>32</sup>

#### **d. Mode 4: Movement of Natural Persons**

This mode describes the services supplied “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”. For example, this would be the situation of a lawyer from Germany, who represents a client before a court in Singapore, or an American attorney, who represent a client before the court in Singapore as an employee of an American law firm based in Singapore.

It should first be noted that the supply of service in this mode covers services provided on a temporary basis and not through a permanent presence (covered by mode 3).<sup>33</sup> However, the GATS does not specify what constitutes a temporary presence. Therefore, each WTO Member must specify in their commitment schedule the duration of stay permitted for natural persons.<sup>34</sup> Nevertheless it bears mention that in the EU context, in *Gebhard* the ECJ underscored that duration is not the sole criteria that distinguishes between services supplied under mode 3 and those supplied under mode 4. Other criteria include the regularity, periodicity and continuity of the service. The ECJ stressed that the fact that the provision of services is temporary does not mean that the provider may not equip themselves with some form of infrastructure in the host state (including an office, chamber or consulting room) to the extent that such infrastructure is necessary for the purpose of performing the service in question.<sup>35</sup>

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<sup>30</sup> ADLUNG/ MOLINUEVO (2008), *Bilateralism in Services Trade: Is there Fire Behind the (BIT-) Smoke?* WTO Staff Working Paper ERSD-2008-01, 16 January 2008.

<sup>31</sup> Article XXVIII (g) defines a “service supplier” as any person that supplies a service”. “A person means either a natural person or a juridical person” [Article XXVIII]. A juridical person means in the case of a supply of a service through commercial presence any person “owned” or “controlled” by juridical persons from a Member. Ownership requires holding more 50 per cent of the equity interest in the commercial presence; control requires the power to name a majority of the directors or the direct control over the actions of the juridical person in question. [Article XXVIII, Para. (m) (ii) and (n) (ii) ].

<sup>32</sup> HOODE / KOLSE-PATIL/ MIROUDOT (2007), *The Interaction between Investment and Services Chapters in Selected Regional Trade Agreements*, OECD Trade Policy Working Papers No 55, COM/DAF/INV/TD (2006)40/FINAL, 19 June 2007.

<sup>33</sup> *The Annex on movement of natural persons supplying services under the agreement* specifies that the GATS does not apply to “measures regarding citizenship, residence or employment on permanent basis”.

<sup>34</sup> WTO-CTS (2001b), *Guidelines for the Scheduling of Specific Commitments under the General Agreements on Trade in Services (GATS)*, adopted by the Council of Trade in Services on 23 March 2001, S/L/92, 28 March, para. 34.

<sup>35</sup> *Gebhard*, C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995], ECR I-4165, para. 27.

If mode 4 covers the supply of services by natural persons, in practice the situation may be more complicated. GATS negotiators distinguish between independent services suppliers, employees or representatives of a services supplier:

1. Independent service supplier: these service suppliers are self-employed and are referred to as *Independent Professionals (IPs)*.
2. Service supplier as employee: There are two categories depending on whether the employer is located in the territory of the supply of services. The first category includes the employees of a service supplier, which has no commercial presence in other jurisdictions. These are referred as *Contractual Service Suppliers (CSSs)*. The second category includes the employees of service suppliers that have a commercial presence in the territory of the WTO Member where the service is provided. This category consists of three types of employees.

The first are *Business Visitors (BVs)*, who are employees of juridical person (generally in a senior position) and cross the border in order to set up a commercial presence for the company or to negotiate the sale of a services on behalf of another enterprise.<sup>36</sup>

The second are *Intra-Corporate Transfers (ICTs)*, which refers to natural persons, who have been employed by a juridical person or have been partner for a certain period of time and are temporarily transferred to the territory of another WTO Member.

The third type are *Graduate Trainees (GTs)*, who are natural persons who have been employed by a juridical person for a period of time, who possess a university degree and are transferred temporarily to an establishment in the territory of another WTO Member for career development purposes or to obtain training in business techniques or method.

3. Services suppliers as representatives: these are natural persons, referred as *Business Services Sellers (BSSs)*, who represent services suppliers and seek temporary entry into the territory of WTO Member for the purpose of negotiating the sale of services or entering into agreement to sell services for that services supplier.

The forms that are of most interest for legal services are intra-corporate transfers (lawyers working for a law firm, who are sent to overseas branches for a period of time); contract service suppliers (lawyers who work for a law firm and travel temporally overseas to supply the services of the law firms they work for); and finally independent professionals (who are self-employed and provide cross-border services on a temporary basis).

## **2. Trade in Legal Services**

Although it is not possible to provide a detailed assessment of trade in legal services in each of the four modes, it is nevertheless certain that legal services are supplied through each of them.

### **a. Trade in Legal Services in Mode 1**

This mode of supply is frequently used, even if evidence for it is lacking. It is demonstrated by the continuous expansion of the outsourcing of legal work to overseas locations.

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<sup>36</sup> WTO-CTS (2009), *Presence of Natural Person (Mode 4)*, Background Note by the Secretariat, Council for Trade in Services, S/C/W/301, 15 December 2009, p. 6-7.

The process of outsourcing legal work overseas refers to a contractual relationship in which legal services provided by an individual who resides in a foreign country.<sup>37</sup> In this context, the Internet enables work to be rapidly transferred from one country to another.<sup>38</sup> The trend originated in American law firms, international corporations and increasingly British law firms<sup>39</sup> that outsource their work to low-wage regions such as India, Bangladesh and the Philippines. These regions are attractive as they can offer a cheaper, educated English-speaking workforce that is paid a fraction of what their American or English equivalents receive for the same work.

The type of work outsourced ranges from office support services to high-level legal work. It includes legal support (transcription, coding, paralegal services, document review), legal research (online database searches, surveys, contract management), Intellectual Property work (prior search, drafting), contract-related services and secretariat and legal publishing services.<sup>40</sup> There are two principal business models for the process of outsourcing overseas legal work. Some large law firms, like Clifford Chance in India, have established their own facilities abroad. However, the more common model is to subcontract certain services to an independent provider in another jurisdiction.<sup>41</sup>

The process of outsourcing overseas legal work poses numerous problems regarding ethics, e.g. ensuring skills and appropriate supervision, preservation of client confidentiality, conflicts of interest, disclosure of the outsourcing arrangement to the client and the potential for assisting in the unauthorized practice of law.<sup>42</sup> Outsourcing is not specific to legal services and also may impact other service sectors. Thus governments may be tempted to enact measures to protect their markets.<sup>43</sup>

## **b. Trade in Legal Services in Mode 2**

Trade in legal services in Mode 2 is often the consequence of differences in quality and openness in legal services between jurisdictions. Clients who are not able to find the appropriate legal advice in their own country may travel to another country. For example, in India foreign law firms cannot give any form of legal advice on Indian soil. However, there are 31 international law firms recorded in international directories<sup>44</sup> who provide legal advice to Indian clients on a Mode 2 basis. In recent years, offshore advice provided by foreign lawyers has generated earnings of more than US\$ 18.5 million.<sup>45</sup>

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<sup>37</sup> ABCNY (2009), *Report on the Outsourcing of Legal Services Overseas*, Association of the Bar of the City of New-York, Committee on Professional Responsibility, August 2009.

<sup>38</sup> For further details see KRISHNAN (2006), *Outsourcing and the Globalizing Legal Profession*, Studies Research Paper No. 40, William & Mary Law Review, Vol. 48, 2006-2007 pp. 2189-2202.

<sup>39</sup> For a description see LLOYD (2007), *Outsourcing and Offshoring Gain Traction in U.K. Legal Market*, The American Lawyer, 19 September 2007.

<sup>40</sup> VALUENOTES OUTSOURCING WEEKLY (2006), *Legal Outsourcing Hype: Can India Deliver*, Vol. III, No. 40, October 2006.

<sup>41</sup> GIBSON (2008), *Outsourcing Legal Services Abroad*, Law Practice, Vol. 34, No. 5, July/August 2008.

<sup>42</sup> ABCNY (2009), *above note 37*, pp. 3-12.

<sup>43</sup> For a discussion see PATTERSON (2008), *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, Richmond Journal of Global Law & Business, Vol. 7, No 2, Spring 2008, pp. 177-204.

<sup>44</sup> LEGAL 500 (2012), *Indian market overview*, [www.legal500.com](http://www.legal500.com), (last visit: 1.10.2012).

<sup>45</sup> HOOK (2007), *Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services*, Sixth Services Expert Meeting Domestic Regulation and Trade in Professional Services in Paris, OECD and World Bank, p.8.

This mode is particularly relevant to dispute resolution services. Differences in quality (judges, efficiency or speed) or in the legal system between countries may motivate clients to choose a dispute resolution center in another country. Some countries have developed their judiciary capacities for civil or commercial matters to take advantage of this difference. For instance, in 2006, 80% of claims brought before the Commercial Court in London involved overseas parties and in half of cases there was no connection with London except that the parties had chosen to use it for dispute resolution.<sup>46</sup> Some authors advocate the development of this kind of service.<sup>47</sup>

Arbitration is another type of dispute resolution service. Trade in this area is growing rapidly and is not confined to traditional exporters of legal services. For instance, the American Arbitration Association has recorded growth of 222%, the Hong Kong arbitration center growth of 52.7%, the South Korean Arbitration Board growth of 194% and the International Criminal Court 22%.<sup>48</sup> Other countries such as Sweden, Switzerland and Austria also provide this type of service.

### **c. Trade in Legal Services in Mode 3**

The establishment of a commercial presence by law firms in foreign countries, although limited in the past, has grown significantly over the last decade. For example, according to Silver, in 1985 of the 71 top-level American law firms<sup>49</sup> 43 had a presence abroad with a total of 117 offices. In 2000, in the same 71 American law firms, all of them had a presence overseas, with a total of 343 offices<sup>50</sup>. Although the number of overseas offices of American law firms only increased by 17% in 2004, the size of existing offices has grown considerably. In 2007, the top 64 American law firms accounted for 386 overseas offices, located mainly in the EU (52%) and the Asia-Pacific region (34%).<sup>51</sup>

In the United Kingdom the expansion is even more impressive. In 2007, the 15 British law firms listed in the Global 100 operated around 310 offices in other jurisdictions.<sup>52</sup> At the same time, there were over 200 foreign law firms with offices in London<sup>53</sup> (around 50% of them American).<sup>54</sup> Other important locations for foreign law firms are the EU (especially Paris, Brussels and Frankfurt) and Asia.

The distribution shows the primary importance of financial centers. These include London, New York, Frankfurt, Hong Kong, Singapore and Tokyo. Capital cities like Washington or Brussels are also popular as are Eastern European cities.<sup>55</sup> Furthermore, emerging economies

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<sup>46</sup> IFSL (2007), *Legal Services*, City Business Series, February 2007, p.7.

<sup>47</sup> See DAMMANN/HANSMANN (2007), *A Global Market for Judicial Services*, Yale Law & Research Paper No. 347, 15 March 2007.

<sup>48</sup> See Hong Kong International Arbitration Center, [www.hkiac.org](http://www.hkiac.org) (last visit on the 1.10. 2012).

<sup>49</sup> Almost all listed in: THE LAWYER (2012a), *The lawyer Global 100*, [www.thelawyer.com](http://www.thelawyer.com) (last visit on the 1.10. 2012).

<sup>50</sup> SIVLER (2001), *Lawyers on Foreign Ground*, M. Janis/ S. Schwarz (ed.), *Careers in International law*, 2<sup>nd</sup>, ABA publishing, pp. 1-21.

<sup>51</sup> SILVER/ DE BRUIN/ RABINOWITZ (2009), *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, *The Georgetown Journal Legal Ethics*, vol. 22, No 4, Fall 2009, pp. 1448.

<sup>52</sup> THE LAWYER (2012a), *above note 49*.

<sup>53</sup> THECITYUK (2011), *Legal Services 2011*, 10 February 2011.

<sup>54</sup> The others come from Australia, Canada, France, Germany, Italy, Spain, the Netherlands, Scandinavia, Switzerland, Portugal and Russia.

<sup>55</sup> FAULCONBRIDGE/ BEAVERSTOCK/ MUZIO/ TAYLOR (2008), *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, *Northwestern Journal of International Law and Business*, Vol. 28, No 3, 2008, pp. 461.

like China or Russia have become attractive. For instance, in China in 2002 there were 91 foreign representative offices; by 2011 the number had risen to 208.<sup>56</sup>

The opening of foreign offices is not the prerogative of big American or British firms. Numerous mid-sized or small firms, for instance in Europe, have also followed the same path, although not on the same scale.<sup>57</sup>

#### **d. Trade in Legal Services in Mode 4**

There are few statistics available related to this mode of supply and therefore no reliable estimates for the trade in services.<sup>58</sup> The Australian International Legal Services Advisory Council has recently published results from a survey of Australian exports of legal services in the 2006–2007 financial years.<sup>59</sup> It mentions that services provided on a *fly-in, fly-out* basis represented around 17.5% of all Australian legal services work overseas. However, it did not distinguish between independent professionals and employees.

It nevertheless seems that the movement of lawyers working abroad essentially concerns the staff of international law firms. In the United Kingdom for example in 2004, of the 3,094 solicitors practicing abroad, 83% were inter-corporate transferees, 13% were working in-house and 3% were self-employed.<sup>60</sup> The main exporters of legal services exporters (British and American firms) have to staff their overseas offices and therefore export their lawyers.

However, it seems that there are different ways to do it. The largest international British law firms have 45–65% of their lawyers working overseas, while many other London-based firms have only 10–20%.<sup>61</sup> In the top American law firms, 25–30% of lawyers are based overseas, while for other American law firms it is 10%.<sup>62</sup> For both British and American firms, the number of lawyers has significantly increased over the past two decades. In the United Kingdom the number of British solicitors located abroad has increased more than sixteen times in 1990–2010 (from 355<sup>63</sup> to 6,000),<sup>64</sup> while the number of lawyers in the largest American firms tripled from 1995 to 2004.<sup>65</sup> By 2007, there were 15,231 lawyers practicing in international offices of American firms, which represented an increase of 40% compared to 2004.<sup>66</sup>

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<sup>56</sup> CHINA BRIEFING (2012), *Foreign Firms in China- 2012 Listing*, February, [www.china-briefing.com](http://www.china-briefing.com) (last visit on the 1.10.2012).

<sup>57</sup> See THE LAWYER (2012b), *The European 100: Taking the Continent's Pulse*, [www.thelawyer.com](http://www.thelawyer.com) (last visit: 1.10.2012).

<sup>58</sup> MAGDELEINE/ MAURER (2008), *Measuring GATS Mode 4 Trade Flows*, WTO Staff Working Paper ERSD-2008-05, October 2008.

<sup>59</sup> ILSAC (2009a), *Australian's International Market for Legal Services: 2006-07 FY*, Attorney-General's Department, Canberra, February 2009.

<sup>60</sup> HOOK (2007), *above note 45*, p. 26.

<sup>61</sup> IFSL (2009), *Legal Services 2009*, IFSL Research Paper, February 2009.

<sup>62</sup> HITT/BIERMAN/COLLINS (2007), *The Strategic Evolution of Large US Law Firms*, Business Horizons, Vol. 50, No. 1, January-February 2007, pp. 17-28.

<sup>63</sup> IFSL (2007), *above note 46*, p. 4.

<sup>64</sup> THECITYYUK (2011), *above note 53*, 10 February.

<sup>65</sup> HITT/BIERMAN/COLLINS (2007), *above note 62*.

<sup>66</sup> Hildebrandt International/ Citygroup Private Bank (2008), *Client Advisory*, January 2008.

Various impediments affect cross-border legal services in mode 4. Restrictions are often due to immigration policies. These apply both to natural persons that seek long-term residence or short-term business visitors. The latter often apply for a tourist visa rather than a business visa to circumvent potential difficulties<sup>67</sup> and problems mainly arise for long-term stays.<sup>68</sup>

The four modes of trade in services provided under Article I: 2 apply to the legal services sector. However, regulatory barriers to trade in legal services vary depending on the mode. While they are few in modes 1 and 2, this is not the case for modes 3 and 4.

## C. Measures by Members

The reference to *measures by Members* underscores that the GATS regulations are adopted by the public authorities of individual WTO Members. This requires the definition of what it is understood by ‘measures’ and ‘public authorities of WTO Members’. Although not specifically mentioned, it also involves a definition of the recipients of measures, namely the service suppliers of WTO Members.

### 1. Measures covered by the GATS

In the GATS context the term *measures* is defined in Article XXVIII (a) as follows:

Any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.

Thus any state action can be a *measure* according to the GATS, as the list extends to “any other form”. A related issue is whether omission or inactivity can also be qualified as a measure as defined by the Article. If the omission or inactivity is a positive decision by a governmental authority, the absence of a measure could fall under the scope of the GATS. However, if a lack of progress is solely the result of slow administration, it would be difficult to call it a measure.<sup>69</sup>

### 2. Public Authorities of WTO Members

Authorities covered by the GATS are defined in Article I: 3(a) and include:

- i. Central, regional or local governments and authorities;
- ii. Non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

This provision reflects the broad institutional scope of the agreement. Unlike the NAFTA, it includes local authorities and non-governmental bodies such as associations, institutions or any other entity – regardless of its legal constitution – with delegated governmental powers. This is particularly relevant to legal services as bar associations in many jurisdictions have the right to recognize and certify legal professionals. It follows that the GATS applies both to

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<sup>67</sup> Idem.

<sup>68</sup> USITC (2009), *Recent Trends in US Services Trade*, Investigation No. 332-345, Publication 4084, July 2009, p.6-15.

<sup>69</sup> KRAJEWSKI (2003a), *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, Kluwer Law International, The Hague/ London/ New-York, p. 64.

governmental regulations related to legal services and any self-regulation enacted by bar associations with delegated powers. On the other hand, the agreement does not apply to regulations enacted by bar associations that do not come under delegated powers,<sup>70</sup> which come under national competition law.

Article 1: 3(a) adds:

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure observance by regional and local governments and authorities and non-governmental bodies within its territory.

While the first part of the Article concerns the scope of the GATS, the second part seeks to make WTO Members accountable (within reasonable limits) for the commitments they have undertaken. This provision is of particular importance for federated states.

Article XXIV: 12 outlines similar obligations. In *US-Malt Beverage*, the Panel noted that the provision applied to measures taken by regional or local governments or authorities, which the central government cannot control because they fall outside its jurisdiction under the constitutional distribution of powers. It held that the general principle of international treaty law applied, i.e. a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.<sup>71</sup>

On the question of what constitutes ‘reasonable measures’, the Panel held in *Canada – Provincial Liquor Boards (EEC)* that a WTO Member that has adopted a contentious measure must demonstrate to other WTO Members that it has taken all reasonable measures available. It is then for other Members to decide whether the Member has met its obligations.<sup>72</sup> While the assessment of ‘reasonable measures’ must be made on a case-by-case basis, the Panel in *Canada – Gold Coins* mentioned that the determination of reasonable measures must take into account whether the consequences of their non-observance for trade relations with other contracting parties were outweighed by the domestic difficulties of securing observance.<sup>73</sup>

### 3. Service Suppliers of another WTO Member

The definition of service suppliers that benefit from the liberalization provided by the GATS are generally addressed by rules of origin, which distinguish between WTO and non-WTO Members. These rules are found in Article XXVIII (k) and (m) in the definition of the natural and juridical person. They state:

- “natural person of another WTO Member” means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:
  - (i) is a national of that other Member; or
  - (ii) accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services (...).

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<sup>70</sup> See *supra*, p.

<sup>71</sup> **US-Malt Beverage**, GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206, para. 5.79.

<sup>72</sup> **Canada-Provincial Liquor Boards (EEC)**, GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, adopted 22 March 1988, BISD 35S/37, paras. 4.34-4.35.

<sup>73</sup> **Canada – Gold Coins**, GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, Unadopted, para.68-69.

- “juridical person of another Member” means a juridical person which is either:
  - (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
  - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
    - 1. natural persons of that Member; or
    - 2. juridical persons of that other Member identified under subparagraph (i).

## D. Measures Affecting Trade in Legal Services

The previous chapter identified the most significant barriers to trade in legal services.<sup>74</sup> Some of these barriers are discriminatory or non-discriminatory and require negotiations either for their removal or the adoption of less burdensome alternative measures. Other impediments are the absence of regulatory intervention to facilitate trade, such as the development of a foreign consultant regime, the negotiation of a mutual recognition agreement, or the development of rules on double deontology. These different barriers to trade in legal services can be summarized in the following table:

**Table 4 The most significant barriers to trade in Legal Services**

| Transparency                        | Discriminatory Measures                          | Non-Discriminatory Measures   | Access to local practice by foreign lawyers |
|-------------------------------------|--------------------------------------------------|-------------------------------|---------------------------------------------|
| Access to information               | Nationality requirements                         | Name restrictions             | Limited licensing                           |
| Information on licensing procedures | Local/residency requirements                     | Restrictions on fee-setting   | Full licensing                              |
|                                     | Quota/ ENT                                       | Restrictions on business form | Mutual Recognition Agreement                |
|                                     | Restrictions on business form                    | Restriction on Advertising    | Double deontology                           |
|                                     | Restrictions on foreign Investment               |                               |                                             |
|                                     | Restrictions on partnership with foreign lawyers |                               |                                             |
|                                     | Restrictions on employment of local lawyers      |                               |                                             |

The GATS deals with these measures in various provisions that are described in more detail in the next section.

<sup>74</sup> See *above*, pp. 27-47.

## II. GATS Main Provisions

The GATS implements four of the five principles for the liberalization of legal services. The importance of these principles differs: transparency and non-discrimination is the cornerstone of the agreement, while the avoidance of unnecessary restrictions and recognition play a less important role. Furthermore, the scope of these principles varies: some of the transparency requirements and recognition principles are general obligations, while other transparency requirements, non-discrimination and the avoidance of unnecessary restrictions only apply in sectors where specific commitments have been made. These differences are addressed in turn.

### A. Transparency

The role of transparency requirements in the facilitation of trade in services is fundamental for trade in general and for trade in legal services in particular. The regulation of the legal profession in most jurisdictions focuses on domestic lawyers. The emergence of the concept of the foreign legal consultant is a relatively recent phenomenon and not all jurisdictions have adopted specific rules, which make it difficult to know whether it is possible for foreign lawyers to practice law and under what conditions. For instance, the scope of practice of foreign lawyers and the form of the relationship with local lawyers may not be clearly delineated. The situation is even worse in the case of temporary services (mode 4).

More generally, the role of transparency in trade facilitation is crucial for two reasons. First, it provides vital information to market participants about the conditions under which commercial transactions can take place. In this respect, it makes markets function more efficiently. Second, it underwrites the effectiveness and integrity of a treaty's policy rules and disciplines, by allowing a treaty participant to monitor whether other participants are meeting their legal obligations.<sup>75</sup>

Based on these considerations, four objectives underlie the GATS provisions on Transparency:

- The underwriting and the promotion of a rules-based approach to policy-making at the national and international level;
- The provision of information to market participants so that they can take maximum advantage of the opportunities created by rules and commitments;
- The facilitation of the monitoring of compliance with international obligations, and through this the avoidance of disputes; and
- The facilitation of future multilateral negotiations with a view to building upon existing commitments and disciplines.<sup>76</sup>

Effective transparency requires that information includes both laws and regulations and the procedures for their administration, based on the premise that the way rules are applied is as significant as the substance of the rules themselves.<sup>77</sup>

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<sup>75</sup> WTO-WGTI (2002), *Transparency*, Note by the Secretariat, Working Party on the Relationship between Trade and Investment, WT/WGTI/W/109, 27 March 2002.

<sup>76</sup> WTO-WGTCP (1999), *The Fundamental WTO Principles of National Treatment, Most-Favored-Nation Treatment and Transparency*, Working Group on the Interaction between Trade and Competition Policy, Background Note by the Secretariat, WT/WGTCP/W/114, 14 April 1999, p. 15.

<sup>77</sup> WTO-WGTI (2002), *above note 75*.

Generally the principle of transparency is divided into three main obligations: (a) the obligation to publish, or otherwise make publicly available, all relevant regulations and subordinate measures of general application that affect trade; (b) the obligation to notify the WTO of various forms of government action and their possible impact on the WTO and other WTO Members; and (c) the obligation to duly administer such regulation and measures and provide domestic review mechanisms where legal redress can be sought.

The GATS outlines these obligations in two separate provisions: Article III contains the requirement to publish regulations, along with various requirements for WTO Members, while Article VI determines the requirements for the administration of domestic regulation and includes several due process requirements that enhance transparency in everyday practice.<sup>78</sup>

## 1. Transparency (Article III)

Article III contains obligations with regard to the transparency of domestic measures that affect trade in services. It is located in Part II entitled *General Obligation and Disciplines*, which means that its requirements apply regardless whether the Member has undertaken specific commitments. However, the scope of Article III is limited to transparency obligations at governmental level and does not extend to private persons. The implications of this are unfortunate as it is the private sector that has most interest in gaining access to information.<sup>79</sup>

Article III outlines four types of obligations: the publication of relevant measures, notification of changes, response to requests and the establishment of enquiry points. The scope of transparency varies depending on the obligations.

Article III: 1 contains the obligation to *publish promptly* all relevant measures of general application, which pertain to or affect trade in services. This obligation includes international agreements (see also Article V: 7). If this is not practicable, Article III: 2 stipulates that WTO Members must otherwise make the measure publicly available. The scope of this provision is broad as it includes: “all relevant measures of general application that affect trade in service”. The term *measure of general application* is not specified in the GATS, but is commonly used in other WTO agreements, which may influence the interpretation of the term in the GATS context.<sup>80</sup> WTO adjudicating bodies have understood the concept of “general application” as being not limited in application to a specific individual case or economic operator. The distinction is made using the ordinary meaning of the term “general” as opposed to that of “specific”.<sup>81</sup> However, in *Japan-Film*, the Panel extended the term “general application” to administrative rulings in individual cases, where such rulings established or revised principles or criteria applicable in future cases.<sup>82</sup>

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<sup>78</sup> DELIMATIS (2007), *International Trade in Services and Domestic Regulations, Necessity, Transparency and Regulatory Diversity*, International economic law series, Oxford University Press, pp. 255- 270.

<sup>79</sup> STEHENSON/ YI (2002), *Transparency in Regulation of Services*, APEC Group on Services, 10 May 2002.

<sup>80</sup> WTO-WPDR (2012a), *Measures of General Application in WTO Agreements*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/W/47, 9 February 2012, pp. 3-6.

<sup>81</sup> **US-Underwear**, Appellate Body Report, *United States- Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February, DSR 1997:1,31, p. 21.

<sup>82</sup> **Japan-Film**, Panel Report, *Japan-Measures affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998: IV, 1179, para. 10.338.

Based on the work undertaken in other international organizations<sup>83</sup>, it appears that information relevant to cross-border legal practice includes in particular information on temporary practice, limited licensing of foreign lawyers (foreign legal consultant), full licensing (re-qualification processes), commercial association with local lawyers and other regulatory issues (such as names, advertising or fee-setting). Such information is not necessarily easily accessible. For instance, the EU provides information for EU lawyers on legal practice within the EU.<sup>84</sup> In contrast, there is little information available concerning the conditions for practice as a foreign legal consultant in GATS' Member states and conditions vary greatly from one jurisdiction to another. As mentioned earlier, in 2005, the Council of the Bars and Law Societies of the European Union issued a document on the conditions of practice in EU Member States, but this does not cover all EU Member States and does not provide information on important issues such as the commercial association of local and foreign lawyers.<sup>85</sup> The situation is even less transparent in Switzerland, where there is almost no information in English on the conditions for the provision of legal services by GATS lawyers in different Swiss cantons.

Article III features an obligation of *notification* (Article III: 3). This requires WTO Members to inform the Council for Trade in Services of the introduction of any new measures or any changes to existing laws, regulations or administrative guidelines, which affect trade in services. The scope of the provision is narrower than Article III: 1 as it covers only laws, regulation or administrative guidelines, but does not include judgments (as opposed to measures of general application that affect trade in services).<sup>86</sup> In addition, it only covers measures affecting sectors where specific commitments have been undertaken.

Article III: 4 requires WTO Members to *respond promptly* to all requests made by other Members and to *establish enquiry points* to provide specific information. In both cases, the obligation extends to information on measures of general application or international agreements within the meaning of Article III: 1. However, as mentioned earlier, Article III: 4 obligations function at governmental level and are therefore relatively not used at the multilateral level.

It should be noted that the GATS contains two exceptions to Article III. First, Article III<sup>bis</sup> allows WTO Members to withhold confidential information as long as its disclosure would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests in public or private enterprises. Second, Article XIV<sup>bis</sup>: 1(a) exempts WTO Members from providing information that they consider would be contrary to national security interests.

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<sup>83</sup> See in particular: THE APEC LEGAL SERVICES INITIATIVE: [www.legalservices.apec.org](http://www.legalservices.apec.org) (last visit on 1.10.2012).

<sup>84</sup> See in particular, EU COMMISSION (2004b), *European Judicial Network in Civil and Commercial Matters: Legal Professions*, 17.08.2004, <http://ec.europa.eu/civiljustice/.htm> (last visit on 1.10.2012).

<sup>85</sup> CCBE (2005c), *Conditions for the admission of lawyers from non-EU Member States to the title of the local legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own title home*, 25.01.2005.

<sup>86</sup> KRAWKESKI (2003), *above note 69*, pp. 124-129.

## **2. Domestic Regulation (Article VI: 1–3)**

Article VI does not refer explicitly to the concept of transparency. However, it requires that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial way (Article VI: 1). These obligations seek to enhance procedural or administrative transparency, notably in accordance with provisions recognizing the right of services suppliers to an independent and administrative review and appeals process (Article VI: 2), and the right to be informed of regulatory and administrative decisions (Article VI: 3). In states that are based on rule of law, such as most EU Member States and Switzerland, the requirements of Article VI: 1–3 should not pose major difficulties. In contrast, in other states they may foster a rules-based approach to authorization procedures.

Like Article III: 1 this Article covers all measures of general application that affect trade in services. However, unlike Article III, Article VI is not a general obligation, but only applies to service sectors where WTO Members have undertaken specific commitments. Furthermore, unlike Article III, which deals with transparency requirement at intergovernmental level, Article VI contains provisions that mainly seek to enhance vertical transparency between national authorities and private persons.

Article VI: 2 requires WTO Members to maintain or institute judicial, arbitral or administrative tribunals or procedures that enable the prompt review of administrative decisions affecting trade in services. Article VI: 3 sets out obligations in the case where authorization is required for the supply of a service, related to informing the applicant of the decision and responding without undue delay to requests from the applicant on information regarding the status of the application.

In addition to these obligations, Article VI: 4 mandates to the Council for Trade in Services to establish bodies in charge of developing disciplines on qualification and licensing requirements/ procedures and technical standards, in order to ensure that such requirements are *inter alia* based on objective and transparent criteria such as competence and the ability to supply the services (Article VI: 4 (a)).

GATS transparency requirements feature four types of obligations: publication, notification, response to requests and establishment of enquiry points. These obligations differ in scope: Article III obligations are general, while those contained in Article VI: 1– 3 only apply in services sectors where specific commitments have been made. Furthermore, they apply at different levels: at governmental level in Article III and at the level of the private person in Article VI: 1–3.

## **B. The Non-Discrimination Principle**

The non-discrimination principle is a key concept in WTO law and policy. Its importance is underlined in the preamble of the WTO Agreement, where the “elimination of discriminatory treatment in trade relation” is identified as one of the two main means by which the objectives of the WTO may be attained. Consequently, provisions dealing with non-discrimination issues are found in all WTO agreements.

GATS rules cover two aspects of discrimination. First, through the provision entitled Most-Favored-Nation Treatment (Article II), they address discrimination between WTO Members. Second, GATS provisions on National Treatment (Article XVII) and to a certain extent Market Access (Article XVII) deal with discrimination between foreign and domestic services or service suppliers.

Besides differences in the type of discrimination covered, these two sets of provisions differ in their scope. The provision on the Most-Favored-Nation Treatment (MFN) is a general obligation, which is nevertheless subject to reservations. In contrast, obligations contained in the provisions on Market Access and National Treatment only apply to service sectors in which Members have undertaken specific commitments.

These provisions constitute the core of service trade liberalization. Therefore they have an impact on legal services, and are examined in turn.

## **1. The General Obligation**

Article II MFN is a general obligation, like other GATS provisions such as Transparency (Article III), Disclosure of Confidential Information (Article III<sup>bis</sup>) or Economic Integration (Article), which apply *erga omnes*. In *EC- Bananas III*, the GATS Panel confirmed that the MFN requirement applies to all service sectors and suppliers irrespective of any specific commitments.<sup>87</sup>

However, the obligation is not absolute and the GATS provides for exceptions, which may have consequences for legal services. Therefore, after briefly reviewing the obligations set out in Article II, this analysis deals with its exceptions.

### **a. Most-Favored-Nation Treatment (Article II: 1)**

Article II: 1 GATS prohibits discrimination between similar services and service suppliers from different WTO Members. Article II: 1 reads:

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

It follows that in principle WTO Members have to treat all lawyers from the all WTO Members identically, even if they have made no commitments to open up their market to foreign lawyers. It effectively means that they have to either allow or bar all foreign lawyers from accessing the market under the same conditions.

Three conditions must be fulfilled in order to determine whether a measure fall within the scope of Article II: the measure must be covered by the agreement, the service or service suppliers must be “like” and less favorable treatment must be accorded to the service or service suppliers of a WTO Member.

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<sup>87</sup> *EC-Bananas III*, Panel Report, *European Communities- Regime for the Importation, Sale and Distribution of bananas*, WT/DS27/R, adopted 25 September 1997, modified by the Appellate Body Report, WT/DS27/AB/R., para. 7.298.

Article I: 1 specifies that the agreement applies to measures affecting trade in services. The various elements of this phrase have been thoroughly analyzed in the previous section; only the two other conditions, namely *likeness* and *no less favorable treatment* remain to be examined.

The concepts of “like services” and “like service suppliers” are not defined in the GATS and case law dealing this issue is scarce. A more detailed analysis is made in relation to Article XVII (National Treatment).<sup>88</sup> For the moment, it should be borne in mind that among the elements to take into consideration for the determination of “likeness” are the characteristics of the service or service suppliers, the classification and description of the service in CPC and consumer habits and preferences regarding the service or the service supplier.<sup>89</sup>

Nor does Article II offer any help on the meaning of “treatment no less favorable”. However, Article XVII states that a measure constitutes less favorable treatment if it modifies the conditions of competition. The question of whether this condition applies by analogy to Article II remains to be clarified. In *EC-Bananas III*, the Appellate Body held that the concept of “treatment no less favorable” within the meaning of Article XVII should not be assumed to apply to Article II: 1. However, in the same case, both the Panel and the Appellate Body held that the “no less favorable treatment” requirement in Articles II and XVII should be interpreted to include *de jure* and *de facto* discrimination.<sup>90</sup> This interpretation tends to suggest the reading of both provisions in the same way.<sup>91</sup>

The GATS provides three circumstances where MFN requirements may not apply. First, Article II: 2 offers WTO Members the possibility to reserve and exempt some service sectors from the obligations of the Article. Second, Article VII authorizes Members to recognize education or experience obtained in a particular country to the detriment of other WTO Members. Third, Article V permits more favorable treatment resulting from preferential trade agreements.

The MFN principle and its exceptions have implications for legal services. In several cases lawyers, in their capacity as foreign legal consultants, have been discriminated on the grounds of nationality. Therefore question of compliance with Article II is relevant. Several cases can be distinguished.

A condition of practice as a foreign legal consultant in Brazil is that applicants must demonstrate that there is an instrument of reciprocity for Brazilian attorneys wishing to practice law in the applicant’s country of origin.<sup>92</sup> Reciprocity requirements can also be found in France in order to sit for the bar exam. As France does not have a foreign legal consultant regime the only way to practice in this jurisdiction for non-EU lawyers is to take the local bar exam. Consequently, reciprocity requirements discriminate between lawyers from different WTO Members.

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<sup>88</sup> See below pp. 93-98.

<sup>89</sup> VAN DEN BOOSCHE (2008), *The Law and Policy of the World Trade Organization: Text, Case and Materials*, 2<sup>nd</sup> edition, Cambridge, pp. 369-443.

<sup>90</sup> *EC-Bananas III*, Panel Report, above note 87, para. 10.23-10.24.

<sup>91</sup> MATSUSHITA/ SCHOENBAUM/ MAVROIDIS (2006), *The World Trade Organization*, 2<sup>nd</sup> ed., Oxford University Press, pp. 619-626; VAN DEN BOOSCHE (2008), above note 89, pp. 369-443.

<sup>92</sup> WTO-TPRB (2009a), *Trade Policy Review of Brazil*, Secretariat Report, WT/TPR/S/212, 2 February, Geneva. Pp. 142-143.

In Germany, only lawyers from a restricted list of countries are authorized to work as foreign legal consultants.<sup>93</sup> In South Korea, only lawyers from countries that have concluded a FTA with the country are authorized to practice as a foreign legal consultant.<sup>94</sup>

In all of these situations, WTO Members discriminate between other WTO Members, which potentially infringes Article II. However, depending on the grounds, such discrimination may be justifiable. Restrictions on practice as a foreign legal consultant in Germany are based on the unilateral recognition of qualifications covered by Article VII. In the same way, the discrimination found in South Korea complies with GATS rules by virtue of Article V. On the other hand, reciprocity requirements such as those in Brazil or France potentially could infringe MFN obligations, even if Brazil has not undertaken any commitments in the legal services sector.

It follows that exceptions to MFN treatment are relevant to legal services. The exceptions outlined in Article VII are discussed in the section on Recognition, while the obligations contained in Article V are analyzed in the next chapter on Preferential Trade Agreements. It only remains to examine the exceptions contained in Article II: 2 and their consequences for legal services.

## **b. MFN Exemptions (Article II: 2)**

Article II: 2 enables WTO Members to create exceptions to MFN obligations:

A Member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

If a country exercises this option, it is not obliged to comply with the MFN requirement. The list of MFN exemptions is annexed to the WTO Agreement. According to § 2 of the *Annex on Art II GATS Exemptions*, no new exemptions can be added. Five WTO Members have recorded MFN exemptions related to the legal services sector, while four other Members have included exemptions for professional services.

As far as legal services are concerned, the five countries that have MFN exemptions are: Brunei Darussalam, Bulgaria, the Dominican Republic, Lithuania and Singapore. In Brunei Darussalam and Singapore, the exemption is necessary because the establishment of foreign law firms in these countries is based on case-by-case approval. In the Dominican Republic the reason for the exemption is reciprocity legislation that is in force. In Lithuania, the exemption covers the authorization of foreign attorneys to participate in court proceedings in accordance with bilateral agreements on legal assistance. In Bulgaria, the exemption covers full National Treatment on the establishment (mode 3) and operation (mode 4) of foreign companies and foreign natural persons, which may be extended only to companies and citizens of countries mentioned on a specific list.

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<sup>93</sup> Egypt; Albania; Argentina; Australia; Bolivia; Brazil; Chile; China; Taipei; Salvador; Georgia; Ghana; India; Indonesia; Israel; Japan; Cameroun; Canada; South Korea; Croatia; Malaysia; Morocco; Macedonia; Mexico; Moldavia; Namibia; New Zealand; Nigeria; Pakistan; Panama; Philippines; Russia; Serbia; Singapore; Sri Lanka; South Africa; Thailand; Turkey; Tunisia; Ukraine; Uruguay; Venezuela; USA; BUNDESMINISTERIUM DER JUSTIZ (2009), *Verordnung zur Durchführung des § 206 der Bundesrechtsanwaltsordnung* [http://www.gesetze-im-internet.de/brabo\\_206dv/BJNR288600002.html](http://www.gesetze-im-internet.de/brabo_206dv/BJNR288600002.html) (last visit 1.10.2012)

<sup>94</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *Foreign Legal Consultant Act*, 5 February 2010, Article 6 and 16.

As far as professional services are concerned, the four countries that have MFN exemptions are: Costa Rica, Honduras, Panama and Turkey. In these countries the exemption covers all professional services and is based on reciprocity.

## 2. Specific Commitments (Articles XVI–XVII)

Commitments are deemed specific as each WTO Member may choose the service sector it intends to liberalize and the level of liberalization it is ready to offer, according to the obligations contained in Articles XVI (Market Access) and XVII (National Treatment). Therefore, the level of liberalization for each service sector varies from one WTO Member to another depending on the Member's schedule of commitments.

In order to undertake specific commitments in a service sector, WTO Members have to enter the sector and record the level of liberalization to which they are committed in a schedule of commitments.<sup>95</sup> This schedule is a document consisting of four columns. The first column describes the service or services. The three other columns are respectively: Market Access, National Treatment and Additional Commitments. For each service sector, Members are required to specify the level of liberalization in the Market Access and National Treatment columns, according to requirements set out in Articles XVI and XVII. They must choose between *none*, *unbound* or *specified limitations*, for each mode of supply in each column. *None* corresponds to full liberalization, while *unbound* corresponds to no liberalization. In between these two extremes, Members may specify the measures they maintain. For instance, with regard to legal services Members generally enter legal advisory services in international or home country law in the first column (as a sub-sector of legal services). In the second column (Market Access) they usually record *none* in modes 1 and 2 (meaning full liberalization in this mode). In mode 3 they generally specify restrictions such as the prohibition of association with local lawyers. Finally, in mode 4, the most frequent entry is *unbound*, which means they maintain regulatory leeway. They then repeat the operation in the third column (National Treatment).

Whereas WTO Members can choose whether to enter a service sector or sub-sector and to record the level of liberalization they provide, they have an obligation to register measures breaching obligations laid down in Articles XVI and XVII in each column for each mode. As an example we will take the case of a WTO Member that records 'legal advice in international law' in the first column. If domestic law contains a nationality requirement in mode 3, the WTO Member may maintain such a measure, but must record it. If it records *none*, when actually there is a nationality requirement, it exposes itself to a dispute settlement procedure (Articles XXII–XXIII).

The liberalization contained in the schedules of commitments of WTO Members does not necessarily reflect the regulatory status quo for the service sector. For instance, the fact that Brazil, Singapore or Hong Kong have not made any commitments in the legal services sector does not mean that foreign lawyers cannot practice in these jurisdictions. In the same way, WTO Members may record more restrictions than the domestic regulatory regime contains. For instance, Switzerland does not regulate the provision of legal advice, but its commitments are limited to legal advice on international law and home country law.

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<sup>95</sup> In their scheduling process WTO Members generally use the "Scheduling Guidelines": WTO-CTS (2001b), *above note 34*.

The role of specific commitments is therefore two-fold. First, they serve as the basis for negotiations on the removal of barriers to trade in different service sectors. The liberalization effect is reinforced thanks to MFN treatment, which automatically extends the result of the negotiations between two WTO Members to other WTO Members (Article II). For instance, the GATS was the arena for negotiations on the removal of restrictions affecting legal services in Japan. These negotiations were mainly held between the United States and Japan, but the results have been extended to all other WTO Members. Second, commitments are a means to ensuring the stability, security and predictability of regulatory regimes. Once WTO Members have undertaken commitments in a service sector, they are locked-in to this liberalization. In other words, they are bound by their commitments. They can modify them, but must follow a specific procedure (Article XXI). If they adopt regulations that infringe their commitments, they open the door to dispute proceedings (under Article XXIII). For instance, the absence of Brazilian commitments in the legal services sector means that foreign lawyers are not protected against policy reversal. Until recently, formal alliances between foreign-trained lawyers and local lawyers were permitted. But in 2010, the Sao Paulo chapter of the National Bar Association ruled that such alliances were against its rules. It confirmed that opinion in February 2011. At the time of writing the federal bar association is considering the matter.<sup>96</sup>

Against this background, an important issue is the extent of the obligations contained in Articles XVI and XVII, which determine the basis for the liberalization in each service and are addressed in turn.

#### **a. Market Access (Article XVI)**

Market Access obligations consist of two paragraphs. Article XVI: 1 recalls MFN principles in connection to market access. It provides that “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule”.

Article XVI: 2 states that:

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule are defined as:

- a. limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- b. limitations on the total value of service transactions or assets in the form of numerical quota or the requirement of an economic needs test;
- c. limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

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<sup>96</sup> THE ECONOMIST (2011), *Foreign Law Firms in Brazil, Keep out, Brazilian Lawyers don't want pesky foreigners poaching their clients*, 23 June 2012; IBERIAN LAWYERS (2012), *New Proposals could dissolve Iberian Law firm Alliances with Brazil*, 16 August, [www.iberianlawyers.com](http://www.iberianlawyers.com) (last visit 1.10.2012).

- d. limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- e. measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;
- f. limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment

Again, WTO Members who have made commitments in one service sector may still maintain restrictions such as those mentioned in Article XVI: 2 but they have an obligation to list them. These limitations can be entered with respect to one or more mode(s) of supply.

In *US-Gambling*, the GATS Panel<sup>97</sup> and the Appellate Body<sup>98</sup> confirmed that the list of measures covered by Article XVI: 2 is exhaustive. Therefore quantitative restrictions other than those listed in Article XVI: 2, such as for instance licensing requirements for foreign lawyers, are not covered by market access obligations. Furthermore, in *US-Gambling*, the Panel,<sup>99</sup> followed indirectly by the Appellate Body<sup>100</sup>, held that the measures listed in Article XVI: 2 are not merely illustrative, but exclusive. Thus a measure not listed under Article XVI: 2 (e.g. licensing requirements) but that has the same effect as a measure covered by the Article (e.g. a quota on foreign lawyers) cannot fall within the scope of Article XVI.

The measures listed in Article XVI: 2 cover four types of quantitative restrictions (sub-paragraphs a-d), as well as limitations on forms of legal entity (sub-paragraph e) and foreign equity participation (sub-paragraph f). These can be both discriminatory and non-discriminatory measures, which creates a problem of the relationship between on the one hand, Articles XVI and XVII (discriminatory measures) and on the other hand, Articles XVI and VI (non-discriminatory measures).

#### *i) Relationship between Articles XVI–XVII: Discriminatory Measures*

Articles XVI and XVII both cover discriminatory measures. For instance, the nationality requirement can be at the same time a limitation of the number of suppliers (Article XVI: 2(a)) and a discriminatory measure (Article XVII). In this situation, Article XX: 2 provides that this measure must be recorded in the column relating to Article XVI. It is also considered as inscribed in Article XVII column. On the other hand, quantitative restrictions, which do not fall within the scope of Article XVI: 2 do not need to be scheduled. If those measures are discriminatory, they should be scheduled under Article XVII. The *China- Publications and Audiovisuals Products* case illustrates this process, where a quantitative measure was not established to have breached Article XVI: 2 (f) obligations. The analysis then became a question of whether the measure had breached the Chinese commitment *none* recorded in the National Treatment column Article XVII in the audiovisual services sector.<sup>101</sup>

<sup>97</sup> **US-Gambling**, Panel Report, *United States- Measures affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, DSR 2005: XVII, 5663, and Corr. 1, para. 6.318.

<sup>98</sup> **US-Gambling**, Appellate Body Report, *above note 9*, para. 215.

<sup>99</sup> **US-Gambling**, Panel Report, *above note 97*, para. 6.325.

<sup>100</sup> **US-Gambling**, Appellate Body Report, *above note 9*, para. 232.

<sup>101</sup> **China-Publications and Audiovisuals Products**, Panel Report, *China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisuals Entertainment Products*, WT/DS363/R and Corr.1, adopted 12 December 2009, para. 7.1412- 7.1413

With regard to legal services, the most frequent discriminatory restrictions that fall under the scope of Market Access provisions are nationality requirements (mode 1–4), quotas on foreign provision/economic need tests (mode 3), restrictions on legal form (mode 3), restrictions on partnership with locally licensed professionals (mode 3), restrictions on the hiring of local professionals (mode 3) and the restrictions on the movement of personnel (mode 4).

*ii) Relationship between Articles XVI–VI: Non-Discriminatory Measures*

As mentioned earlier Article XVI deals with quantitative measures that can be non-discriminatory; this situation is also covered by Article VI: 4–5, which could result in an overlap in the scope of application. However, it must be stressed that Article VI and more specifically the provisions on Domestic Regulation apply only to measures not covered by Articles XVI and XVII. In other words, those provisions are mutually exclusive. Although this interpretation is not supported by the GATS’ text, in *US-Gambling* the Panel adopted this interpretation.<sup>102</sup> In addition, a consensus among WTO Members on this issue seemed to have emerged during the domestic regulation negotiations.<sup>103</sup>

Not only are both provisions exclusive in their application, they are also different in their scope. Article XVI mainly relates to the quantity or number of either services or service suppliers. It is aimed at “maximum restrictions” that cannot be overcome by the actions of the supplier (e.g. nationality requirements for legal practice).<sup>104</sup> In this regard, Article XVI has a negative function by prohibiting the use of a set of measures that limit market access.<sup>105</sup> In contrast, Article VI: 4–5 deals with the quality of the service or the ability of the supplier. It follows that this provision is aimed at “minimum requirements” (e.g. specific entry requirements) that in theory can be fulfilled by the service supplier.<sup>106</sup> In this regard, Article VI: 4–5 performs a positive function as it provides for normative criteria that WTO Members must respect when enacting regulation (objectivity, transparency and necessity).<sup>107</sup>

In *US-Gambling*, the WTO had to deal with series of American laws, which prohibited the supply of internet gambling in a non-discriminatory manner: neither American nor foreign services suppliers were allowed to supply such services. The question concerning the application of Article XVI was whether a total prohibition on the cross-border supply of a (online gambling) service, where a full market access commitment had been made, could be deemed a market access limitation falling within the scope of Articles XVI: 2(a) and XVI: 2(c), even if the prohibition does not contain any reference to numbered units as required under Article XVI: 2 (a) (c).

Both the GATS Panel and Appellate body specified that the Article XVI: 2 prohibition did not cover measures that have the *effect* of limiting the number of services suppliers or the number of service operations and the total quantity of service output (like licensing requirements for lawyers). On the other hand, the Appellate Body stressed that “the thrust of sub-paragraph (a)

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<sup>102</sup> **US- Gambling**, Panel Report, *above note 97*, para. 6.305.

<sup>103</sup> WTO-WPDR (2011d), *above note 186*.

<sup>104</sup> PAUWELYN (2005), *Rien ne va plus?*, *Distinguishing Domestic Regulation from Market Access in GATT and GATS*, World Trade Review, Vol. 4, No. 4, July 2005, p. 153.

<sup>105</sup> ORTINO (2006), *Treaty Interpretation and the WTO Appellate Body Report in US-GAMBLING: A Critique*, Journal of International Economic Law, Vol. 9, No. 1, March 2006, pp. 117-148, p.139

<sup>106</sup> PAUWELYN (2005), *above note 104*, p. 104.

<sup>107</sup> ORTINO (2006), *above note 101*, p. 139.

is not on the form of limitations, but on their numerical or quantitative nature”.<sup>108</sup> Thus the words “in the form of” as understood under Article XVI: 2(a) should not be taken “as prescribing a rigid mechanical formula”.<sup>109</sup> Likewise with regard to subparagraph (c), the Appellate Body pointed out that all types of limitations under this subparagraph are quantitative in nature and they all restrict market access. Therefore, the Appellate Body ruled that, “the limitations covered there under cannot take a single form, nor be constrained in a formulaic manner”.<sup>110</sup> These considerations led the Appellate Body to accept that a total prohibition, understood as a zero quota, is a measure of numerical nature or a quantitative measure that is inconsistent with Article XVI: 2(a).<sup>111</sup>

As Delimatsis argues, this ruling distinguishes between measures that are *per se* quantitative and other measures that are not of a quantitative nature, but that have the same effect as quantitative measures.<sup>112</sup> In this latter case, the adjudicating body made it clear that these measures do not fall within the scope of Article XVI. With regard to quantitative measures, they stressed that the list of measures in Article XVI: 2 is not illustrative, but exclusive. However, they agreed to extend the interpretation of the measures mentioned in Article XVI: 2.

This subtle distinction may be better understood with examples. The first situation covers, for instance, regulations that require foreign lawyer to pass an exam in order to practice in a host jurisdiction and may result in a limitation on the number of foreign lawyers. This is not a quantitative measure *per se*, but has a quantitative effect. Such a measure does not fall within the scope of Article XVI, but Article VI. The second situation would be regulations that limit the practice of law by a foreign lawyer in one region of a WTO Member State (like in Malaysia). Such measure is quantitative, but is not listed in Article XVI: 2. It would have to be recorded in the National Treatment column as a discriminatory measure. Finally, an extensive interpretation could include nationality requirements for the practice of certain fields of law. Such a situation is not covered by Article XVI: 2 (a) *strictu sensu*, but can be considered as a restriction “in the form of numerical quota” extended to include zero quotas.

The *US-Gambling* case has been the subject of numerous analyses. Delimatsis supports the Panel and Appellate Body interpretations as described above.<sup>113</sup> Krawjeski criticizes the lack of textual and contextual arguments to support the adjudicating bodies reasoning.<sup>114</sup> Some authors argue that such online gambling restrictions should have been analyzed under Article VI. Pawelyn argues that the case should have been analyzed as a technical standard,<sup>115</sup> while Ortino criticizes the absence of any consideration of the context of Article XVI and the object and purpose of the GATS.<sup>116</sup> However, these two analyses fail to take into account the distinction between quantitative measures *per se* and other measures that have the effect of quantitative measures. For example, a qualification exam for lawyers (or taxi drivers) would fall within the scope of Article XVI, which does not take into account policy objectives. Such

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<sup>108</sup> **US- Gambling**, Appellate Body Report, *above note 9*, para. 232.

<sup>109</sup> *Idem*, para. 231.

<sup>110</sup> *Idem*, para. 247.

<sup>111</sup> *Idem*, para. 227-233.

<sup>112</sup> DELIMATIS (2006), *Don't Gamble with GATS- the Interaction between Article VI, XVI, XVII and XVIII in the Lights of the US-Gambling Case*, Journal of World Trade, No 40, No. 6, December 2006, pp. 1059-1080.

<sup>113</sup> *Idem*.

<sup>114</sup> KRAWJESKI (2005), *Playing by the Rules?*, Legal Issues of Economic Integration, Vol. 32, No 4, 2005, pp. 417-447.

<sup>115</sup> PAWELYN (2005), *above note 104*.

<sup>116</sup> ORTINO (2006), *above note 105*.

reasoning is not necessary in a distinction between purely quantitative measures and measures that have a quantitative effect which was the approach taken by the Appellate Body. Finally, Zleptnig has called for more clarification from the WTO's political and judicial bodies to draw the line between rules on market access and domestic regulation.<sup>117</sup>

Mavroidis proposes a totally different solution, considering Article XVI: 2 to only cover quantitative restrictions on foreign suppliers only, to the exclusion of domestic suppliers. This solution would be in line with the function of trade agreements and avoid the problem of the overlap between Article XVI and domestic regulation. From this perspective, Article XVI would be considered as a subset of Article XVII, which would also solve the problem of conflicting commitments.<sup>118</sup> With respect to legal services in particular, this would cover restrictions on association between local and foreign lawyers. In this regard, two situations can be distinguished. First, they are prohibitions based on protectionism such as those found in Chinese and South Korean schedules of commitments. They serve protectionist purposes and fall under the scope of Article XVI. On the other hand, they are restrictions on association between domestic lawyers and non-lawyers (such as accountants), as is the case in Switzerland.<sup>119</sup> These measures are not discriminatory *per se*, as they place all non-lawyers on the same footing. However, the result is the same for foreign lawyers: they cannot associate with local lawyers, as they are not considered to be a local lawyer. According to Mavroidis's proposal, such a situation would not be dealt with under Article XVI, but rather under Article VI. However, this interpretation does not appear to have received much attention in current negotiations. Therefore, both situations should fall under the scope of Article XVI, but as the WTO Secretariat highlights, such limitations should be recorded in the event of commitments regarding the provision of legal advice on domestic law (and not for commitments on legal advice in home country law and/or international law).<sup>120</sup>

It results from all these considerations that clarification is needed from negotiators or adjudicating bodies on the scope of Article XVI and its relationship to Articles XVII and VI. If the relationship between Article XVI and Article XVII has not yet been addressed, adjudicating bodies arguably provided some guidance on the scope of Article XVI in *US-Gambling*. As things stand, Article XVI covers discriminatory and non-discriminatory measures, which involve an overlap between on the one hand, Articles XVI and XVII for discriminatory measures, and on the other hand Articles XVI and VI. With respect to discriminatory measures, Article XX: 2 makes it clear that in case of overlap, discriminatory measures fall under the scope of Article XVI. With regard to non-discriminatory measures, it follows from *US-Gambling* and other negotiations that Article VI deals with measures not covered by Article XVI (and XVII). More specifically, with regard to the interpretation of Article XVI, the Appellate Body stressed that the list of measures mentioned in Article XVI: 2 is exhaustive, exclusive but not illustrative. On the other hand, the Appellate Body extended the interpretation of measures mentioned in Article XVI beyond a purely mechanical formula stating that a total ban was equivalent to numerical, zero quota.

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<sup>117</sup> ZLEPTNIG (2007), *The GATS and internet-based services: Between Market Access and Domestic Regulation*, Cambridge Review of International Affairs, Vol. 20, No. 1, March 2007, pp. 133-157.

<sup>118</sup> MAVROIDIS (2007), *Highway XVI Re-visited: the Road from Non-Discrimination to Market Access in GATS*, *World Trade Review*, Vol. 6, No 1, February 2007, pp 1-23.

<sup>119</sup> See below, pp. 118-120.

<sup>120</sup> WTO-CTS (2010d), *above note 19*, p. 13-14.

## b. National Treatment (Article XVII)

Article XVII covers discriminatory measures that affect foreign suppliers and aims to ensure that they are subject to the same competition conditions, it states:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

As mentioned earlier, Article XX: 2 stipulates that measures that are inconsistent with both Articles XVI and XVII must be recorded in the column relating to Article XVI. Under Article XX: 2, any discriminatory measure scheduled in the Market Access column is also regarded as scheduled under Article XVII and subject to the provisions of that Article.<sup>121</sup> It follows that the measures inscribed in Article XVII are discriminatory measures that are not quantitative within the meaning of Article XVI: 2.

Case law has developed a four-pronged test to establish the inconsistency of a particular measure with Article XVII. This approach was originally developed by the Panel in *EC-Bananas III*<sup>122</sup> followed by the Appellate Body in the same case.<sup>123</sup> More recently, in *China-Publications and Audiovisuals Products* the Panel took the same approach with some small differences.<sup>124</sup> It follows that in order to determine whether Article XVII has been infringed, the complainant has to demonstrate that:

- The services at issue are inscribed in a WTO Member's schedule;
- The extent of WTO Member's national treatment commitments with respect to the service entered in its schedule;
- Whether these measures at issue affect the supply of these services;
- Whether these measures accord less favorable treatment to services or service suppliers of other WTO Member, in comparison with like domestic services or services suppliers.

These conditions must be fulfilled *cumulatively*. The first two conditions are factual issues and the answers can be found in the WTO Member's schedules. The two other conditions include the determination of three elements: (i) does the measure in question affect the supply of services; (ii) the likeness of domestic and foreign services or service suppliers; and (iii) less favorable treatment.

### *i) Measures affecting trade in services*

The determination of whether a measure affects the supply of services does not pose real difficulties since the Appellate Body in *EC-Bananas III* adopted a broad definition:

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<sup>121</sup> WTO-CTS (2001b), *above note 34*, p. 6-7.

<sup>122</sup> *EC-Bananas III*, Panel Report, *above note 87*, para. 7.134.

<sup>123</sup> *EC-Bananas III*, Appellate Body Report, *above note 13*, para. 241 ff.

<sup>124</sup> *China-Publications and Audiovisuals Products*, Panel Report, *above note 101*, para. 7.944 ff.

The term “affecting” reflects the intent of the drafters to give a broad reach of the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term “affecting” in the context of Art. III of the GATT is wider in scope than such terms as “regulating” or governing.<sup>125</sup>

The Appellate Body specified that measures that have “an effect on” include *de iure* and *de facto* discriminatory measures.<sup>126</sup> The *de iure* discriminatory measures cover measures that differentiate directly on the basis of prohibited criterion, such as for instance, nationality requirements for lawyers. *De facto* discriminatory measures or origin-neutral measures include measures that do not discriminate directly against foreign suppliers, but in practice, modify the conditions of competition to the benefit of domestic suppliers. With regard to legal services, the most frequent *de facto* discriminatory measures are residency requirements and membership of the local bar association.

*ii) Like services or service suppliers*

*EC-Bananas III* established that different services activities taken individually were virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed.<sup>127</sup> In *China-Publications and Audiovisuals Products* the Panel noted that origin is the only factor on which a measure can base a difference of treatment between domestic service suppliers and foreign suppliers. Thus the *like services and service suppliers* requirement is met, provided there will or can be domestic and foreign suppliers that under the measure are the same in all material respects except origin. However, it observes that in cases where a difference of treatment is not exclusively linked to the origin of services suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, “like”.<sup>128</sup> Unfortunately, case law related to this topic is scarce.

In contrast, adjudicating bodies have developed a well-established approach for determining likeness under the GATT, which is summarized by the Appellate Body in *EC-Asbestos*. The analysis of the likeness of two products includes four general criteria: (a) the properties, nature and quality of the products; (b) their end-uses; (c) consumers’ tastes and habits and (d) the tariff classification of the products (or CPC in the classification of services).<sup>129</sup> In some cases, the adjudicating bodies did not limit the analysis of likeness to the physical characteristics of the product, but also included an analysis of the legitimate objectives and purpose of the regulation in question.<sup>130</sup>

The question is whether such analyses can be transposed to the GATS? To a certain extent, some elements (such as end-users and consumers’ tastes) can be useful to determine the likeness of services. However, the four criteria do not provide a clear analysis of service suppliers.<sup>131</sup>

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<sup>125</sup> *EC-Bananas III*, Appellate Body Report, *above note 13*, para. 220.

<sup>126</sup> *Idem*, para. 244.

<sup>127</sup> *EC-Bananas III*, Panel Report, *above note 87*, para. 7.322.

<sup>128</sup> *China-Publications and Audiovisuals Products*, Panel Report, *above note 101*, para. 7.995 ff.

<sup>129</sup> *US-Clove Cigarettes*, Appellate Body Report, *United States- Measures affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 4 April 2012, para. 107.

<sup>130</sup> *EC-Asbestos*, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

<sup>131</sup> COSSY (2006), *Determining “Likeness” under the GATS: Squaring the Circle?*, Staff Working Paper ERSD-

Therefore, while GATT jurisprudence may influence the definition of likeness under the GATS, a services-related analysis of “likeness” needs to be developed in order to take into account the specificities of trade in services.<sup>132</sup>

### *iii) Less Favorable Treatment*

The third component of the analysis is whether the measure in question provides less favorable treatment for foreign services or service suppliers compared to like domestic services and service suppliers. The determination of a less favorable treatment does not pose major difficulties in the event of direct discrimination.

On the other hand, the assessment becomes more complicated for *de facto* discrimination or indirect discrimination. For instance, direct discrimination such as nationality requirements for lawyers is discriminatory by nature and falls within the scope of Article XVII. In contrast, indirect discriminations such as residency requirements, membership in the local bar, language requirements or restrictions on advertising may potentially constitute *de facto* discrimination falling under the scope of Article XVII. For most measures that indirectly discriminate, outright prohibition would have a powerful liberalization effect. Most of these restrictions are enacted in order to preserve legitimate objectives, such as the correction of market failures and the preservation of non-economic public interest. It follows that a distinction should be made between on the one hand, measures that provide less favorable treatment and must be removed, and on the other hand, measures that affect trade or indirectly discriminate, but are necessary to preserve legitimate objectives. In this latter situation, the requirements of trade agreements shift on the analysis of the necessity or rationality of the measures in question.

In the EU context, the TFEU contains provisions that prohibit discrimination based on nationality in Article 49 (in mode 3) and Article 56 (in modes 1, 2 and 4). The ECJ in early cases ruled that direct discriminatory measures like nationality requirements for the practice of law in foreign jurisdictions had breached the non-discriminatory requirement.<sup>133</sup> Similarly, indirect discrimination such as residency requirements for the cross-border practice of law was found to violate non-discriminatory obligations.<sup>134</sup> Subsequently, the ECJ has required the elimination of restrictions even if they apply equally to national providers of services and those of other Member States, in cases where they are liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where they lawfully provide similar services.<sup>135</sup> Under such a non-restriction approach, the elements of “less favorable treatment” and “likeness” are replaced by a test of necessity. It follows that the analysis of national measures in the light of EU obligations has shifted from a non-discriminatory assessment to a market access approach with the avoidance of unnecessary trade restrictions.

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2006-08.

<sup>132</sup> For an in-depth analysis see DIEBOLD (2010), *Non-Discrimination in International Trade in Services: “Likeness” in WTO/GATS*, Cambridge University Press.

<sup>133</sup> **Reyners**, C-2/74, *Jean Reyners v. Belgian State*, [1974], ECR 631.

<sup>134</sup> **Van Binsbergen**, C-33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974], ECR 1299.

<sup>135</sup> **Säger**, C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd*, [1991], ECR I-4221, para. 12.

In the 1990s, ECJ jurisprudence progressively extended the scope of the TFEU to national non-discriminatory measures (direct or indirect), but which still hinder access to market. Initiated in *Säger*<sup>136</sup> in the context of the free movement of services, the ECJ applied the same reasoning to the right of establishment provisions in *Kraus*<sup>137</sup>, confirmed and fine-tuned in *Gebhard*.<sup>138</sup> At a later stage, the approach has been extended to other freedoms (the free movement of workers,<sup>139</sup> citizens<sup>140</sup> and capital<sup>141</sup>).

The GATS does not provide for such integration and such a shift does not appear possible. Instead, the GATS features two separate provisions, which deal with the two different requirements: Article XVII deals with discriminatory measures, while Article VI addresses the question of necessity. This separation requires the identification of measures that are discriminatory or less favorable in the meaning of Article XVII: 3 and that must be inscribed in the schedule of commitments. The delimitation of discriminatory measures which fall under the scope of Article XVII is a fundamental operation. It distinguishes the scope of Article XVII from that of Article VI, in particular with respect to indirect discrimination.

Article XVII: 3 stipulates that direct or indirect discrimination shall be considered *less favorable treatment* if it modifies the conditions of competition in favor of services or services suppliers of the WTO Member compared to like services or service suppliers of any other WTO Member. A footnote specifies that Article XVII does not require any WTO Member to compensate for any inherent competitive advantage, which results from the foreign character of the relevant services or service suppliers. Apart from this, the GATS does not provide further guidance on the definition of less favorable treatment.

A hotly debated question has emerged on less favorable treatment that may violate national treatment obligations. The literature distinguishes between the *diagonal test* and the *asymmetric test*. The *diagonal test* compares the less favorable treatment accorded to *any* foreign products to *any* like domestic products. On the other hand, the *asymmetric test* requires that at least one group of foreign products are treated less favorably than one *group* of domestic products (e.g. minimum fee restrictions on all lawyers). This restriction is origin-neutral, but may treat foreign lawyers less favorably due for instance to differences in the cost of living. Under the *diagonal test*, it is sufficient to demonstrate that *one* foreign lawyer faces less favorable treatment compared to *one* domestic lawyer. In contrast, the *asymmetric test* requires that at least a group of foreign lawyers face *less favorable treatment* compared to a *group* of domestic lawyers. It follows that the *diagonal test* covers more discriminatory measures than the *asymmetric test*. It has the effect that even extremely subtle discrimination falls under Article XVII. On the other hand, the *asymmetric test* is more demanding since it requires that the measure in question negatively affects the competitive relationship of the group of foreign products in relation to the group of domestic products.

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<sup>136</sup> *Idem*.

<sup>137</sup> **Kraus**, C-19/92, *Diter Kraus v. Land Baden-Württemberg*, [1993], ECR I-1663.

<sup>138</sup> **Gebhard**, above note 35.

<sup>139</sup> **Commission v. Denmark**, C-464/02, *Commission of the European Communities v. Kingdom of Denmark*, [2005], ECR I-7929.

<sup>140</sup> **Tas-Hagen**, C-192/05, *Tas-Hagen Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, [2006], ECR I-10451.

<sup>141</sup> **Commission v. Portugal**, C-367/98, *Commission of the European Communities v. Portuguese Republic*, [2002], ECR I-4731.

The requirements of the test depend on the size of the group and the calculation of the overall burden the discriminatory measures put on foreign products: if the sample includes a small number of products, the requirement test is less stringent than if the number of compared products is large.<sup>142</sup>

There is no relevant case law on this issue in relation to the GATS. Most cases are related on trade in goods. It appears that the WTO adjudicating bodies have favored the *asymmetric test* approach. However, they have not taken a consistent approach to whether the test applies to a small number of foreign and domestic products or whether a higher percentage of imported products have to be negatively affected by the measure.<sup>143</sup> Therefore, the question of whether such analyses may apply in the GATS context remains open. However, based on the WTO Members' schedules of commitments in the legal services sector and negotiations between WTO Members, it appears that restrictions that fall under the scope of Article XVII mainly revolve around residency requirements and to a lesser extent membership of a professional association. Other measures generally fall under Article VI.

### **c. Additional Commitments (Article XVIII)**

Article XVIII allows Members to negotiate commitments with respect to measures affecting trade in services that are not subject to market access and national treatment obligations. Thus Article XVIII reads:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

With respect to content, the *2001 Scheduling Guidelines* mention that such commitments can include, but are not limited to, undertakings related to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI. They also specify that additional commitments are expressed in the form of undertakings, not limitations.<sup>144</sup>

As far as legal services are concerned, the most frequent additional commitments are licensing requirements and technical standards (code of conduct) for foreign legal consultants that are found in the schedules of for instance, Australia, Canada or the United States. The purpose of undertaking such commitments is to ensure greater predictability, certainty and security of licensing requirements than if they were only subject to Article VI. They are also designed to inspire other WTO Members to do likewise.

The following table presents an overview of the various issues related to the schedules of commitment in the legal services sector.

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<sup>142</sup> EHRING (2002), *De Facto Discrimination in WTO Law: National Treatment and Most-Favored-Nation Treatment- or Equal Treatment?*, Jean Monnet Working Paper 12/01.

<sup>143</sup> EHRING (2002), *above note 142*, pp. 9-16 ; ORTINO (2008), *The Principles of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues*, K Alexander & M. Andenas (eds), The World Trade Organization and Trade in Services, Koninklijke Brill NV., Netherlands, pp. 173-204, pp. 180-186.

<sup>144</sup> WTO-CTS (2001b), *above note 34*, p.6-7.

**Table 5 Various issues related to schedule in the legal services sector**

| Sector, Sub-sector                                                                                                                                                                                | Limitations on Market Access                                                                                                                                                                                                                                                                                                                                                                                         | Limitations on National Treatment                                                                                                      | Additional Commitments                                                                                                                                                                                               |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Professional Services<br>a. Legal Services<br>CPC 861<br>or<br>International law, home country law and/or host country law.<br>Advisory, representation and/or arbitration, mediation services | <p>none, unbound, or specific language:</p> <p>Nationality requirements (mode 1 to 4)</p> <p>Quotas on foreign provision/ economic need test (mode 3)</p> <p>Restrictions on legal form (mode 3)</p> <p>Restrictions on partnership with locally licensed professional (mode 3)</p> <p>Restrictions on the hiring of local professionals (mode 3)</p> <p>Restrictions on the movement of personal staff (mode 4)</p> | <p>none, unbound, or specific language:</p> <p>Prior residency or residency requirement</p> <p>Membership in local bar requirement</p> | <p>Qualification / Licensing requirements (mode 3-4) for FLC</p> <p>Restrictions on the name (mode 3)</p> <p>Restrictions on fee-setting (mode 3) or fee-sharing</p> <p>Restrictions on advertising (mode 1 – 4)</p> |

## C. Avoidance of Unnecessary Restrictions

The avoidance of unnecessary restrictions is more commonly referred as the *Necessity Test* in the WTO framework. Two GATS provisions feature a necessity test: Article VI: 4–5 and Article XIV. These two provisions differ in nature. Article VI is an obligation, while Article XIV functions as an exception. Since most of the discussions on the application of a *Necessity Test* in the liberalization of legal services revolve around Article VI, this analysis focuses on the necessity as an obligation within the meaning of Article VI.

The types of measures that fall under the scope of Article VI and are subject to the *Necessity Test* have been debated. Some negotiators and commentators argue that Article VI: 4–5 addresses measures that are not subject to the requirements of Articles XVI and XVII. Accordingly, the *Necessity Test* only applies to measures that are neither discriminatory nor a limitation of market access.<sup>145</sup> In contrast, others argue that there may be an overlap between measures covered by Article XVI and XVII and Article VI: 4.<sup>146</sup> After all, a residency requirement can be *de facto* discrimination covered by Article XVII and a measure more burdensome than necessary to ensure the quality of the service within the meaning of Article VI: 4–5. Neither Article VI: 4 nor Articles XVI and XII address this question. However, as

<sup>145</sup> WTO-WPDR (2001a), *Domestic Regulation: Necessity and Transparency*, Communication from the European Communities and their Member States, S/WPDR/W/14, 1 May 2001.

<sup>146</sup> JANDA (2003), *GATS Regulatory Disciplines Meet Global Public Goods: The Case of Maritime and Aviation Services*, P. Sauvé/ A. Mattoo (eds), *Domestic Regulation and Service Trade Liberalization*, Oxford University Press, pp. 109-129.

mentioned earlier, current negotiations within the WPDR favor a clear distinction of the scope of Articles XVI, XVII and VI: 4, which means that a *Necessity Test* would apply to measures that are neither measures listed in Article XVI nor discriminatory measures.<sup>147</sup> In other words, Article VI: 4–5 covers non-discriminatory measures (not listed in Article XVI) and aims to ensure, among other thing, that these measures are not more burdensome than necessary to achieve policy objectives.

This requirement introduces a concept of a rationality test. This is expected to play an important role with regard to legal services, as discriminatory measures in this sector are being progressively removed by most WTO Members.<sup>148</sup> An analysis of the *Necessity Test* within the GATS starts with a description of the test as it is understood in other WTO agreements and then look at the idea of necessity as defined in Article VI: 4–5.

## 1. The *Necessity Test* in WTO Agreements

In general terms, the *Necessity Test* can be described as a mechanism that seeks to establish the consistency of measures affecting trade in services, through an examination of whether they are necessary to achieve policy objectives. The test is designed to strike a balance between two important goals. On the one hand, it aims to preserve the freedom of WTO Members to set and achieve regulatory objectives through measures of their own choice, while on the other hand, it seeks to discourage WTO Members from adopting or maintaining measures that unduly restrict trade.<sup>149</sup>

Provisions featuring a necessity test in whole or in part, can be found in various WTO trade agreements: in the GATT (Articles XX and XI); in the Technical Barriers to Trade (TBT) agreement (Articles 2.2 and 2.5); in the Application of Sanitary and Phytosanitary Measures (SPS) agreement (Article 2.2 and 5.6); in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement (Articles 3.2, 8.1 and 27.2); in the Agreement on Government (Article 23.2).

The GATS contains provisions relating to a necessity test in Article VI: 4–5 (Domestic Regulation), in Article XIV (General Exceptions) Article XII (Restrictions to Safeguard the Balance of Payments) and in the Annex on Telecommunication (paragraph 5 (e)).<sup>150</sup> A necessity test usually contains three elements: the measure, the objective and the link between the measure and the objective. The measures subject to the necessity test vary in scope: they can be unqualified (i.e. the test applies to all measures, as in Article XIV) or may be more limited (it only applies to specific measures, e.g. Article VI: 4). The policy objective may be set out in a closed list (e.g. Article XIV GATS) or an open illustrative list of “legitimate objectives” (e.g. Article 2.2 TBT). The link between the measure and the objectives may be expressed either as “necessary” (Article XIV GATS), or using other terms such as “not more trade restrictive than required” (Article 5.6 SPS).<sup>151</sup>

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<sup>147</sup> WTO-WPDR (2009), *Draft on Domestic Regulation pursuant to Art. VI: 4 GATS, Second Revision*, Informal note by the Chairman, Working Party on Domestic Regulation, Room document, 20 March 2009.

<sup>148</sup> WTO-WPDR (2012b), *Regulatory Issues in Sectors and Modes of Supply*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/W/48, 13 June 2012

<sup>149</sup> WTO- WPDR (2003c), *Necessity Test in the WTO*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/27, 2 December.

<sup>150</sup> For an overview see DELIMATIS (2008), *Determining the Necessity of Domestic Regulations in Services: the Best is Yet to Come*, The European Journal of International Law, Vol. 19, No 2, April 2008, pp. 365-408, pp. 370-381.

<sup>151</sup> WTO- WPDR (2003c), *above note 149*.

Case law in the context of the GATS is rare and mainly relates to Article XIV.<sup>152</sup> Case law derived from other WTO agreements makes it possible to distinguish some important elements of the test that could apply to Article VI: 4–5. In applying the test, the WTO adjudicating bodies do not examine the necessity of the intended policy objectives, but rather the necessity of the measure intended to achieve that intent. It is nevertheless essential that objectives are identified against which the necessity of a measure can be determined. In several instances, the Panel and the Appellate Body have stressed that Members have the right to determine the level of achievement of a chosen objective that they consider appropriate. The examination of “reasonable availability” of alternative measures involves at least two factors: first, the difficulty the Member in question may have in applying a particular alternative measure and, second, the ability of this alternative to reach the desired level of achievement. Finally, the jurisprudence holds that the overall burden of proof rests upon the party who asserts a particular claim or defense.<sup>153</sup>

Having set out the background to the necessity test as it is interpreted in the context of other WTO agreements, we now look at it in the context of Article VI: 4–5 of the GATS agreements.

## 2. The *Necessity Test* and Article VI: 4–5 GATS

As mentioned earlier, measures falling under the scope of Article VI are non-discriminatory measures (covered by Article XVII) and measures not listed in Article XVI. With respect to legal services, these include non-discriminatory measures that affect cross-border legal practice. Drawing from ECJ case law, these may include measures such as language requirements<sup>154</sup>, requirements to register in the local bar<sup>155</sup>, reserved activities<sup>156</sup>, restrictions on fee-setting<sup>157</sup> or advertising. The scope of Article VI: 4–5 is nevertheless limited in two respects. First, it only covers measures related to qualification/license requirements and procedures and technical standards. Second, these measures are limited to service sectors where WTO Members have undertaken specific commitments.

Article VI: 4 mandates the Council for Trade in Service to establish bodies to develop necessary disciplines on measures relating to licensing/qualification requirements and procedures and technical standards in order to ensure that they are *inter alia*: not more burdensome than necessary to ensure the quality of the service (Article VI: 4 (b)). As a result ongoing negotiations are taking place on the development of disciplines for a necessity test in the context of the Working Party on Domestic Regulation.

Article VI: 5 provides for the application of a *Necessity Test*. Under Article VI: 5 (a) (i) (in service sectors where they have undertaken commitments) WTO Members shall not apply licensing and qualification requirements and technical standards that nullify and impair such commitments with requirements that are more *burdensome than necessary* to ensure the

<sup>152</sup> **US-Gambling**, Panel Report, *above note 97* ; **US-Gambling**, Appellate Body Report, *above note 9*.

<sup>153</sup> For an overview of WTO case law see WTO-WPDR (2011a), “*Necessity Test*” in the WTO, Note by the Secretariat, Addendum, S/WPDR/W/27/Add.1, 18 January 2011.

<sup>154</sup> **Wilson**, C- 506/04, *Graham J. Wilson v. Ordre des avocats au Barreau de Luxembourg*, [2006], ECR I-08613

<sup>155</sup> **Gullung**, C292/86, *Claude Gullung v. Conseil de l’ordre des avocats de Colmar et de Saverne*, [1988], ECR I-111.

<sup>156</sup> **Reisebüro Broede**, C-3/95 *Reisebüro Broede v. Sandker*, [1996] ECR I-6511; **Säger**, C-76/90, *Manfred Säger v. Drenemeyer & Co. Ltd.*, [1991], ECR I-4221.

<sup>157</sup> **Cipolla**, joined cases C-94/04, C- 202/04, *Frederico Cipolla v. Rosaria Fazari and Stefano Marcino and Claudia Capodarte v. Roberto Meloni*, [2006], ECR I-1142.

quality of the service. The scope of this obligation is nevertheless limited to cases that could not reasonably have been expected by the Member at the time the specific commitment was made (Article VI: 5 (a) (ii)), which severely restricts the applicability of the obligation.<sup>158</sup>

Several issues are relevant to negotiations for the adoption of a necessity test as mandated by Article VI: 4. These include *inter alia*, a coherent definition of a necessity test and the inclusion (or not) of an illustrative or exhaustive list of legitimate policy objectives.<sup>159</sup>

## D. Recognition

The term *recognition* is not defined in the GATS, although there is a specific provision that deals with the issue. Generally speaking, recognition is understood as the acceptance of foreign suppliers' qualifications or licenses as equivalent to those of domestic suppliers. The idea behind this mechanism is that if a professional can provide services lawfully in one jurisdiction, they can do so in any other jurisdiction without having to comply with the regulations applied in those jurisdictions. Home country regulations, although not identical to those applied in the host country, are nevertheless regarded as equivalent.<sup>160</sup> The absence of recognition increases the cost of entry for foreign suppliers, who have to invest in education and training in order to enter the foreign market. Therefore, it can be argued that the objective of recognition is to reduce transaction costs, thereby facilitating market access.<sup>161</sup>

Recognition deals with qualifications and/or licenses, which can be comprehensive or specific.<sup>162</sup> Qualification requirements generally concern the ability of natural persons to perform services in a specific country, region or market. Meeting these requirements ensures a certain minimum level of competency. Recognition is essentially based on the assessment of equivalency of academic qualifications and/or professional qualifications.

Recognition of academic qualifications can be conferred on students with advanced qualifications, in order to be eligible for training or to have the right to use a title or a degree. On the one hand, recognition of professional qualifications refers to the evaluation of credentials for entry into and/or practice of the profession. This involves recognition of educational qualifications, work experience and expertise.<sup>163</sup> On the other hand, licensing requirements generally go beyond the competency of the service supplier to provide adequate service to consumers and concern specific public objectives such as consumer protection or quality control. In terms of the sequence of events leading to the authorization of legal practitioners to provide services, preliminary qualification requirements must be met before licensing requirements come into play.<sup>164</sup>

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<sup>158</sup> DELIMATIS (2007), *Due Process and 'Good' Regulation Embedded in the GATS*, Journal of International Economic Law, Vol. 10, No 1, March 2007, pp.13-50.

<sup>159</sup> WTO-WPDR (2001a), *above note 145*.

<sup>160</sup> UNCTAD (2005), *Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS*, UNCTAD/DITC/TNCD/2005/2, 21 February, p. 6.

<sup>161</sup> MARCHETTI/ MAVROIDIS (2012), *I Now Recognize You (and Only You) As Equal, An Anatomy of (Mutual) Recognition Agreements in the GATS*, I. Lianos & O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge University Press, pp. 414-444.

<sup>162</sup> NICOLAIDIS (2005), *Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals*, Fiorella, Kistoris, & Padoa Schioppa, (eds.), *The Principle of Mutual Recognition in the European Integration Process*, Palgrave Macmillan, pp.129-189, p.145.

<sup>163</sup> UNCTAD (2005), *above note 160*, p.3

<sup>164</sup> WTO-WPDR (2005d), *Definitions of Qualification Requirements, Qualification Procedures, Licensing Requirements, Licensing Procedures and Technical Standards*, Communication from the Separate Customs

Generally speaking there are two methods of recognition: unilateral and mutual. Unilateral recognition is an autonomous decision by regulatory authorities in the host country to accept as equivalent home country qualifications. This kind of recognition has long been the norm for professionals wishing to practice across borders. However, it is typically based on administrative discretion, which does not ensure an objective predictable assessment of qualifications leading to the risk of arbitrary decisions. In order to prevent such problems Mutual Recognition Agreements (MRAs) have been developed. Under these international agreements two or more countries accept the equivalence of each other's qualifications on a reciprocal basis. MRAs ensure a more predictable and objective evaluation of professional qualifications; they also reduce the transaction costs of granting entry for regulatory bodies. However, at the same time, recognition can divert or restrict trade with countries that are not recognized. In this context, the purpose of the GATS provisions is to promote the benefits of recognition and at the same time to try to mitigate any negative effects of such mechanisms. However, before analyzing the GATS provisions in greater detail, it is necessary to describe the particular characteristics of recognition issues.

## **1. Recognition in the Legal Services Sector**

To date, recognition in the legal services sector takes the form of autonomous recognition where particular aspects of qualifications are recognized as equivalent, other aspects being subject to additional requirements to practice home country and/or international law. In cases where WTO Members authorize the provision of legal advice services under home country law and international law, they generally recognize foreign qualifications, but set out licensing requirements. However, in some cases, mechanisms have been developed to enable foreign lawyers to become fully licensed. It follows that there are two types of licensing approach: full and limited.

### **a. The Full Licensing Approach**

The *Full Licensing Approach* enables foreign lawyers to become fully licensed to practice the law of the host jurisdiction through examination or otherwise.<sup>165</sup>

In almost all jurisdictions in the world, to various degrees, foreign lawyers are not allowed to practice local law (i.e. provide legal advice and representation). The generic justification given for this restriction is consumer protection and the role of local lawyer in the local administration of justice. As law differs in different jurisdictions, it is important that a lawyer fully understands local law before advising or representing clients in the host jurisdiction.<sup>166</sup> In addition local authorities are reluctant to authorize the practice of local law when practitioners have not followed the traditional path and thus have not been properly monitored. In order to remedy these problems mechanisms have been developed to address the need for cross-border legal practice: mutual recognition and re-qualification.

Mutual recognition of professional qualifications acquired in a foreign country often takes place between countries that have close ties, for example countries that have a shared colonial history and similar legal systems. For example, there are arrangements between Brazil and

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Territory of Taiwan, Penghu, Kinmen and Mastu, Working Party on Domestic Regulation, S/WPDR/W/37, 6 October 2005.

<sup>165</sup> IBA (1998a), *IBA Statement of General Principles for Establishment and Regulation of Foreign Lawyers*, adopted at the IBA Council Meeting, Vienna, June 1998.

<sup>166</sup> HOOK (2007), *above note 45*, p. 25.

Portugal and Spain and Argentina in which they recognize each other's legal qualifications and automatically admit lawyers from other country without a test. Recognition also exists between Commonwealth countries, which partially share case law.<sup>167</sup> In the same way, in 2010 French and Quebec bar associations concluded an agreement on mutual recognition of professional qualifications.<sup>168</sup> The recognition of professional qualifications may also take place at a regional level, the EU being the most significant example. According to EU Directive 2005/36<sup>169</sup>, the recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as they practice in the home Member State and to pursue it in the host Member State under the same condition as its nationals.<sup>170</sup>

The re-qualification mechanism is another way to facilitate the practice of local law by foreign lawyers. Jurisdictions such as New York or England and Wales offer foreign lawyers transfer routes that enable them to integrate fully into the local profession. In New York, foreign lawyers are allowed to sit for the bar exam provided that they have three years of university-level academic legal education and have obtained a Master of Laws (LLM) qualification from an American Bar Association accredited law school in the United States. In England and Wales, lawyers from common law jurisdictions and the EU are permitted to practice in England via a transfer examination.<sup>171</sup> In contrast, numerous countries permit foreign lawyers to re-qualify but do not give credit for existing qualifications or experience. Therefore foreign lawyers must undertake the full curriculum of local lawyers.<sup>172</sup> In the EU, Directive 98/5<sup>173</sup> offers the possibility of re-qualification. Thus a lawyer, who has effectively and regularly practiced local law including EU law for at least three years under their home country professional title, has the right to automatically qualify as a local lawyer, i.e. to become a member of the legal profession of the host country, in addition to being a member of the legal profession in their home country. Such lawyers have two professional qualifications and titles.<sup>174</sup>

## **b. The Limited Licensing Approach**

The *Limited Licensing Approach* can be understood as allowing foreign practitioners of foreign law to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host state bar.

There are differences in the limited licensing approach. In some countries regulations prohibit non-lawyers from practicing law. Generally this includes the provision of advice regarding

<sup>167</sup> WTO SECRETARIAT (2001b), *Chapter Fifteen: Legal Services*, Guide to the GATS: an overview of Issues for Further Liberalization of Trade in Services, Kluwer International Law, p. 412.

<sup>168</sup> CNB (2010), *Arrangement en vue de la Reconnaissance Mutuelle des Qualifications Professionnelles entre le Barreaux du Québec et le Conseil national des Barreaux*, 8 December, <http://www.cnb.avocat.fr> (last visit 1.10.2012).

<sup>169</sup> Directive 2005/36 EC of the European Parliament and of the Council of 7 September 2005, *on the Recognition of Professional Qualification*, 30 September 2005, OJ L 255/22.

<sup>170</sup> Art. 4 al. 1 Directive 2005/36.

<sup>171</sup> *The Qualified Transfer Test*, <http://www.qltt.co.uk/> (last visit 1.10.2012)

<sup>172</sup> For an illustration see CARROLL (2001), *Innocents Abroad: Opportunities and Challenges for the International Legal Adviser*, Vanderbilt Journal of International Law, Vol. 34, No 4, 14 December 2001, pp. 1097-1133.

<sup>173</sup> Directive 98/5 EC of the European Parliament and the Council of 16 February 1998, *to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>174</sup> Art. 10 Directive 98/5.

legal rights or obligations.<sup>175</sup> Thus a foreign lawyer wishing to provide legal advice on the law of their home country or international law must be qualified as lawyer. As full re-qualification is an onerous requirement some countries have developed a limited licensing mechanism for such lawyers who are known as Foreign Legal Consultants. Countries such as the United States, Canada or Australia have scheduled the conditions a foreign lawyer must fulfill in order to practice. In other countries, lawyers only have a monopoly on court representation or the delivery of certain deeds and not the provision of legal advice. Thus anyone is free to offer their services.<sup>176</sup> This is the situation in many European countries, which have no specific limited licensing mechanism.

A problem emerges when the provision of legal services is the monopoly of lawyers, but where there is no specific licensing mechanism for foreign legal consultants. Thus foreign lawyers wishing to provide legal advice services on home country or international law cannot do so unless they meet the admission criteria for the practice of host country law. This situation was criticized as unnecessarily onerous in an Australian proposal in 2001.<sup>177</sup> A foreign lawyer is required to obtain a full license when they may only require only a license to practice home country, third country and/or international law, rather than host country law. The Australian proposal set out a description of the 'Limited Licensing' concept and demonstrated its value in meeting the requirements of legal practitioners and law firms interested in providing international legal services. It specifically called for formal recognition of the right of a foreign legal practitioner to practice home country, international and, where qualified, third-country law (with the exclusion of host country law). In addition it stressed that this formal recognition goes hand-in-hand with the right of foreign legal practitioners to associate with host country legal practitioners.<sup>178</sup>

The position of the EU has evolved. Initially, in the context of the Uruguay Round, there was no uniform position, largely due to the specificities of the function of lawyers.<sup>179</sup> If a majority of bar organizations accepted the concept of the Foreign Legal Consultant (or Practitioner (FLP)) a significant minority rejected it, preferring the concept of full integration according to which the foreign lawyer can practice in the host country only after they have become a fully integrated member of the legal profession in the host country. Today, in the context of the Doha Round, all Council of Bars and Law Societies of Europe (CCBE) members are prepared to apply the FLC concept to lawyers from states outside the EU, with the term 'home country' meaning a EU Non-member State and the term 'host country' meaning an EU Member State<sup>180</sup> under the following conditions:

- a) The FLP is recognized by the host country on the basis of Art. VII GATS 1994, provided he is a member of a comparable independent regulated bar with a code of conduct in line with the code of conduct of the CCBE and its member organizations and has a sufficient and comparable education or experience obtained, requirements met or licenses or certifications granted in his home country.
- b) The FLP must register as such with the bar and/or competent authorities of the host country.

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<sup>175</sup> TERRY (2004), *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement between the American Bar Association and the Brussels Bars*, Mary C. Daly & Roger J. Goebel (eds), *Rights, Liability, and Ethics in International Legal Practice*, 2<sup>nd</sup> ed., pp. 105-177, p.121.

<sup>176</sup> *Idem*.

<sup>177</sup> WTO-CTS (2001g), *above note 21*.

<sup>178</sup> *Idem*, pt. 6.

<sup>179</sup> GOLDSMITH (2007), *Liberalization of Legal Professions and Services: A View from the CCBE*, Koen Byttebier and Kin Van der Borght (eds), Cameron May, London, pp. 173-188.

<sup>180</sup> CCBE (2001), *Inbound Position of the CCBE vis-à-vis Requests for Liberalization from third countries (outside the EU)*, 1.03.2001.

- c) The professional conduct of the FLP in the host country is regulated under the ethical rules of the bar and/or competent authorities of the host country, notwithstanding the fact that the ethical rules of the host country may be stricter than those of the home country.
- d) The FLP must practice in the host country under his home title.
- e) The FLP must give legal advice only in his home country law and/or in international public law (excluding European Community law).
- f) The FLP is not permitted to represent anybody in court and before administrative authorities except where no requirement for representation by a lawyer exists.
- g) The FLP may associate with host country lawyers and may be employed by host country lawyers, to the extent permitted to them, for the joint exercise of the profession.<sup>181</sup>

## 2. Recognition under the GATS

GATS provisions dealing with recognition do not address the content of recognition, but rather focus on procedural aspects. They seek to strike the balance between on the one hand, the promotion of benefits that recognition may offer and, on the other hand, the reduction of trade distortion effects. It contains two provisions (Articles VII and VI: 6), dealing with the recognition of licenses and/or qualifications.

Article VII sets out the conditions under which recognition should be granted to order to comply with international obligations. Article VI: 6 establishes procedural requirements to ensure that WTO Members take into account foreign professional qualifications. Article VI also contains requirements that aim to enhance procedural or administrative guaranties. In addition, in 1997 WTO Members adopted Guidelines that address Mutual Recognition Agreements.<sup>182</sup>

### a. Article VII: Recognition

Article VII permits WTO Members to recognize specific qualifications and/or licenses, to the detriment of other WTO Members. It reads:

For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

It follows that Article VII does not mandate recognition but authorizes it, i.e. only when a WTO Member recognizes a qualification or license do Article VII obligations become applicable.<sup>183</sup> Recognition can take many forms: unilateral, mutual recognition agreements or harmonization that may involve the recognition of academic qualifications and professional qualifications.

<sup>181</sup> CCBE (2003b), *CCBE Update the General Agreement on Trade in Services*, 31.01.2003.

<sup>182</sup> WTO-CTS (1997), *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, Council for Trade in Services*, S/L/38, 28 May 1997.

<sup>183</sup> NICOLAIDIS/ TRACHTMAN (2000), *From Policed Regulation to Managed Recognition in GATS*, in Sauv   and Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization*, Harvard University/Booking Institution Press, Washington DC, pp. 241-282.

The effect of this provision is to permit WTO Members to recognize the qualifications of providers from some WTO Members to the exclusion of other WTO Members. Thus it is an exception to Article II (MFN).<sup>184</sup> This deviation is based on the idea that given the differences in regulations among WTO Members, recognition is more likely to take place on a bilateral or regional, rather than a multilateral basis. Moreover, the application of MFN to recognition would reduce the possibility of other negotiated agreements.<sup>185</sup> However, Article VII also includes limitations on this freedom, in three substantive obligations.

First, Article VII: 2 requires a WTO Member that recognizes the qualifications of another WTO Member on a MRA basis, to “afford the adequate opportunity for other interested WTO Members to negotiate their accession to such an agreement or to negotiate comparable ones”. The same requirement applies in the case of autonomous recognition. The aim is the multilateralization of existing recognition agreements.<sup>186</sup> Although there is no doubt that the burden of proof lies with the *demandeur*, Article VII gives no indication of the efforts necessary for other countries to obtain recognition. In the absence of any explanation in the text or case law, *process based* recognition is used, meaning that a WTO Member accepts that the process for becoming a lawyer in another WTO Member is equivalent to the one applied to its own lawyers. Therefore a WTO Member has to demonstrate that its process of qualification and/or licensing is equivalent to that of the WTO Member that benefited from recognition.<sup>187</sup>

Second, Article VII: 3 requires that WTO Members do not accord recognition “in a manner which would constitute a means of discrimination ... or a disguised restriction on trade in services between different countries”.

Third, Article VI: 5 strongly encourages WTO Members to use recognition on a multilateral basis. They are required to cooperate with international and non-governmental organizations with a view to establishing common standards.

Besides these three obligations, Article VII: 4 requires WTO Members to notify existing recognition measures to the Council for Trade and promptly inform them of new recognition measures or significant modifications to existing ones.

With regard to legal services, the limited number of MRAs in the sector means that Article VII relates mainly to autonomous recognition. It applies to full licensing, for example the Qualified Transfer Test, which applies to foreign lawyers or overseas lawyers qualified in jurisdictions that are recognized by the Solicitors Regulation Authority of England.<sup>188</sup> It also applies to limited licensing. For instance, in Germany the Ministry of Justice determines which types of lawyers from which GATS countries are comparable. Therefore only lawyers from a limited set of WTO Members are authorized to practice as a Foreign Legal Consultant in Germany.<sup>189</sup>

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<sup>184</sup> BEVIGLIA-ZAMPETTI (2000), *Market Access through Mutual Recognition*, in Sauvé and Stern (eds), GATS 2000: New Directions in Services Trade Liberalization, Harvard University/Booking Institution Press, Washington DC, pp. 283-305.

<sup>185</sup> OECD (2003), *Service Providers on the Move: Mutual Recognition Agreements*, Working Party of the Trade Committee, TD/TC/WP (2002)48/FINAL, 6 February 2003.

<sup>186</sup> TREBILCOCK/ HOWSE (2005), *The Regulation of International Trade*, 3rd ed., Routledge, p. 361.

<sup>187</sup> MARCHETTI/ MAVROIDIS (2012), *above note 161*.

<sup>188</sup> *The Qualified Transfer Test*, <http://www.qltt.co.uk/> (last visit 1.10.2012)

<sup>189</sup> BUNDESMINISTERIUM DER JUSTIZ (2009), *above note 93*.

## **b. Article VI: 6: Adequate Procedures for Verifying Competence of Professionals**

Article VI: 6 states:

In sectors where commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

The purpose of this provision is to ensure that the benefits of the commitments made in professional services are not undermined by a lack of relevant verification procedures.<sup>190</sup>

The term “adequate procedure” does not address specifically recognition, but refers more broadly to procedures for verifying the competence of professionals.<sup>191</sup> However, this verification involves a review of professional qualifications (academic qualifications, experience, certification, etc.) and a determination whether these requirements are sufficient to supply the service in the host country. Thus it includes a determination of equivalence of professional qualifications. The obligations of Article VI: 6 can therefore be seen in the context of Article VII.<sup>192</sup>

Article VI: 6 obligations are particularly relevant in the absence of MRAs dealing with professional services. Thus WTO Members who have made commitments in professional services sectors and have not signed MRAs should still implement Article VI: 6<sup>193</sup>. This is the situation for autonomous recognition, which is the most frequent mechanism used in the legal services sector.

The term “adequate procedure” is not described in more detail in the GATS.<sup>194</sup> Hence implementation is left to WTO Members, who may freely determine the type of procedure they deem appropriate. However, this procedure must make it possible to justify the denial of the recognition of professional qualifications on objective grounds and to identify why foreign professionals are not deemed competent to practice.<sup>195</sup>

The purpose of this section was to analyze the GATS provisions for the liberalization of legal services, namely provisions on transparency, non-discrimination, the necessity test and recognition. All these provisions mandate (in Articles XIX: 1 and VI: 6) negotiations on further liberalization. The next section analyzes the consequences of such negotiations for legal services.

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<sup>190</sup> DELIMATIS (2007b), *above note 158*, pp.13-50.

<sup>191</sup> OECD (2003), *above note 185* p. 12.

<sup>192</sup> DELIMATIS (2007a), *above note 78*, p. 47.

<sup>193</sup> *Idem*.

<sup>194</sup> WOUTERS/ COPPENS (2008), *GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization*, in K. Alexander and M. Adenas (eds), *The World Trade Organization and Trade in Services*, pp. 207-263.

<sup>195</sup> MATTOO/ MISHRA (2009), *Foreign Professional in the United States: Regulatory Impediments to Trade*, *Journal of International Economic Law*, Vol. 12, No. 2, May 2009, pp. 435-456, p. 455.

### III. Negotiations on the Liberalization of Legal Services within the GATS

The GATS is not only about rights and obligations, but it is also a negotiating instrument. In this regard, it contains several provisions that mandate WTO Members to pursue negotiations in line with the principle of progressive liberalization. Thus Article XIX: 1 requires WTO Members to enter into successive rounds of negotiation on specific commitments, Article VI: 4 gives the CTS the mandate to develop disciplines on Domestic Regulation, Article X: 1 requires WTO Members to carry out negotiations on the question of Emergency Safeguards, Article XIII: 2 provides the basis for negotiations on Government Procurement and Article XV: 1 for negotiations on Subsidies.

With regard to legal services, two sets of negotiations are relevant. The first are the negotiations on the schedules of commitments or *Market Access Negotiations*, which are held in a bilateral or plurilateral format. The second are the negotiations on *Domestic Regulation*, which are carried out on multilateral format.

#### A. Market Access Negotiations

Under Article XIX: 1, “Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization”. As a result a new round of negotiations started on 1 January 2000. In March 2001, in order to facilitate the negotiations, the Council for Trade in Services adopted the *Guidelines and Procedures for the Negotiations on Trade in Services*.<sup>196</sup> In November 2001, the Doha Ministerial Declaration brought services negotiations under the wider Doha Development Agenda (DDA).<sup>197</sup> The purpose of market access negotiations is twofold: to remove MFN reservations (Article II: 2) and to improve WTO Member’s Specific Commitments by increasing the number of commitments or removing restrictions in existing commitments.

The starting point for negotiations on specific commitments was the outcome of the Uruguay Round negotiations. The market access negotiation in the context of the Doha Round negotiations could be held on a bilateral, plurilateral and multilateral basis. It is nevertheless stressed that the main method of negotiation should be the request-offer approach (held on bilateral basis).<sup>198</sup>

Under this procedure, WTO Members send *requests* directly to other Members indicating the improvements they are seeking for their services and service suppliers. In response, other Members specify in their *initial offers* how and to what extent they are willing to undertake binding commitments in response to these requests. This is then the starting point for a series of bilateral negotiations. Regardless of which WTO Member submits a request, the offer, in the form of an improved schedule of commitments, applies to all members, by virtue of Article II.

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<sup>196</sup> WTO-CTS (2001a), *Guidelines and Procedures for the Negotiations on Trade in Services*, adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93, 29 March

<sup>197</sup> WTO-MD (2001), *Ministerial Declaration Adopted on 14 November 2001*, Ministerial Conference Fourth Session, Doha, 9-14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

<sup>198</sup> WTO-CTS (2001a), *above note 196*, para. 10-11.

In December 2005, WTO Members adopted the Hong Kong Ministerial Declaration, which reaffirmed the key principles and objectives of services negotiations and called on WTO Members to intensify their efforts. Annex C of the Declaration states that the request-offer format for negotiations should remain the main method for securing substantial commitments. However, Annex C also states that the request-offer approach should be pursued on a plurilateral basis.<sup>199</sup>

In plurilateral negotiations, a group of WTO Members with a common interest makes a joint request to individual WTO Members to improve specific commitments in a particular sector or mode of supply. Subsequently they meet collectively. It is up to each WTO Member to respond individually to the collective request. Two rounds of plurilateral negotiations were conducted in early 2006, based on 21 collective requests that were formulated mostly along sector lines.<sup>200</sup> The Hong Kong Declaration set the deadline for the submission of plurilateral requests as 28 February 2006. The results of the plurilateral and bilateral negotiations were expected to be reflected in a second round of revised offers, which were to be submitted by 31 July 2006. A lack of progress in other areas (notably Agriculture and Non-Agricultural Market Access negotiations) led to the suspension of the Doha Development Agenda negotiations until January 2007. They resumed in February 2007 without a timeline being set.

In parallel to bilateral and plurilateral negotiations, the chair of the Council for Trade in Services periodically carries out consultations with WTO Members on the elements required for the completion of negotiations, which end in the adoption by Members of a draft text. The most recent report of the Council notes that little progress has been achieved.<sup>201</sup>

These various phases (the Uruguay Round, the bilateral request-offer and plurilateral request-offer) formed the background for market access negotiations in legal services. This section describes these different phases as they apply to negotiations in the legal services sector in general and EU and Swiss commitments in particular.

## **1. Market Access Negotiations on Legal Services**

### **a. Initial Situation after the Uruguay Round**

Pursuant to the *Guidelines and Procedures for the Negotiations on Trade in Services*, the starting point for the market access negotiations are the specific commitments undertaken as the result of the the Uruguay Round negotiations.<sup>202</sup> These include commitments undertaken by original WTO Members and WTO Members that have acceded to the organization since 1995. In the legal services sector, 76 WTO Members (out of a total of 153) have undertaken commitments.<sup>203</sup>

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<sup>199</sup> WTO-MD (2005), *Doha Work Program, Ministerial Declaration Adopted on 18 December 2005*, Ministerial Conference, Sixth Session, Hong Kong, 13-18 December 2005, WT/MIN(05)/DEC, 22 December.

<sup>200</sup> The 21 sectors are: Air Transport Services; Architectural, Engineering and Integrated Services; Audiovisual Services; Computer and Related Services; Construction Services; Distribution Services; Education Services; Energy-Related Services; Environmental Services; Financial Services; Legal Services; Logistic Services; Maritime Transport Services; Postal and Courier Services; Service Related to Agriculture; Telecommunication Services; Cross-Border Supply (Modes 1 and 2); Mode 3; Mode 4 and MFN Exemptions.

<sup>201</sup> WTO-CTS (2011b), *Negotiations on Trade in Services, Report by the Chairman Ambassador Fernando de Mateo to the Trade Negotiations Committee*, Council for Trade in Services Special Session, TN/S/36, 21 April.

<sup>202</sup> WTO-CTS (2001a), *above note 196*, para. 10.

<sup>203</sup> Mongolia is the only accession country to have not undertaken any commitment in legal services.

With regard to classification, of these 76 WTO Members:

- Thirteen have used the W/120 classification referring to CPC 861, without modification.
- Three have made commitments without any references.
- Sixty have departed from the W/120 classification and the CPC and instead use a classification based on the distinction between legal advice and/ representation in host country law, international law and/or home country law.<sup>204</sup>

Most commitments relate to advisory services in home jurisdiction and international law (68 Members have undertaken commitments in mode 1, and 67 in mode 3). In contrast, there are considerably fewer commitments on the practice of host jurisdiction law (28 Members have commitments on advisory services in host country law in mode 1, and 29 in mode 3), while 27 Members have made commitments on host country representation. The number of restrictions in legal services is relatively modest compared to other service sectors. WTO Members that have undertaken commitments have maintained restrictions through the definition of sub-sectors (*i.e.* commitments are limited to advice on home country and/or international law) and a distinction between modes of supply (*i.e.* commitments in mode 1 and 2 but not modes 3 and 4). There is a relatively low level commitment in mode 4 (fly-in-fly-out services).<sup>205</sup>

The most frequent scheduled limitations are restrictions on legal entity (17 entries). Typically, these limit the choice of legal form to natural persons (sole proprietorship) or partnership and exclude limited companies. In some cases, partnerships have also been excluded. Nationality and citizenships restrictions are also common (13 entries). These usually relate to limits on geographical area or activity (representation or notary services).<sup>206</sup> Other market access restrictions relate to foreign equity (2 entries). One entry requires the discretionary consent of the Bar Association for the establishment of a commercial presence, which can be associated with an economic needs test.<sup>207</sup>

With regard to national treatment restrictions, the most common restrictions are residency requirements (8 entries). Some countries require full residency, while others require time-limited residency (*e.g.* 180 days per year) or legal domicile (2 entries). Six entries require graduation from a local university. In four cases, this limitation applies specifically to the practice of domestic law, which discriminates *de facto* against foreign suppliers who have to go through a re-qualification process.<sup>208</sup>

Other national treatment restrictions include language requirements, recognition of foreign degrees only for nationals who have studied abroad, the requirement that foreign ventures are viable businesses in their country of origin, the requirement for foreign lawyers to take an active part in the business and maintain an interest in the local law firm, the requirement to be member of the home country bar association (for services supplied in mode 1) and the use of home country title.<sup>209</sup>

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<sup>204</sup> WTO-CTS (2010d), *above note 19*, pp. 14-18.

<sup>205</sup> WTO-CTS (1998a), *above note 18*, p.16.

<sup>206</sup> *Idem.*

<sup>207</sup> WTO-CTS (2010d), *above note 19*, pp. 14-18.

<sup>208</sup> *Idem.*

<sup>209</sup> WTO-CTS (1998a), *above note 18*, p.17.

This situation formed the background for the next phase of negotiations, which began with the submission of proposals followed by the request-offer procedure.

## **b. WTO Members' Proposals related to Legal Services**

In the first phase, several WTO Members tabled general proposals outlining their interest in negotiations on legal services. There were two categories of proposals: those that specifically addressed legal services and others that addressed professional services, including legal services. Three proposals focused specifically on legal services (two from United States<sup>210</sup> and one from Australia<sup>211</sup>), while four addressed professional services (the EU<sup>212</sup>, Canada<sup>213</sup>, Colombia<sup>214</sup> Switzerland<sup>215</sup> and India<sup>216</sup>).

All of these proposals considered nationality and residency requirements to be more restrictive than necessary to achieve public policy objectives. Two proposals (Australia and the United States) aimed to extend the scope of practice of foreign lawyers. The Australian proposal called for formal recognition of the right of qualified lawyers to practice home country, international and third-country law without the imposition of additional or different limitations by the host country. In the same vein, it called for formal recognition of the right to prepare and appear in international commercial arbitration. Two proposals (the EU and Switzerland) concerned the removal of restrictions on membership of professional associations. Three proposals (Australia, the EU and the United States) suggested trade liberalization in mode 3. These restrictions concern the partnership of foreign law firms with local professionals, the employment of local qualified lawyers by foreign law firms and restrictions on legal form. Finally six proposals (the United States, the EU, Canada Switzerland, India and Colombia) called for the facilitation of the movement of natural persons in mode 4.

After this submission period, the negotiation phase began using the bilateral request-offer format.

## **c. The Bilateral Request-Offer Negotiations Phase**

Under the Doha Ministerial Declaration, initial requests were to be submitted by 30 June 2002 and initial offers by 31 March 2002 and negotiations were expected to be concluded not later than 1 January 2005.<sup>217</sup> However, difficulties in the overall negotiations (notably on Agriculture and Non-Agricultural Market Access) led to a change in the schedule.

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<sup>210</sup> WTO-CTS (1998b), *Legal Services*, Communication from the United States, Council for Trade in Services S/C/W/80, 9 December 1998; WTO-CTS (2000b), *above note 20*.

<sup>211</sup> WTO-CTS (2001d), *Negotiating Proposal for Legal Services*, Communication from Australia, Council for Trade in Service Special Session, S/CSS/W/67, 28 March 2001.

<sup>212</sup> WTO-CTS (2000c), *GATS 2000: Professional Services*, Communication from the European Communities and their Member States, Council for Trade in Services Special Session, S/CSS/W/33, 22 December 2000.

<sup>213</sup> WTO-CTS (2001c), *above note 22*.

<sup>214</sup> WTO-CTS (2001f), *Professional Services*, Communication from Colombia, Council for Trade in Services Special Session, S/CSS/W/98, 9 July 2001.

<sup>215</sup> WTO-CTS (2001e) *GATS 2000: Professional Services*, Communication from Switzerland, Council for Trade in Services Special Session, S/CSS/W/75, 4 May 2001.

<sup>216</sup> WTO-CTS (2000a), *above note 23*.

<sup>217</sup> WTO-MD (2001), *above note 197*.

In August 2004 the General Council set a new target date: revised offers were due by May 2005 and Members that had not yet submitted initial offers were strongly encouraged to do so as soon as possible.<sup>218</sup>

The first part of the request-offer phase was bilateral and took place directly between WTO Members and not via the WTO Secretariat. As a result there was no central record of requests and offers. As they are not all publicly available, it is not possible to have a clear picture of the evolution and the content of the negotiations in the legal services sector.<sup>219</sup> However, a few documents do provide some information. In particular, two reports by the Chairman of the Council for Trade in Services to the Trade Negotiations in July 2005<sup>220</sup> and November 2005<sup>221</sup> are particularly relevant.

Both reports stated that 69 initial offers (from 93 Members) and 30 revised offers (from 54 Members) had been tabled. However, they stressed that the general view among WTO Members was that the general quality of offers was poor. In most sectors, most offers did not propose any improvements. With respect to legal services, the July 2005 Report stated that only 17 offers actually proposed improvements in the sector, although it also reported that progress had been made on the use of standardized terminology. These small improvements were well below what would constitute a critical mass. The general view was that the absence of, or limitations in offers would not lead to effective market access and some WTO Members questioned the engagement of others in the negotiations.<sup>222</sup>

The lack of progress led a considerable number of WTO Members to the conclusion that the resource-intensive, time-consuming request-offer method did not produce the desired results. Therefore it was agreed that in addition to bilateral negotiations, request-offer negotiations should also be pursued on a plurilateral basis.<sup>223</sup>

#### **d. The Plurilateral Request-Offer Negotiations Phase**

In December 2005, the Hong Kong Ministerial Declaration reaffirmed the key principles and objectives of services negotiations and called on WTO Members to intensify negotiations in accordance with these objectives.<sup>224</sup> In Annex C, it endorsed the plurilateral approach to negotiations, which were to be pursued along with bilateral negotiations.

In plurilateral negotiations, a group of WTO Members with a common interest makes a joint request to other individual members to improve specific commitments in a particular sector or mode of supply. Subsequently they meet collectively with the Members that have received the request. Two rounds of negotiations took place in early 2006 based on 21 collective requests that were formulated along the sector lines.

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<sup>218</sup> WTO-GC (2004), *Doha Work Program*, Decision adopted by the General Council on the 1<sup>st</sup> August 2004, WT/L/579, 2 August.

<sup>219</sup> GELOSO GROSSO (2004), *Managing Request offer Negotiations under the GATS: the Case of Legal Services*, OECD Trade Policy Working Paper No 2, OECD Publishing, pp. 14-17.

<sup>220</sup> WTO-CTS (2005c), Special Session of the Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, Council for Trade in Services Special Session, TN/S/20, 11 July 2005.

<sup>221</sup> WTO-CTS (2005d), Special Session of the Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, Council for Trade in Services Special Session, TN/S/23, 28 November.

<sup>222</sup> WTO-CTS (2005c), *above note 220*, Annex 1, p. 5.

<sup>223</sup> WTO-CTS (2005d), *above note 221*, Annex A, p. 8.

<sup>224</sup> WTO-MD (2005), *above note 199*.

With regard to legal services, the WTO Members with an interest in the sector included Australia, Canada, Chile, the EU, Japan, New Zealand, Norway and the United States (the so-called *Friends of Legal Services*). Australia, as coordinator of the group tabled a *Collective Request* on 28 February 2006.<sup>225</sup> The recipients of this request included Brazil, China, Egypt, Hong Kong, India, Indonesia, South Korea, Malaysia, Mexico, Peru, Chinese Taipei, Singapore, South Africa, Thailand, the Philippines and Turkey. The purpose of the Collective Request was to identify specific objectives for liberalization in legal services, while recognizing the flexibility provided for individual developing countries under Article XIX: 2.

However, it should be noted that the intention was to complement and not supersede bilateral request-offer negotiations. This Collective Request is a very important document as it provides a summary of the negotiations. It identifies commitments to be made to ensure effective liberalization. It also highlights limitations to trade in legal services that need to be removed. The following table shows the most relevant elements in the Collective Request.

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<sup>225</sup> MISSION OF AUSTRALIA (2006), *Collective Request: Legal Services*, February 2006.

**Table 6 Collective Request in the Legal Services sector**

Types of commitments to be made

The *Collective Request* specifies the types of commitments that should be undertaken under Art. XVI, XVII and XVIII of the GATS that would allow foreign lawyers and law firms to provide legal services covering laws of multiples jurisdictions. In this regard two phases of liberalization are distinguished.

In the first phase, WTO Members are countries that have not opened their markets or are beginning to do so. Thus they are encouraged to make new or improved commitments in following sectors:

- To make commitments that cover all modes of service delivery, including in all Mode 4 categories with special emphasis on coverage for lawyers in the categories of contractual service suppliers and independent professionals;
- To permit foreign lawyers a right to provide legal services in foreign law and international law, subject to no significant impediments. In addition where Members grant the right to provide legal advisory services in this field on temporary basis without meeting normal accreditation requirements, they are requested to make commitments reflecting that.
- To permit foreign lawyers/law firms to establish, with a view to providing legal services in domestic, foreign and international law through:
- Partnership and other forms of commercial association between foreign and domestic lawyers/law firms, with freedom to negotiate fee and profitable sharing arrangements;
- Employment of domestic lawyers;
- To permit foreign lawyers to prepare and appear in legal arbitration and conciliation/mediation proceedings in foreign and international law;
- To permit foreign law firms to use a firm name of their choice, respecting customs or usage of the host country.

In the second phase, Countries that have already complied with these elements and are requested to consider permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in host country law (domestic law).

Limitations to be removed

The *Collective Request* lists the most important limitations to the supply of legal services that are to be removed:

- Commercial presence and residency requirement for Modes 1 and 2, particularly for the practice of foreign law and international law;
- Limitations that restrict partnership or other forms of commercial association or collaboration between foreign lawyers/law firms and domestic lawyers/law firms;
- Limitations that restrict or prevent recruitment, by foreign lawyers/law firms, of lawyers admitted/licensed to practice domestic law;
- All forms of economic need tests;
- Nationality and prior residency requirements, particularly for the practice of foreign law and international law;
- Foreign capital limitations;
- Prior experience requirements for the practice of foreign law and international law;
- Prohibitions or limitations on the establishment of foreign law firms, particularly for the practice of foreign law and international law, including limitations on establishing direct branches of foreign law firms and discriminatory limitations on the types of legal entity allowed for the commercial presence of foreign law firms (foreign forms should be able to establish in any forms available to domestic supplies);
- Quantitative restrictions on the number of offices that can be established, including numerical ceilings on foreign lawyers.

## **e. The Current State of Play**

In December 2007 the Australian delegation (as coordinator of the Collective Request) issued a review of progress.<sup>226</sup> It reported that overall, the co-sponsors had been disappointed with the level of commitment and the lack of additional flexibility. It highlighted that there had been indications of possible, minor improvements from only two of the 16 recipients.

By the end of April 2011, 71 WTO Members had submitted initial offers, while 31 had submitted revised offers. These offers are not all publicly available.<sup>227</sup> Of the 71 initial offers, 23 are publicly available and 12 include improvements<sup>228</sup>. Of the 31 revised offers, 23 are publicly available and 11 of them deal with improvements to commitments in legal services<sup>229</sup>. Within the target group of countries, South Korea and Indonesia have made commitments in the legal services sector for the first time. Pakistan did likewise, despite not being one of the target countries, while China, South Africa, Malaysia and Thailand have improved their commitments. The remaining target group countries have not yet made any commitments.

The most frequent improvements relate to scope of practice. Some WTO Members have added commitments that include both advisory and arbitration services. In some instances it has been extended to cover home country, international and third country law. Other WTO Members have introduced new classifications. In some specific sectors and jurisdictions restrictions on nationality or residency requirements have been removed. Some WTO Members have changed their commitments in modes 1 and 2, and less often mode 3, changing their requirements for Market Access and National Treatment from *unbound* to *none*. They have also been removals of restrictions on partnership with local professionals and hiring locally qualified lawyers.

The evolution of the schedules of commitments for the EU and Switzerland started with the commitments undertaken in 1994 and continue up to their revised offers in the Doha Round of negotiations.

## **2. EU and Swiss Commitments in the Legal Services Sector**

The commitments of the EU and Switzerland have evolved from a primitive level of commitment in advisory services in home country and international law towards more elaborate undertakings. These changes are examined in turn.

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<sup>226</sup> WTO-CTS (2007), *Review of Progress in Legal Services*, Council for Trade in Services Special Session, Communication from Australia, JOB (07)/198, 5 December 2007.

<sup>227</sup> These can be consulted on the European Service Forum website at <http://www.esf.be> or on the Coalition Service Industries website at: <http://www.uscsi.org>.

<sup>228</sup> Australia, Canada, China, the EU, Indonesia, Pakistan, South Africa, Switzerland and Thailand.

<sup>229</sup> Australia, Canada, Chile, China, the EU, Iceland, Japan, South Korea, New Zealand, Switzerland, Thailand, the USA.

## a. EU Commitments in the Legal Services Sector

As a result of the Uruguay Round, the EU made commitments in the legal services sector.<sup>230</sup> It then submitted an initial offer in April 2003 and a revised offer in June 2005<sup>231</sup>. The most significant change relates to the way the EU entered the legal services sector in its schedule. Other modifications concerned improvements to commitments in various modes. This evolution is best understood through a comparison of the 1994 commitments with those contained in the 2005 revised offer.

### i) 1994 EU Commitments in the Legal Services Sector

The 1994 EU commitments are similar to those of other WTO Members, in the sense that they are related to legal advice services under home country law and international law with the exclusion of EU law. For these services, the EU inscribed restrictions that differed from one EU Member State to another.

- a. In modes 1, 3, 4 Denmark recorded restrictions on the marketing of legal advice that were limited to lawyers with a Danish license and law firms registered in Denmark;
- b. In mode 1 for both Market Access and National Treatment no restrictions were recorded with the exception of *unbound* by France and Portugal for the drafting of legal documents;
- c. In mode 2 the EU recorded *none* for Market Access and National Treatment;
- d. In mode 3 in Market Access Germany recorded that access to the German legal market for foreign legal consultants was subject to acceptance in the bar association according to Federal Lawyers Act, which limits the practice of law in the form of sole proprietorship and partnership. France also imposed restrictions on business form;
- e. In mode 4 EU commitments for Intra Corporate Transfers and Contractual Service Supplies limited stays to one year for work experience but no made commitments on the length of authorized stay. For legal services it recorded *unbound*, Greece entered a nationality requirement, Luxemburg recorded *unbound*, while France recorded the provision of legal advice and drafting of legal documents as reserved to regulated judicial professions.

Finally, under Additional Commitments France and Belgium inscribed that both host country and international law were open to regulated legal professionals. Put differently, this meant that any foreign lawyer wanting to practice in these jurisdictions had to pass an exam and be integrated into the French and Belgium juridical system.

### ii) The EU Revised Offer

As mentioned earlier, the major change in EU commitments related to the way the EU enters legal services in its schedules – in other words how it defines legal services. The new practice is described and explained in a document that the EU submitted in 2003 to the Committee on Specific Commitments.<sup>232</sup>

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<sup>230</sup> GATS (1994a), *Schedules of Specific Commitments: European Communities and their Member States*, GATS/SC/83, 15 April, pp. 12-13.

<sup>231</sup> WTO-CTS (2005b), *Conditional Revised Offer*, Communication from the European Communities and its Member States, Council for Trade in Services Special Session, TN/S/O/EEC/Rev.1, 29 June, pp. 46-56.

<sup>232</sup> WTO-CSC (2003), *above note 25*.

It consists of recording all legal services without making a distinction between legal advice, representation services and arbitration and mediation services. Other services are expressly excluded from commitments, such as services performed by suppliers entrusted with a public function (advisory, documentation and certification services).

For these services, the EU has undertaken commitments on legal services in international and EU law and the law of any jurisdiction where the service supplier and its personnel are qualified as lawyers. The EU specifies that for each area of practice, lawyers may be subject to licensing requirements and procedures:

- For lawyers providing legal services relating to international law and foreign law, these may take *inter alia* the form of compliance with local codes of ethics, use of home title (unless the host title has been recognized), insurance requirements, simplified registration with the host country bar association or simplified admission to the host country bar through an aptitude test and legal or professional domicile in the host country<sup>233</sup>;
- For legal services in respect of EC law, “they shall in principle be carried out by or through a fully qualified lawyer admitted to the Bar in the EC acting personally, and legal services in respect of the law of a Member State of the EC shall in principle be carried out by or through a fully qualified lawyer admitted to the Bar in that Member State acting personally”.

Full admission to the bar in the relevant Member State might therefore be necessary for representation before the courts and other competent authorities as it involves the practice of national domestic (EU and Member State) procedural law. However in some Member States, foreign lawyers who are not fully admitted to the bar may be allowed to represent a party who is a national of the State in which the lawyer is entitled to practice, in civil proceedings.

For all these legal services, the EU recorded Market Access and National Treatment limitations according to the mode of supply:

- a. For all modes of supply the EU recorded nationality requirements for full admission to the bar, which is necessary for the practice of domestic law (EU and Member State) in Austria, Cyprus, Estonia, Greece, Hungary, Lithuania, Malta and the Slovak Republic. It is also required for representation services in Belgium and Finland;
- b. In modes 1, 2 and 4: Denmark and Sweden recorded restrictions in the National Treatment column. Denmark’s related the marketing of legal advice services, which are restricted to lawyers with a Danish license and law firms registered in Denmark. Sweden’s related to admission to the bar (for the use of Swedish title *advokat*), which is subject to a residency requirement.
- c. In mode 1: All EU Member States undertook full liberalization, recording *none* in Market Access and National Treatment columns
- d. In mode 2: All EU Member State undertook full liberalization recording *none* in Market Access and National Treatment columns
- e. In mode 3: The EU recorded *none* in the Market Access column except for Austria, Belgium, Cyprus, Denmark, Germany, Estonia, Greece, France, Hungary, Italy, Ireland, Malta, Poland, Portugal, Sweden, Slovenia, the Slovak Republic and the United Kingdom.

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<sup>233</sup> For further details see CCBE common position CCBE (2001), *above note 180*; CCBE (2003b), *above note 181*. GOLDSMITH (2007), *above note 179*.

Restrictions concern the form of practice and cooperation with domestic lawyers.

- In Austria: association with domestic lawyers is possible under the condition that foreign lawyers are fully qualified in their home country, and equity participation and shares in any law firm do not exceed 25%. Foreign lawyers must not have decisive influence in decision-making.
  - In Belgium, Cyprus, Denmark, Greece, Italy, Ireland, Malta, Portugal and the United Kingdom: commercial businesses providing legal services in respect of domestic law (EU and Member State) can take any of the legal forms allowed under the national law of the relevant Member State.
  - In Germany: only sole proprietorship or partnership is allowed by the *Bundesrechtsanwaltschaftsordnung*.
  - In Estonia: the commercial presence is restricted to sole proprietorship or law firms with limited liability, in which cases permission is needed from the Bar Association.
  - In France: provision is only through a *Société d'Exercice Libérale* (SEL) or a *Société Civile Professionnelle* (SCP). At least 75% of shares shall be owned by lawyers fully admitted to the French Bar.
  - In Hungary: a commercial presence should take the form of a joint business with a Hungarian attorney or representative office. Advisory services may only be provided on the basis of a collaboration contract concluded with a Hungarian attorney or law firm.
  - In Poland: allowed forms are registered and limited partnership.
  - In Sweden: an *advokat* may not only practice their profession in cooperation with other *advokats*. Exemptions may be granted by the Swedish bar.
  - In Slovenia: a commercial presence is restricted to sole proprietorship or to a law firm with unlimited responsibility (partnership). Only lawyers with a license to practice may be partners. Commercial presences practicing domestic (EU and Member State) law may do so only through sole proprietorship or partnerships in any of the legal forms stated in the Act on Advocacy.
- f. In mode 4: the EU made horizontal commitments related to Intra Corporate Transfers (ICTs), Contracted Service Suppliers (CSS) and Independent Professionals (IPs).

ICTs include Managers, Specialists and Graduate Trainees. The entry stay is limited to a maximum of three years for Managers/Specialists and twelve months for Graduate Trainees. They are all also subject to specific requirements. CSS and IPs may stay for a period of not more than six months in any 12 months period in all Member States except Cyprus. Both are subject to specific requirements. In the Market Access column all Member States do not undertake any other further commitments beyond horizontal commitments.

One of the merits of this new scheduling practice is that it is not limited to provision of legal advice but embraces all legal activities and therefore includes a large part of EU Member State regulation in its schedules. It clarifies limitations on the form of practice and foreign equity participation. Compared to the 1994 commitments, the revised offer extends the area to include the practice of EU law. In addition, it removes some restrictions in mode 1 and provides further liberalization, especially in mode 4.

However, unlike United States' or Australian commitments, licensing requirements are not clearly stated for each individual Member State and are not recorded in the additional commitments column, which does not offer security or predictability.<sup>234</sup>

Compared to Directive 98/5 on *the Practice of the Profession of Lawyer in Another Member State*, the scope of these commitments is much narrower.<sup>235</sup> For example, the Directive authorizes EU lawyers to provide legal advice on the law of their own Member State, EU law, international law and the law of the host Member State (Article 5:1). In contrast, GATS commitments are limited to legal advice in the area of law where the service supplier is qualified and international law. More importantly GATS lawyers are not granted free movement within the EU, but are subject to different licensing requirements in different EU Member States. This question appears to be a sticking point in trade negotiations at bilateral level, particularly in the EU–India FTA.

## **b. Swiss Commitments**

### *i) Overview of Swiss Commitments*

Like the EU, Swiss commitments have evolved since 1994, although not to the same extent. In 1994 Switzerland undertook commitments on consultancy services on home country law and international law and recorded *none* in modes 1, 2 and 3 under Market Access and National Treatment (with the exception of a nationality requirement in one canton). In mode 4, horizontal commitments applied. In these modes Switzerland undertook commitments for Intra Corporate Transfers (ICTs), Business Services Sellers (BSS) and Business Visitors (BV). For ICTs, Switzerland recorded a limitation on stay of three years, which may be extended to four years. For BSS and BVs the stay is limited to three months in one year. In all cases the stay is subject to authorization (residency permit and work permit) and to the application of domestic regulations (on remuneration, working hours, social security, immigration provisions). In addition, an economic need test may apply. If an authorization is renewed the applicant must remain abroad for at least two months between the two consecutive periods of stay.<sup>236</sup>

In its revised offer, Switzerland made commitments related to advisory services regardless of the area of law, thereby liberalizing the provision of legal advice on domestic law. In addition, Switzerland made commitments related to international arbitration services, mediation and extrajudicial services and patent attorney services. With the exception of the latter, Switzerland recorded *none* in modes 1, 2 and 3 and *unbound* in mode 4. For patent attorney services, in modes 1, 2 and 3 it entered *none* with the exception that in order to register a Swiss patent or trademark at the Swiss Federal Institute of Intellectual Property (IGE/IPI) on behalf of a client, the IGE/IPI may require that the patent attorney has a permanent postal address in Switzerland and one year of professional experience in Switzerland under the supervision of a patent attorney admitted by the IGE/IPI. In mode 4, horizontal commitments apply. In these modes Switzerland has improved commitments for ICTs, BSS and BVs and extended the scope of its commitments to Contract Service Suppliers (CSS). These categories remain subject to authorization (residency permit and work permit) and to the application of domestic regulations (on remuneration, working hours, social security and immigration provisions). On the other hand, the economic needs test requirement has been removed.

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<sup>234</sup> CCBE (2005c), *above note 85*.

<sup>235</sup> Directive 98/5 EC, *above note 173*.

<sup>236</sup> GATS (1994b), *Schedule of Specific Commitments*, Switzerland, GATS/SC/83, 15 April 1994.

For ICTs, the initial period of stay remains limited to three years but may be extended to five years. For BSS, BVs and CSS the period of stay is no longer limited to three months but extended to 90 days within one year, although other requirements remain.<sup>237</sup>

## *ii) Comments*

These commitments may be too liberal in view of the current state of legislation in Switzerland. Specifically, two situations can be envisaged. First, both lawyers and non-lawyers can supply legal advice services on any law; there is no legal privilege (with the exception of certain notary activities). On the other hand, lawyers known as registered lawyers have legal privilege for representation services. These lawyers are regulated at state (canton) level. In addition in 2002, the Swiss Federal Government enacted the *Federal Act on the Freedom of Movement of Lawyers (Lawyers' Act)*<sup>238</sup>, which aimed to facilitate the free movement of lawyers within the country. It covers Swiss lawyers and lawyers from EU Member States. It contains rules on market access (i.e. to become a registered lawyer) and rules on professional conduct.

Article 8 of the *Lawyers' Act* specifies the conditions to be met in order to become a registered lawyer. Specifically, Article 8 (1)(c) reads:

a registered lawyer must be able to practice independently; they may be employed only by persons who themselves are recorded in one of the cantonal registers of lawyers.

It is clear that all lawyers who have passed the Swiss states (canton) bar exam can become a registered lawyer. The situation is less obvious in the case of foreign lawyers. This could have implications on whether a registered lawyer could work for foreign lawyers or foreign law firms. This question has not received much consideration so far.

However, in 2008 the cantonal Court of Geneva had to decide whether a lawyer registered with a non-Swiss bar association could be considered as registered lawyer as defined by the *Lawyers' Act*.<sup>239</sup> On the basis on the Bilateral Agreement between Switzerland and the EU, which incorporates EU legislation on the free movement of lawyers into Swiss legislation, the Court ruled that a lawyer registered with a foreign bar association (in this case the London Bar Association) could be considered as a registered lawyer. However, the case is founded on a preferential agreement between Switzerland and the EU. It is doubtful that the same treatment would apply to lawyers from other WTO Member States.

Therefore there are clearly restrictions on the ability of foreign lawyers or law firms to employ or even associate with Swiss registered lawyers. These restrictions are covered by Article XVI: 2 (d) and Article XVII and are one of the most significant obstacles faced by international law firms. However, Switzerland has inscribed *none* under Market Access in mode 3, which does not reflect the actual situation and may potentially be in breach of their WTO obligations.

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<sup>237</sup> WTO-CTS (2005a), *Conditional Revised Offer*, Communication from Switzerland, Council for Trade in Services Special Session, TN/S/O/CHE/Rev.1, 14 June 2005, p. 13-14.

<sup>238</sup> FEDERAL COUNCIL (2002), *Federal Act on the Freedom of Movement of Lawyers*, 23 June 2000, available on <http://www.ccbe.eu> (last visit: 1.10.2012).

<sup>239</sup> **Buchwalder**, *Buchwalder, Chappuis, Lembo contre Commission du Barreau*, Arrêt du Tribunal Adminsitratif de Genève, A/2814/2007-BARR, 11 March 2008.

Nevertheless, such restrictions do not need to be scheduled when WTO Members make commitments related to legal services in international and home country law. In such cases, a WTO Member makes no commitment to allow the supply of legal services on domestic law, and hence any restrictions on such services are permissible. In contrast, where a WTO Member liberalizes both the supply of foreign and domestic law, such restrictions should be scheduled as a limitation on Market Access or National Treatment.<sup>240</sup>

In the 1994 schedules, Switzerland undertook commitments on the provision of legal advice in international and home country law. In contrast, in its subsequent offers, it extended the coverage to the provision of legal advice on domestic law. Consequently, Swiss commitments could potentially breach their WTO obligations. It should nevertheless be kept in mind that revised offers are still conditional and may be modified before the conclusion of the Round.

Beyond this specific case, the changing commitments of both the EU and Switzerland shows that the extension of commitments from the provision of advisory services in international and home country law to domestic law requires WTO Members to examine more closely restrictions that may affect non-lawyers or foreign lawyers. Numerous restrictions that do not have to be recorded as commitments in the provision of legal advisory services on international and home country law turn out to be required for advisory services on domestic law.

Having reviewed market access negotiations in the legal services sector, we now turn to domestic regulation negotiations.

## **B. Domestic Regulation Negotiations**

As mentioned earlier, Article VI: 4 gives a mandate to the Council for Trade in Services to develop disciplines on domestic regulation. Unlike market access negotiations, these negotiations are held on a multilateral basis. The first phase of the negotiations started in March 1995 with the adoption by the Council for Trade in Services of the *Decision on Professional Services*.<sup>241</sup> This Decision gave the Working Party on Professional Services (WPPS) a mandate to develop any disciplines on mutual recognition and domestic regulation in the accountancy sector. During this phase WTO Members adopted two disciplines. In May 1997, they adopted the *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy sector*, which aimed to provide guidance for negotiations on mutual agreements on accountancy services.<sup>242</sup> In December 1998, they adopted the *Disciplines on Domestic Regulation in the Accountancy Sector (Accountancy disciplines)*.<sup>243</sup>

The second phase started in 1999, with the *Decision on Domestic Regulation*.<sup>244</sup> With this Decision, the Council for Trade in Services dissolved the WPPS because it had fulfilled its tasks and replaced it with the Working Party on Domestic Regulation (hereinafter: WPDR). The mandate of the WPDR is the development of any necessary disciplines to ensure that measures relating to licensing requirements and procedures do not constitute unnecessary

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<sup>240</sup> WTO-CTS (2010d), *above note 19*, pp. 13-14.

<sup>241</sup> WTO-CTS (1995), *Decision on Professional Services*, Council for Trade in Services, S/L/3, 4 April 1995.

<sup>242</sup> WTO-CTS (1997), *above note 182*.

<sup>243</sup> WTO-CTS (1998c), *Decision on Disciplines Relating to the Accountancy Sector*, Council for Trade in Services, adopted on 14 December 1998, S/L/64, 17 December 1998.

<sup>244</sup> WTO-CTS (1999), *Decision on Domestic Regulation*, Council for Trade in Services, adopted on 26 April 1999, S/L/70, 28 April 1999.

barriers to trade in services. It also encompasses the tasks assigned to the WPPS including the development of general disciplines for professional services. Consequently the development of horizontal disciplines and disciplines for professional services is intertwined: it includes the development of disciplines applicable to all services sectors as well as the development of disciplines applicable to all professional services. However, the discussions within the WPDR focused essentially on the development of horizontal disciplines leaving aside the disciplines on professional services.

During these negotiations WTO Members drew upon various documents such as the *Checklist of Issues*<sup>245</sup> and the *Examples of Measures to be Addressed by Disciplines under GATS Article VI: 4*.<sup>246</sup> With regard to legal services, two sources played a significant role in understanding the implications of the disciplines of this service sector. The first was consultations carried out by WTO Members with domestic professional services associations with respect to the potential applicability of the Accountancy Disciplines to other professions. A synthesis of these consultations was prepared by the WTO Secretariat.<sup>247</sup> The second source was the Secretariat's paper on the results of consultations with international professional organizations.<sup>248</sup> These consultations are particularly relevant to the study of legal services, as they provide a better understanding of the specific issues. They also provide the elements for the eventual extension of the Accountancy Disciplines to the legal services sector. The comments were synthesized in a proposal tabled by Australia in 2005.<sup>249</sup>

The objective of this section is to analyze the impact of the disciplines on domestic regulation on legal services. It starts with a brief presentation of the Accountancy Disciplines, and then turns to a description of the comments from various bar associations on the extension of the Accountancy Disciplines to legal services. Finally, it concludes with a presentation of the current state of play of negotiations and their impact on the legal services sector.

## 1. The Accountancy Disciplines in a Nutshell

Pursuant to the Decision on Professional Services, the Council for Trade in Services adopted the Accountancy Disciplines on the 14 December 1998.<sup>250</sup> The purpose of these disciplines is to facilitate trade in the accountancy services, ensuring that domestic regulation affecting trade in accountancy services are based on objective and transparent criteria and are not more burdensome than necessary to ensure the quality of the service. In this regard, they aim to adapt the criteria of Article VI:4 to the specificities of the accounting services.

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<sup>245</sup> WTO-WPDR (2001b), *Checklist of Issues for WPDR*, Working Party on Domestic Regulation, Informal Note by the Secretariat, JOB(01)/92, 19 June 2001, which is a document containing the main elements and issues under discussions within the WPDR.

<sup>246</sup> WTO-WPDR (2005a), *Examples of Measures to Be Addressed by Disciplines under GATS Article VI:4*, Working Party on Domestic Regulation, Informal Note by the Secretariat, JOB(02)/20/Rev.10, 31 January 2005.

<sup>247</sup> WTO-WPDR (2003a), *Synthesis of Results to Date of the Domestic Consultations in Professional Services*, Informal Note by the Secretariat, Job No. 7667, 29 November 2000. The latest version of this document circulated as JOB(02)/204/Rev.1, 21 February 2003.

<sup>248</sup> WTO-WPDR (2003b), *Results of Secretariat Consultations with International Professional Services Associations*, Informal Note by the Secretariat, JOB(03)/126, 25 June 2003.

<sup>249</sup> WTO-WPDR (2005b), *Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, Working Party on Domestic Regulation, Communication from Australia, S/WPDR/W/34, 6 September 2005.

<sup>250</sup> WTO-CTS (1998c), *above note 243*.

It is stressed that the measures subject to scheduling under Articles XVI and XVII of the GATS are not covered by the Disciplines. Such measures are addressed in the GATS through the negotiation and scheduling commitments.<sup>251</sup> In addition, it is specified that the Accountancy Disciplines apply only to WTO Members that undertook specific commitments in accounting services in their schedules of commitments.<sup>252</sup> Finally, it is mentioned that for the time being these disciplines have no legal effect. They are expected to be integrated into the GATS by the end of the current negotiations, along with other disciplines.

The Accountancy Disciplines are divided into eight sections: Objectives (Article I: 1), General provisions (Article II: 2), Transparency (Articles III: 3–7), Licensing Requirements (Articles IV: 8–13), Licensing Procedures (Articles V: 14–18), Qualification Requirements (Articles VI: 19–21), Qualification Procedures (Articles VII: 22–24) and Technical Standards (Articles VIII: 25–26).

The two principles of the Accountancy Disciplines, necessity and general transparency requirements are set out in Articles II: 2 and III: 3–7 and then specified in the context of licensing and qualification requirements and procedures (Articles IV–VIII).

#### **a. Transparency Requirements**

General transparency requirements are set out in the section ‘Transparency’ (Article III: 3–7). These requirements specify the obligations set out in Articles III and VI: 1–3 of the GATS at governmental level. WTO Members are required to make publicly available the names and addresses of competent authorities (Article III: 3) and information on becoming a member of the profession, i.e. information on authorized activities, rules concerning professional titles and requirements and procedures for obtaining or renewing licenses or professional qualifications (Article III: 4). Second, WTO Members have an obligation to inform another WTO Member, upon request, of the rationale behind a regulation (Article III: 5). Third, the Accountancy Disciplines state that WTO Members should provide other WTO Members the opportunity to comment before introducing a measure that could affect trade in services (Article III: 6). Finally they provide access to the detail of procedures related to the review of administrative decisions provided for by Article VI: 2 of the GATS, which should be made public (Article III: 7).

Transparency requirements are also described in detail. The Accountancy Disciplines define licensing requirements (as substantive requirements other than qualification requirements to be satisfied in order to obtain or renew authorization to practice) and state that they shall be “pre-established, publicly available, objective and shall not in themselves constitute a restriction on the supply of the service” (Articles 8 and 14).

#### **b. Necessity Requirements**

General necessity requirements are set out in General Provisions (Article II: 3). This is considered to be the most important provision as it means that any regulatory measure in the sector is subject to a necessity test.<sup>253</sup>

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<sup>251</sup> Para. 1 of the Accountancy Disciplines.

<sup>252</sup> *Idem*.

<sup>253</sup> TROILLET/ HEGARTY (2003), *Regulatory Reform and Trade Liberalization in Services: The Benefits and Limitations of Strengthened GATS Rules- Accountancy Disciplines*, A. Mattoo/P. Sauvé (eds), Domestic Regulation and Service Trade Liberalization, Washington DC, Oxford University Press, pp. 147-166.

Article II of the Accountancy Disciplines reads:

“Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective.

Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.”

Overall, this provision explicitly excludes the application of the disciplines to measures covered by Articles XVI or XVII. Furthermore, it requires that trade-restrictiveness should be neither the objective nor the result of the application of the regulatory measure in question, thereby establishing a purpose and effect test. Finally, this provision contains an illustrative list of four legitimate objectives that Members can pursue, namely: consumer protection, quality of service, professional competence and/or integrity of the profession.<sup>254</sup>

Applied to licensing requirements, the Accountancy Disciplines aim to ensure that requirements such as residency (Article IV: 9), membership of professional organization (Article IV: 10) or name restrictions (Article IV: 11) are necessary and fulfill legitimate objectives. In the same way, requirements regarding professional indemnity insurance must take into account existing insurance coverage (Article IV: 12) and fees charged by competent authorities must reflect administrative costs and not represent an impediment to trade (Article IV: 13).

With regard to qualification requirements, the Accountancy Disciplines state that competent authorities in WTO Members must take into account existing qualifications on the basis of equivalency of education, experience and/or examination requirements (Article VI: 19). It also stipulates that the scope of examinations and of any other qualification must be limited to subjects relevant to activities for which authorization is sought (Article VI: 20).

For qualification and licensing procedures, the Accountancy Disciplines state that application of procedures and related documentation necessary to ensure fulfillment of qualification and licensing requirements should not be more burdensome than necessary (Article V: 15), verification of the applicant’s qualifications must take place in a reasonable time-frame (Article VII: 22), and fees should reflect administrative costs and not represent an impediment to trade (Article VII: 23). Finally, the Accountancy Disciplines state that measures related to technical standards must be prepared, adopted and applied only in order to fulfill legitimate objectives (Article VII: 25).

Having briefly described the Accountancy Disciplines, the next question is whether such disciplines could be applied to the legal services sector.

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<sup>254</sup> DELIMATSI (2008), *above note 150*, pp. 385-386.

## 2. Extension of the Accountancy Disciplines to Legal Services

### a. Bar Comments: General Overview

As mentioned earlier, consultations with various legal associations were held at two levels. First, in 1999 WTO Members agreed to engage in voluntary “domestic consultations”.<sup>255</sup> At this level, consultations took place between WTO Members and domestic bar associations about the application of the Accountancy Disciplines to the legal profession.<sup>256</sup> Comments from some bar associations have been made public (e.g. those from the Canadian Bar Association<sup>257</sup> and the Federation of Law Societies of Canada<sup>258</sup>, and the CCBE in the EU)<sup>259</sup> and the WTO Secretariat has produced a document that synthesized the consultations.<sup>260</sup>

Second, in 2002 the WTO Secretariat asked six international legal associations<sup>261</sup> for *inter alia*, their comments on the applicability of the Accountancy Disciplines to legal services. Of these six organizations, only the International Bar Association (IBA)<sup>262</sup> and the International Union of Lawyers (UIA)<sup>263</sup> responded.<sup>264</sup> Of all the comments received, the most comprehensive analysis is the *IBA Resolution concerning the “Disciplines on Domestic Regulation in the Accountancy Sector”* (the *IBA Resolution on Accountancy Disciplines*) and more specifically the Explanatory Memorandum accompanying the Resolution.<sup>265</sup> This document is the result of discussions that took place within the IBA/GATS forum in May 2003 in Brussels and was approved by the IBA policy-making Council that includes representatives from more than 150 countries.<sup>266</sup>

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<sup>255</sup> WTO-WPDR (1999), *Report on the Meeting held on 17 May 1999*, Working Party on Domestic Regulation, Note by the Secretariat, S/WPDR/M/1, 14 June 1999, par. 12.

<sup>256</sup> TERRY (2004a), *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying to the GATS Legal Services*, the Professional Lawyer, Vol. 83, pp. 83-126.

<sup>257</sup> CBA (2000), *Submission the General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession*, adopted in August 2000.

<sup>258</sup> FLSC (2001), *Meeting Canada's Current Obligations for the Legal Profession under the General Agreement*, adopted on 24 February 2001.

<sup>259</sup> CCBE (2003c), *CCBE Response to the WTO Concerning the Applicability of the Accountancy Disciplines to the Legal Profession*, 30.05.2003.

<sup>260</sup> WTO- WPDR (2003a), *above note 247*.

<sup>261</sup> These associations are: The International Association for the Protection of Industrial Property (AIPP), The International Bar Association (IBA), the International Federation of Industrial Property Attorneys (FICPI), the International Law Association (ILA), the International Union of Lawyers (UIA) and the International Union of the Latin Body of Notaries (UINL).

<sup>262</sup> IBA (2003b), *IBA Resolution Concerning the “Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64)*, adopted at the IBA Council Meeting, San Francisco, September.

<sup>263</sup> UIA (2004), *Letter Responding to the WTO's December 2002 Consultation about the Accountancy Disciplines*, 10 November 2004.

<sup>264</sup> WTO (2005), *Results of Secretariat Consultations with International Professional Services Negotiations*, Working Party on Domestic Regulation, Informal Note by the Secretariat, JOB(03)/126/Rev.6, 15 September 2005.

<sup>265</sup> IBA (2003c), *Exhibit B: Explanatory Memorandum accompanying the IBA's Suggested Changes to the WTO Accountancy Disciplines Before they Can Be Applied to the Legal Profession*, 2003.

<sup>266</sup> For a detailed description see Terry (2004b), *Lawyers, GATS, and the WTO Accountancy Disciplines: the History of the WTO's Consultations, the IBA GATS Forum and the September 2003 IBA Resolution*, Penn State International Law Review, vol. 22, No. 4, 2004, pp. 695-841.

This resolution served as the basis for the Australian Proposal on the development of disciplines on domestic regulation for the legal service sector, which was tabled in 2005.<sup>267</sup> These documents are important as they reflect the view of the legal profession on the applicability of domestic regulation disciplines to the legal services sector; they relate to the transparency requirement and the necessity test.

## **b. IBA Comments on Transparency Requirements**

With regard to transparency requirements, the IBA comments focused on two issues. First, they aim to clarify definitions of terms such as *qualification*, *licensing requirements* and *technical standards*, and propose a distinction between *Full Licensing* and *Limited Licensing* mechanisms. Second, they promote an exchange of information on disciplinary sanctions between home and host country professional bodies.

The IBA pointed out that the Accountancy Disciplines did not define precisely the terms *licensing* and *qualification* requirements. In addition, they needed to be adapted in order to take into account the specificities of legal services (e.g. the different approaches to full licensing and limited licensing systems and the local aspect of qualification requirements). In its view the terms *licensing* and *qualification* – without any additional explanation – were likely to cause confusion as they were not used consistently. In addition, they recommended that language be added in order to indicate that there may be both qualification and licensing requirements for all of the usual methods by which lawyers cross borders. Furthermore, the IBA argued that the term *technical standard* was not an expression regularly used in the context of the legal profession. Instead lawyers have ethical rules and rules of professional conduct, that are described in various international resolutions. Therefore, additional explanatory statements were needed.<sup>268</sup> Consequently, the IBA proposed the following definitions:

“Qualification” shall mean the substantive requirements that a lawyer is required to fulfill to obtain a certification or license, such as education, examination requirements, practical training and experience or language requirements

“Licensing” shall mean those substantive requirements, other than qualification requirements, with which a lawyer must comply in order to obtain formal permission to supply legal services.

“Technical standards”, in the context of legal services, refers, not only to technical measures in the narrow sense (that is measures that lay down the characteristics of a service or the manner in which it is supplied), but also to ethical rules and rules of professional conduct.

These definitions require modifications to the Accountancy Disciplines provisions dealing with transparency requirements (Article III), licensing requirements (Article IV) and technical standards (Article VIII).

In addition to these definitions, the IBA highlighted the transparency obligations of Article IV: 8 of the Accountancy Disciplines, noting that licensing requirements must be pre-established and publicly available, but also stressing that these requirements must include licensing requirements in relation to temporary services provided under home title of the foreign lawyer and in relation to permanent establishment under the home title.

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<sup>267</sup> WPDR (2005), *above note 10*.

<sup>268</sup> IBA (2003c), *above note 265*, p. 23.

Moreover, the IBA stated that licensing requirements must take into account disciplinary sanctions imposed on applicant lawyers by the relevant professional bodies in their home country.

This aimed to ensure that regulators in the host state were aware of any disciplinary action against a lawyer in their home state. This is fundamental as a license issued by the host state may be based on the lawyer's continued good standing and license from their home state. Thus host state authorities are entitled to be made aware of any changes.<sup>269</sup>

### **c. IBA Comments on Necessity Requirements**

IBA comments dealt with three aspects of necessity requirements. First, they proposed the introduction of core values into the assessment of the necessity of a measure in order to take into account the specificities of the legal profession. Second, with regard to licensing requirements and the requirement to take into account existing professional insurance, they suggested ways to make it easier for host country jurisdictions to comply with this obligation. Third, they proposed modifications to the qualification requirement of legal services.

#### *i) Inclusion of the Core Values of the Profession*

The general feeling of the IBA was that the core values and the specific characteristics of their profession were not taken into account in the Accountancy Disciplines. As explained in the *IBA Explanatory Memorandum*<sup>270</sup>, lawyers around the world share the same values, although not expressed in the same manner. These values are independence, confidentiality and avoidance of conflict of interest. In addition, the IBA stressed that the legal profession differs from other services profession in at least three major respects: *The Special Role of the Legal Profession*, *the Heterogeneity of Substantive Knowledge* and *the Regulatory Structure of the Legal Profession*. Similarly, the International Lawyers Association commented that using the Accountancy Disciplines as a paradigm for regulating the legal profession was inappropriate, as the approach of the two professions was totally different. Instead it proposed that the Accountancy Disciplines should be rewritten to take into account the specificities of the legal profession.

Therefore the IBA, CCBE and to a lesser extent the CBA proposed rephrasing Article II of the Accountancy Disciplines. They suggested adding the core values of the legal profession to the non-exhaustive list of legitimate objectives. Moreover the IBA proposed the integration of the specific characteristics of the legal profession in the assessment of the necessity of a measure. The purpose of this addition was to define more precisely the scope of necessity test in the context of legal services and avoid exposing the regulation of the legal profession to “dispute resolution systems that sometimes require time to find the proper balancing of interest and may potentially pose major risk”.<sup>271</sup> In addition, the IBA proposal aimed to give more latitude to local authorities in decision-making. It should be noted that the CCBE comments diverged a little from the IBA on this point. Specifically, the CCBE did not specify the role of lawyers in the definition of what is necessary.<sup>272</sup>

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<sup>269</sup> *Idem.*, p.16.

<sup>270</sup> *Idem.*, p. 3-4.

<sup>271</sup> *Idem.*, p.10-11.

<sup>272</sup> CCBE (2003c), *above note 259*, p.11.

## *ii) Specific Necessity Test Provisions on Licensing Requirements*

With regard to licensing requirements and more specifically professional indemnity insurance, the Accountancy Disciplines mention in Article IV: 12 that WTO Members should take into account any existing insurance insofar as it covers activities in the host country jurisdiction and it is consistent with its regulations. The IBA and CCBE, drawing upon EU experience in this field, noted that significant practical difficulties exist as a result of different policy language and coverage.<sup>273</sup> Thus they proposed that professional associations be allowed to place the burden (including the costs of the exercise) onto foreign applicants of demonstrating the coverage of their existing insurance and the solvency of the company providing such insurance.

## *iii) Specific Necessity Test Provisions on Qualification Requirements*

Regarding qualification requirements, the Accountancy Disciplines set out two obligations (Article VI):

(19) Members shall ensure that, whether or not the Member adopts the “full licensing” system or the “limited licensing” system, its competent authorities take into account of qualification acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

(20) The scope of examination and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought.

Both the IBA and the CCBE commented that Article VI: 20 should be deleted. Their arguments were two-fold. First they noted that when a lawyer re-qualifies in the host country, they will acquire the whole host title. This title will enable them to carry out all the activities of the host lawyer. However, nowhere in the world can a lawyer obtain a qualification or title limited to particular area. Thus the obligations of Article VI: 20 are not applicable to the legal sector. Second, they acknowledge that the EU is accustomed to the notion of taking into account prior qualifications obtained in another EU Member State. This exercise is based on the assumption that lawyers qualify in similar ways, with similar standards and with the same range of activities in all EU Member States. However, the same assumption is hardly reasonable when applied world-wide. Another possibility would be to establish a system whereby WTO Members could recognize the university degree and title from each country, but this is a very time-consuming and resource-intensive exercise.<sup>274</sup> This led the IBA and CCBE to the conclusion that Article VI: 20 should be deleted as the obligation was impractical.

In contrast, Article VI: 19 (as a general duty) was noted to be acceptable by the two bar associations. The IBA proposed that Article VI: 19 should apply to both full and limited licensing systems.

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<sup>273</sup> *Idem.*, p.18.

<sup>274</sup> IBA (2003c), *above note 265*, pp. 21-22; CCBE (2003c), *above note 259*, p. 8.

#### **d. The Australian Proposal**

In September 2005 Australia tabled a proposal on the *Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors (the Australian Proposal)*.<sup>275</sup> Although this proposal is essentially based on IBA comments it contains some additions.

##### *i) Transparency Requirements*

The Australian Proposal reiterates all IBA comments about Article IV: 8. However, it adds that licensing requirements should be pre-established, publicly available *and objective*.

Another modification is a specific paragraph on a “limited licensing” system in Article IV: 11. This aims to ensure that where such a system exists; foreign lawyers are not required to satisfy the requirements of the “full license” system. Moreover it states the conditions foreign applicants should fulfill in order to be granted a “limited license”. These conditions are:

- To be licensed or authorized to practice by their home regulatory authority;
- To be in good standing in their home country;
- To be a person of good character and repute;
- To agree to submit to the Code of Ethics, or its equivalent of the host regulatory authority;
- If applicable, to carry liability insurance or bond indemnity or other security consistent with domestic law and which, if applicable, is no more burdensome than required by the host regulatory authority of fully licensed local lawyers.

##### *ii) Necessity Requirements*

The Australian Proposal reiterated IBA comments on general provisions (Article II), with the addition of two paragraphs (Article II: 3; 4). Article II: 3 sets out a kind of “good practice” for the regulation of legal services in general, stating that:

(...) Regulation should be designed and administrated to find the balance between the promotion of the interest of clients and the facilitation of the effective delivery of legal services, which shall be consistent with protection of the public in the host jurisdiction, the maintenance of professional standards and the independence of the legal profession of the host jurisdiction.

Article II: 4 restates the necessity requirements related to qualification, licensing, technical standards and procedures. However, the provision extends this obligation to all levels of government, including regional and local government and authorities and non-governmental bodies. The other changes introduced by the Australian proposal relate to qualification requirements (Article VI) and procedures (Article VII).

Article VI on qualification requirements contains three paragraphs (Article VI: 22, 23, 24). In the first (Article VI: 22), the Australian Proposal restates the IBA changes in relation to the requirement that WTO Members take into account the qualifications acquired in the territory of another Member whether or not this Member adopts the “full licensing” or “limited licensing” system. However, the Australian Proposal adds the principle of recognition of foreign qualifications on the basis of equivalency of education, experience and/or examination. Nevertheless, it stresses that this does not imply harmonization of

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<sup>275</sup> WTO-WPDR (2005b), *above note 249*.

criteria/standards. The purpose of the provision is to prevent unduly burdensome requirements being applied in the verification of foreign qualifications that may impair market access commitments. Finally Article VI: 22 *in fine* stresses that foreign lawyers who seek a limited license should not be required to have host Member specific qualifications required of fully licensed local lawyers. In the second paragraph (Article VI: 23), unlike the IBA comments, the Australian Proposal maintains the limitation on the scope of examination and any other qualification requirements to subjects relevant to the activities for which authorization is sought. However, it specifies that eligibility pre-requisites to take such an examination should be abolished (e.g. residency or experience in a specific location in the host country). They may nevertheless be maintained under the condition that they meet legitimate objectives. Finally the last paragraph (Article VI: 24) mentions qualification requirements (education, examinations, practical training, experience and language skills). Language skills must meet legitimate objectives and not in itself act as a barrier for foreign practitioners.

Article VII on qualification procedures also contains three paragraphs (Article VII: 26, 27 and 28). In Article VII: 26 the Australian Proposal mentions (as did the *Accountancy Disciplines*) that the verification of applicants' qualifications should take place within a reasonable time-frame. In Article VII: 27 (like the *Accountancy Disciplines*) it states that examinations should be scheduled at frequent intervals, but adds that WTO Members should explore the possibility of conducting such examinations using electronic means. Finally Article VII: 28 provides for appeal/review channels in the case of non-recognition of qualifications. It also states that the fees charged by competent authorities should reflect the administrative costs involved and should not represent an impediment to practicing the relevant activity.

It results from these considerations that some key elements need to be taken into account before the adoption of disciplines on domestic regulation in the legal services sector. The following table provides an overview of the most important issues.

**Table 7 Overview of necessary elements for the adoption of disciplines in the legal services sector**

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| <p><b>Transparency Requirements:</b></p> <p><i>Definitions:</i> Definition of qualification, licensing or technical standard should be more precisely defined to take into account the specificities of the legal profession, like for instance for technical standards;</p> <p><i>Level of legal activity:</i> The Disciplines should take into account that the legal profession is carried out in many countries at the level of political subdivisions rather than at the national level. Provisions should extend requirements at all levels of a government, including regional, local government and non-governmental bodies.</p> <p><i>Distinction Full/limited licensing requirements:</i> Licensing Requirements for the supply of legal services in mode 3 should distinguish limited licensing from full licensing requirements. These requirements should include pre-established, publicly available and objective requirement like <i>inter alia</i>, to be licensed in or authorized to practice in home jurisdictions, to be in good standing in home jurisdictions, to be a person of good character and repute, to agree to submit to host jurisdiction code of conduct and to carry liability insurance.</p> <p><i>Exchange of Information:</i> Exchange of information between authorities on disciplinary sanctions imposed on applicant lawyers in home jurisdiction should be encouraged.</p> <p><i>Qualification requirements:</i> Qualification requirements should mainly relate to education, experience, practical training and language skill (language should not be used as barrier to trade in itself).</p> <p><i>Requirements for temporary legal services:</i> The requirements for temporary legal services provided under home title (in mode 4) should be more transparent (distinguishing what is permitted from what is not).</p> <p><b>Necessity Requirements:</b></p> <p>As general idea the core values of the profession, which are shared among legal practitioners in all jurisdictions throughout the world should be explicitly recognized. These values are the independence, the confidentiality and the avoidance of conflict of interest. These measures should be taken into account in the examination of the necessity of some restrictions. If these restrictions have been recognized as necessary in other forum the WTO, like in <i>Wouters</i> in the EU. However, attention should be paid on the fact that the core value claim should not to be used to serve protective purpose. Some authors raised this issue following the comments made by bar associations for the adoption of disciplines in the legal services sector.<sup>276</sup></p> |
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The Australian proposal did not meet with an enthusiastic reactions from other delegations. The most common view was that the majority of the Australian proposals were generic and suited to horizontal disciplines.<sup>277</sup> As a result the adoption of disciplines specific to legal services is not part of the agenda of WTO negotiations. Instead they are integrated into negotiations on horizontal disciplines, which are addressed in the next sections.

<sup>276</sup> HOPKINS (2004), *Liberalizing Trade in Legal Services: The GATS, The Accountancy Disciplines, and the Language of Core Values*, Indiana International & Comparative Law Review, Vol. 15, No. 3, 2005, pp. 427-471; PATON (2003), *Legal Services and the GATS: Norms as Barriers to Trade*, New England Journal of International & Commercial Law, Vol. 9, No. 2, September 2003, pp. 361-386.

<sup>277</sup> WTO-WPDR (2005f), *Results of Secretariat Consultations with International Professional Services Negotiations*, Note by the Secretariat, Working Party on Domestic Regulation, S/WPDR/M/31, 21 October 2005.

### 3. Horizontal Disciplines: Consequences for Legal Services

In the first years of WPDR negotiations the proposals were broad and general. Since 2006, the pace has increased and debates have focused on horizontal disciplines.<sup>278</sup> The development of horizontal disciplines embraces all service activities including the legal sector.

To date the WPDR Chair has presented five drafts on domestic regulation disciplines under Article VI: 4. The last was prepared on 20 March 2009 (the *Chair's March 2009 Text*).<sup>279</sup> This document served as a basis for further discussions. On 14<sup>th</sup> March 2010 the Chairperson produced an informal note, which synthesized the comments and proposals from the *Chair's March 2009 Text*.<sup>280</sup> Beginning in early 2011, WTO Members started intensive drafting sessions to produce a new revised text by Easter 2011; however, more time was needed.

#### a. Overview of Current Domestic Regulation Negotiations

According to the WPDR Chair, the current situation can be described as being in various stages of progress. There are paragraphs where agreements have been reached on an *ad referendum* basis; paragraphs where there is no agreement, but where language proposals have been reduced to a single alternative; and paragraphs where progress is limited and multiple alternatives and language options remain.

The *Chair's March 2009 Text* was divided as follows:

- I. Introduction;
- II. Definitions;
- III. General Provisions;
- IV. Transparency;
- V. Licensing Requirements;
- VI. Licensing Procedures;
- VII. Qualification Requirements;
- VIII. Qualifications Procedures;
- IX. Technical Standards;
- X. Development;
- XI. Institutional Provisions.

Proposals have been submitted to add new paragraphs to it. These relate to: a definition of *authorization*; insertion of a *necessity test* or related language; the role of mutual recognition agreements; language examination; and an additional provision under the chapter on development.<sup>281</sup> Based on the WPDR Chair's last report, there seems to be a convergence of opinion on Definitions, Transparency (with a new formulation) and the Licensing Requirements. The other sections will need further negotiations in order to reach agreement on a revised text.

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<sup>278</sup> DELIMATIS (2008), *above note 150*, p. 397.

<sup>279</sup> WTO-WPDR (2009), *above note 147*.

<sup>280</sup> WTO-WPDR (2010), *Disciplines on Domestic Regulation Pursuant to Article VI:4, Annotated Text*, Informal Note by the Chairperson, Working Party on Domestic Regulation, Room Document, 14 March.

<sup>281</sup> WTO-WPDR (2011c), *above note 186*.

The most contentious issue is the incorporation of a necessity test. One group of WTO Members who are strongly opposed to the idea argues that it could threaten the discretion of regulators to adequately take into account legitimate policy objectives in their own jurisdiction.<sup>282</sup> Despite this, the Chairperson has produced a report on the *Chair's March 2009 Text* with alternative proposals on various issues, such as General Provisions, Licensing and Qualification Procedures and Technical Standards.

Further discussions are also necessary concerning the merge of a number of paragraphs related to licensing and qualifications procedures, which deal with the same issues. Other discussions will focus on the language of specific provisions and the addition of new paragraphs (related to authorization, mutual recognition agreements or development).

## **b. Current Disciplines on Domestic Regulation and Legal Services**

The bar associations called for the explicit recognition of the core values of the profession as a general principle and specifically in connection with the application of the necessity test. Current negotiations do not suggest this will happen. Consequently, it is likely that the impact of the disciplines will essentially concern transparency issues.

In this respect, the main concern was a more precise definition of licensing and qualification requirements, procedures and technical standards. WTO Members have agreed on the following definitions. Although they are not specific to the legal profession they could be applied to it:

- "**Licensing requirements**" are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service.
- "**Licensing procedures**" are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a license, must adhere to in order to demonstrate compliance with licensing requirements.
- "**Qualification requirements**" are substantive requirements relating to the competence of a natural person in relation to the supply of a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.
- "**Qualification procedures**" are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service.
- "**Technical standards**" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.

Another concern of legal professionals was that disciplines should apply at all political levels and not just the national level. Current disciplines do not address this issue, although Article 1: 3 (a) of the GATS does. However, it should be noted that a key question in negotiations on the disciplines was whether voluntary standards (e.g. the IBA or CCBE code of conduct) fall within their scope.

With regard to qualification requirements, the concerns of the legal professions related to education, experience, and practical training and language skills. Paragraph 27 of the *Chair's March 2009 Text* mentions that, "in verifying and assessing qualifications, where the competent authority finds it relevant, it shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications". Furthermore, a

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<sup>282</sup> WTO-WPDR (2011c), *above note 190*.

proposal has been tabled to add a paragraph to the Text, which provides that, “WTO Members should not require passage of language examination unless they are based on meeting legitimate policy objectives such as the safety of the consumer, ensuring the quality of the services or where working knowledge of the language is essential for the practice”. Finally, current disciplines do not address limited licensing requirements, licensing requirement for temporary (legal) services, or the exchange of information between professional bodies.

#### **4. Concluding Remarks**

As mentioned earlier, Article VI:4 gives a mandate of to the Council of Trade in Services to develop through appropriate bodies any necessary disciplines in order to ensure that licensing/qualification requirements/procedures and technical standards are based on objective and transparent criteria and are not burdensome than necessary to ensure the quality of the service. In 1999 the Council of Trade in Services entrusted the WPDR with developing both general disciplines applicable to all services and disciplines specific to professional services.

However, current negotiations only focus on the development of horizontal disciplines and not those specific to professional services. In addition, despite the explicit mandate of Article VI: 4 to develop disciplines that ensure domestic regulations are not more burdensome than necessary, future disciplines will probably not include a necessity test. Rather they will focus on transparency issues. Consequently, the overall result of the negotiations can already be described as disappointing.

With regard to legal services and setting aside the necessity test, several transparency issues must be addressed following comments from bar associations and the Australian proposal, namely:

- a. *Definitions*: Negotiations have tried to find adequate definitions. Even if the current definitions do not address the specificities of legal services, they should be workable.
- b. *Level of legal activity*: Current negotiations do not deal with this issue. However, it should be noted that in relation to technical standards, proposals have been submitted that extend the application of the disciplines to private professional organizations.
- c. *The distinction between full and limited licensing requirements*: Current discussions do not address such issues.
- d. *The exchange of information*: There are no ongoing discussions on this issue.
- e. *Qualification requirements*: The disciplines must contain proposals addressing this issue.
- f. *Requirements for temporary services*: There are no proposals related to this specific issue

Consequently although some improvements can be expected from the disciplines, it can be said they are unlikely to have a meaningful impact on the legal profession.

## IV. Conclusion

The previous chapter identified five principles of liberalization: transparency, non-discrimination, avoidance of unnecessary burdensome measures, recognition and the promotion of competition rules. It appears from this analysis that liberalization under the GATS revolves around transparency, non-discrimination and necessity test issues. Two types of negotiations have been described. First, negotiations on market access deal primarily with discriminatory measures and a few non-discriminatory measures. Second, negotiations on domestic regulation address transparency issues and the need for measures that affect access to the market and the conduct of service suppliers.

With regard to market access negotiations, the overall outcome can be described as modest. This is even truer in the legal services sector, where very few new WTO Members undertook commitments and WTO Members who improved their existing commitments did not significantly liberalize the sector. The situation is even worse with respect to negotiations on domestic regulation, which focused on horizontal disciplines that cover all service sectors, and set aside the adoption of disciplines on professional services. Furthermore, the analysis suggests that the incorporation of a necessity test in the disciplines is unlikely.

Therefore GATS negotiations related to the legal services sector seem to have fallen victim, like other services sectors, to the general political context of the Doha Round negotiations and the Doha Round Dilemma.<sup>283</sup> Yet the continuous international growth of the legal services sector underscores the need for regulatory intervention, either in the form of regulatory reform or trade liberalization.

In this context, it is reasonable to ask if these negotiations have been a waste of time. In terms of results the answer would probably be yes. However, the answer may be more nuanced in terms of content. In-depth discussions on trade barriers to cross-border legal practice have laid the foundations for further liberalization that may take place elsewhere; either at the domestic level, in the context of regulatory reform and/or at the regional level in the context of regional free trade agreements. Further discussions on liberalization of legal services at regional level could eventually include:

- a. The development of Foreign Legal Consultant regimes, including the removal of all barriers to trade mentioned in the collective request, notably the requirement that foreign lawyers enter into partnership with, or hire a domestic lawyer.
- b. Development of mutual recognition agreements (MRA), which would not only solve the problems of legal practice by foreign lawyers, but also related issues such as association with domestic lawyers, employment of foreign lawyers or participation in domestic law firms.
- c. As an alternative to MRA, the development of re-qualification regimes.
- d. Clarification of the requirements for the provision of legal services on a temporary basis (mode 4).
- e. Development of cooperation agreements between competent authorities to ensure licensing requirements (this could help avoid residency requirements) and monitor the conduct of legal practitioners.

While negotiations of these elements may be extremely difficult at multilateral level, it remains to be seen if it is more feasible on a regional basis.

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<sup>283</sup> CONE III (2003), *Legal Services in the Doha Round*, Journal of World Trade, Vol. 37, No.1, 2003 pp. 29-47.

## CHAPTER 3: THE LIBERALIZATION OF LEGAL SERVICES UNDER THE EU AND SWISS (EFTA) PREFERENTIAL TRADE AGREEMENTS

The last decade has witnessed the proliferation of Preferential Trade Agreements (PTAs) that feature a chapter on the liberalization of trade in services. As most of these agreements are concluded between WTO Members they may therefore contravene the fundamental principle of non-discrimination between WTO Members and MFN treatment (Article II GATS). However, Article V of the GATS provides an exception to MFN treatment and makes it possible for WTO Members to enter into agreements liberalizing trade in services for the purpose of economic integration.

Article V sets out four conditions for the conclusion of such agreements. These conditions seek to ensure that PTAs facilitate trade between parties, but do not raise barriers with respect to non-parties. First, PTAs should have “substantial sectoral coverage”. There is no clear definition of this term, but a footnote indicates that “this condition is understood in terms of number of service sectors and modes of supply” and that “in order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply”. Second, PTAs should provide for the “absence or elimination of substantially all discrimination in the sense of Article XVII between the parties (...) through: (i) elimination of existing of substantially all discrimination, and/or (ii) prohibition of new or more discriminatory measures”. Article V: 2 states that in order to assess whether these conditions have been met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization between the countries concerned. Third, Article V: 4 emphasizes that the agreement should not “in respect of any WTO Member outside the agreement raise the overall level of barriers to trade in service (...) compared to the level applicable prior to such an agreement”. Finally, Article V: 6 focuses on rules of origin and stipulates that service suppliers of non-parties to the PTA who have a commercial presence in the territory of a party to the PTA and “substantive business operations” should benefit from the PTA.

It is against this background that an ever-increasing number of WTO Members have concluded PTAs that include a chapter on trade in services. As of 15 January 2012, the WTO Secretariat had received notification of 511 agreements, of which 319 were in force.<sup>1</sup> Of these 319 agreements, 101 included a chapter on trade in services. Ninety-one of these PTAs had been concluded in the 2000s, which suggests that the incorporation of a services chapter is a recent development. The EU and Switzerland, as exporter of services, are particularly involved in this process.

The EU has a longstanding practice in the conclusion of PTAs. First, the EU itself is to a certain extent a PTA. Second, future EU Member States are linked to the EU with a PTA. Third, the EU has been involved in an ongoing process of developing relations with third countries. These strategies were based on objectives such as the development of close relationships with neighbor countries, the promotion of peace or the allocation of aid. Trade was one element of this political agenda and involved mainly trade in goods. The situation

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<sup>1</sup> WTO SECRETARIAT (2012), *Regional Trade Agreements: Facts and Figures*, <http://www.wto.org> (last visit: 1.10.2012).

changed in 2006 when the EU Commission issued the communication *Global Europe*, which announced a shift in the EU agenda. Since then, trade has become one of the key elements of the EU relationship with third countries. This change was reinforced by the introduction of increased competences to negotiate PTAs. Before December 2009 and the entry into force of the Treaty of Lisbon, the allocation of competences between the EU and its Member States was complex: trade in goods, some services and some trade-related intellectual property rights was the exclusive competence of the EU, while other trade issues fell under the shared competence of the EU and its Member States. Since the Lisbon Treaty, trade in goods and services, commercial aspects of intellectual property and foreign direct investment are now under the exclusive competence of the EU. As a result, it has negotiated numerous so-called new-generation PTAs that include not only trade in goods, but also trade in services, intellectual property rights and investment issues. At the time of writing, four new-generation PTAs are in force (with Chile, Mexico, CARICOM and South Korea), two are being ratified (with Colombia/Peru and Central American States), while others are under negotiation (with Canada, India, the ASEAN States, MERCOSUR, the GCC, Ukraine, the Mediterranean States and the African States).

Similarly, Switzerland has extensive experience in the conclusion of PTAs. In 1960, Switzerland joined the European Free Trade Agreement (EFTA), designed as an alternative to the EU integration process. EFTA agreements have always had a trade focus. Originally signed with neighboring countries in Europe (Central Europe) and Mediterranean countries that had relations with the EU, such agreements were designed to prevent trade discrimination against EFTA States and focused on trade in goods. The situation gradually evolved in the 2000s when EFTA States embraced the general trend and began to go global. The EFTA has concluded ten new-generation PTAs (with Chile, Mexico, Singapore, South Korea, Canada, Colombia, the GCC, Ukraine, Peru and Hong Kong) and is negotiating other agreements with *inter alia* Central American states, India and Indonesia. At the same time the relatively loose integration that characterizes the EFTA enables its Members to negotiate agreements outside the association. Consequently, Switzerland has concluded a PTA with Japan and is negotiating another with China.

This chapter analyzes the liberalization of trade in legal services under EU and EFTA/Swiss PTAs. It starts with a brief presentation of PTAs in general, and the development of trade in services under them. The second part describes EU and EFTA practice, and identifies some PTAs that are particularly relevant to this study. It then analyzes horizontal issues related to trade in services (including legal services) under these agreements, which provides the basis for a comparison of liberalization of trade in services under PTAs and GATS agreements. Finally, the third part deals specifically with the liberalization of trade in legal services in EU and EFTA/Swiss PTAs.

## **I. OVERVIEW OF PREFERENTIAL TRADE AGREEMENTS (PTAs): EU AND SWISS PERSPECTIVES**

PTAs are not a new phenomenon in the international trade landscape. Throughout modern history, countries have sought to secure and strengthen their trade relations through various arrangements, ranging from colonial preferences to bilateral commercial treaties or broader regional arrangements. However, the last two decades have witnessed an explosion in the number of PTAs concluded, with several new, long-terms trends.

The EU and Switzerland have a long-standing practice in the field and are integral part of the process. This section provides an overview of the evolution of modern PTAs with a particular focus on EU and Swiss/EFTA models. It starts with a general presentation of the evolution of PTAs and then turns to the trade policy of the EU and Switzerland with respect to the conclusion of new-generation of PTAs.

## A. General Presentation of PTAs and Trade in Services

PTAs that include a chapter on trade in services are a new phenomenon that followed the creation of the NAFTA and the GATS in the mid-1990s. Prior to this period, PTAs mainly dealt with trade in goods and preferential tariffs offered to selected trading partners. Today, rules governing trade in services are usually included in a so-called *new generation* of PTAs that cover not only trade in goods, but also investment, intellectual property, competition and cooperation in a variety of non-trade areas. Trade in services is now a necessary feature of PTAs signed by developed countries and an increasingly important component of PTAs signed by developing countries. Interestingly, although the most important trading partners (the United States, the EU, Japan, China and Brazil) are involved in these new-style PTAs, they have not concluded any with each other.<sup>2</sup>

The degree of liberalization of trade in services provided by these agreements depends, on the one hand, on the type of PTA (namely the depth of integration), and on the other hand, the motivation for partners to include a chapter on trade in services. These elements are examined in turn.

### 1. Definition of PTAs

Traditionally the term *Preferential Trade Agreements* (PTAs) refers to a variety of unilateral, bilateral or plurilateral arrangements that favor signatories over non-members by extending tariff and other non-tariff preferences. It should be noted that the WTO uses the term *Regional Trade Agreements* (RTAs) to describe such arrangements. This study will use the term PTAs, as a large number of such agreements are not limited to countries in a single region.

Trade literature distinguishes two forms of PTAs: *shallow* and *deep*.<sup>3</sup> *Shallow* agreements deal with cross-border measures. Domestically, they accord national treatment to foreign firms, but go no further. In contrast, *deep* agreements include rules on internal domestic policies. There are four main categories of PTAs that can be distinguished by the depth of integration<sup>4</sup>:

- a. Free Trade Agreements (FTAs) refer to agreements between two or more parties in which tariffs and other barriers are eliminated on most or all trade. Each party maintains its own trade policy, including tariffs with third parties. The most well-known agreement of this type is the North American Free Trade Agreement (NAFTA).

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<sup>2</sup> MARCHETTI/ ROY (2009), *Services Liberalization in the WTO and in PTAs*, J. Marchetti/ M. Roy (eds), Opening Markets for Trade in Services, Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press, pp. 61–112.

<sup>3</sup> LAWRENCE (1996), *Regionalism, Multilateralism and Deeper Integration*, Washington DC: Brookings Institution.

<sup>4</sup> BALASSA (1961), *The Theory of Economic Integration*, Richard D. Irwin, Homewood, Illinois.

- b. The Customs Union (CU) is a form of trade agreement under which two or more parties preferentially eliminate tariffs and other barriers on most, or all trade. In addition, they agree to apply a common commercial policy toward third parties, including *inter alia* the establishment of a common external tariff. The most well-known agreements are the Southern Common Market (MERCOSUR) and the Southern African Custom Union (SACU).<sup>5</sup>
- c. Common Markets (CMs) go a step beyond the customs union with the adoption of common economic policies on product regulation, free movement of goods, services, capital and labor. This is the case in the European Economic Area (EEA) or CARICOM (the Caribbean Community).
- d. -Economic Unions (EUs) are trade blocs composed of both elements of the common market and the customs union. Member States of such a union have both common policies on product regulation, freedom of movement of goods, services and other factors of production (capital and labor) and a common external policy. In addition, Member States often share a common currency. The most illustrative example is the EU.<sup>6</sup>

It results from this categorization that the FTA and to a lesser extent the CU should be considered as *shallow* agreements as they mainly deal with cross-border measures. However, the last two decades have witnessed profound evolution in the structure of these PTAs. They are no longer focused on lowering tariffs but tend to cover a wider range of issues that affect domestic regulation and involve more structured institutional arrangements. This evolution has resulted in the emergence of the so-called *new generation of PTAs* (mainly FTA) that go deeper in the integration. Most of these agreements include rules on trade in services.

Although the emergence of a new generation of PTAs is a recent phenomenon, the analysis begins with the historical evolution and the rationale for PTAs. It then turns to EU and Swiss PTAs and their impact on the liberalization of legal services.

## 2. Historical Evolution of PTAs and Trade in Services

PTAs have always been a component of trade policy and the advent of the multilateral approach found in the General Agreement on Tariffs and Trade (GATT) did not lessen their appeal. However, states have not had the same approach to PTAs and strategies have evolved over the last 60 years. Three periods can be distinguished.<sup>7</sup>

### a. The 1950s-mid 1980s

This period witnessed the beginning of the construction of the EU, with the creation of the European Economic Community (EEC) in 1957 and the adoption of the Treaty of Rome. In addition, the EEC began to build of a network of preferential (but non-reciprocal) trade agreements with current or past colonial possessions.

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<sup>5</sup> ANDRIAMANANJARA (2011), *Customs Unions*, J-P Chauffour & J-C Maur (eds), Preferential Trade Agreement Policies for Development: A Handbook, World Bank, pp. 111–120.

<sup>6</sup> COOPER (2011), *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, CRS Report for US Congress RL31356, 6 January, p. 6.

<sup>7</sup> WTO SECRETARIAT (2011a), *The WTO and Preferential Trade Agreements: from Co-existence to Coherence*, World Trade Report 2011, Geneva, pp. 48–85.

In parallel with the creation of the EEC, European countries that decided to stay outside the EEC created the EFTA in 1960.<sup>8</sup>

Under the Treaty of Rome, the essential task assigned to EEC institutions was to create a common market between Member States. These included *inter alia* the implementation of common policies on four fundamental freedoms: freedom of movement of goods, freedom of movement of salaried workers, freedom of establishment and freedom of movement of services. In the 1970s the first substantial case law related to these four freedoms emerged. The first cases related to legal services were heard in 1974 and concerned restrictions on the freedom of establishment (*Reyners*<sup>9</sup>), the removal of nationality requirements for lawyers and the freedom of movement of services and the removal of residency requirement (*Van Binsbergen*<sup>10</sup>). This period also saw the emergence of secondary law dealing with trade in services, such as Directive 77/249 adopted in 1977 that aimed “to facilitate the effective exercise by lawyers of freedom to provide services”.<sup>11</sup>

This period saw significant advances in the liberalization of trade in services in the EEC, which at the time was the only supranational entity with experience of regional liberalization. In other parts of the world trade in services was regulated through bilateral and regional agreements with narrow scope. For instance, the United States had concluded a number of Friendship, Commerce and Navigation (FCN) treaties that regulated cross-border relations with respect to specific services such as aviation, shipping and communication.<sup>12</sup>

#### **b. The mid 1980s-1990s**

This period saw significant shifts in trade policy. Europe continued its integration process under the “single market” program and the Maastricht Treaty was adopted, which transformed the European Economic Community (EEC) into the European Community (EC).<sup>13</sup> Following the collapse of the Soviet Union, the EC concluded a series of bilateral PTAs with Central and East European States. Not only did these agreements focus on the reduction of tariffs, but also on the development of a consistent EC approach in sectors such as trade in services. The aim was to pave the way for the admission these countries to the EC and the process ended with the accession of Bulgaria and Romania in 2007.

In the same period, in reaction to the EC’s expansion and because of frustration with delays in the Uruguay Round negotiations, the United States changed its strategy. After a 40-year period of prioritizing multilateralism, it turned to PTAs with the first FTA concluded in 1985 with Israel. More importantly, it concluded the NAFTA in 1994 with Canada and Mexico. NAFTA was a fundamental step in the evolution of trade liberalization. First, because it included much of the new trade agenda that the United States had been promoting at multilateral level (e.g. investment, trade in services, intellectual property and government

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<sup>8</sup> Founding Member States included: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

<sup>9</sup> *Reyners*, C-2/74, *Jean Reyners v. Belgian State*, [1974], ECR 631.

<sup>10</sup> *Van Binsbergen*, C-33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974], ECR 1299.

<sup>11</sup> Directive 77/249 EEC of The Council of European Communities of 22 March 1977, *to facilitate the effective exercise by lawyers of freedom to provide services*, 26 March 1977, OJ L 78/17.

<sup>12</sup> BROCK (1982), *A Simple Plan for Negotiations on Trade in Services*, The World Economy, Vol. 5, No 3, November 1982, pp. 229–240, p. 236.

<sup>13</sup> EU COMMISSION (1985), *Completing the Internal Market*, White Paper from the Commission to the European Council (Milan 28–29 June 1985), COM (85) 310 final.

procurement). Second, it had a great influence on the Uruguay Round negotiations, which integrated most of these new topics in the Marrakech agreements leading, notably, to the advent of the GATS.<sup>14</sup> Finally, the NAFTA served as a model for numerous bilateral agreements negotiated by NAFTA Member States and other states. Most of PTAs related to trade in services are influenced to some extent either by the NAFTA or the GATS.

This period therefore saw significant progress at regional level and some progress at multilateral level with the conclusion of the Uruguay Round negotiations in 1994. For the first time, trade issues other than those related to goods were incorporated into the negotiating process. Trade in services, which had so far only been addressed by the EC and to a lesser extent through bilateral relationships, was brought to the multilateral level in the GATS, which itself had been significantly influenced by the NAFTA experience.

### **c. 2000-2012**

The last decade has been characterized by a dramatic increase in the number of PTAs and it is expected that this trend will continue for the foreseeable future. According to WTO data, from 1948 to 1994, the GATT received 123 PTA notifications (relating to trade in goods). Since the creation of the WTO (in 1995) there have been 300 additional agreements covering trade in goods or services. From 1950 the number of PTAs increased more or less continuously to almost 70 in 1990. In the following five years that number doubled and had quadrupled by 2011. This evolution is expected to continue in the foreseeable future.<sup>15</sup>

Beyond the explosion in the number of agreements, other significant changes characterize this new wave of regionalism. They relate to the structure of PTAs, their geographical coverage and the degree of market integration.

#### *i) Structure of PTAs*

Traditionally, PTAs have been negotiated between two states (bilateral) or several states (plurilateral) in a single region. The new wave of regionalism is characterized by an increasing number of bilateral arrangements. Prior to 1995, two-thirds of all PTAs notified to the GATT were plurilateral agreements. Since the establishment of the WTO, bilateral agreements have increasingly become the norm, accounting for 80% of all notified PTAs and 90% of PTAs currently under negotiation.<sup>16</sup>

Two other new trends have emerged with this new wave of PTAs. First, they are not only concluded by individual states, but also by regional blocs (which are PTAs in themselves) on behalf of its members. This can take the form of an agreement between the regional bloc and a state, as for instance the agreement between the EU and South Korea. It can also take the form of an agreement between regional blocs; for example the agreement between the EFTA and the GCC or the agreement between the EU and the CARICOM. Second, new PTAs tend to go beyond integration within a region and move towards multiple, worldwide bilateral agreements.

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<sup>14</sup> MARCHETTI/ MAVROIDIS (2011), *The Genesis of the GATS (General Agreement on Trade in Services)*, European Journal of International Law, Vol. 22, No. 3, 2008, pp. 689-721, pp. 692-967.

<sup>15</sup> WTO SECRETARIAT (2012), *above note 1*.

<sup>16</sup> ACHARYA/ CRAWFORD/ MALISZEWSKA/ RENARD (2011), *Landscape*, J-P Chauffour & J-C Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook*, World Bank, pp. 37-66, p. 43.

PTAs are currently less used as instruments for the promotion of traditional, regional integration (as was the case for the EU, EFTA or ASEAN), but rather as a tool for the negotiation of strategic, bilateral and more flexible market access.<sup>17</sup>

### *ii) Geographical Coverage of PTAs*

PTAs have gradually ceased to be strictly regional and now include partners from other geographical areas. At the time of writing, one half of PTAs notified to the WTO are not regional, while 10 years ago purely regional PTAs dominated. The tendency to negotiate PTAs across regional boundaries is even more pronounced for those that are still under negotiation; two-thirds are cross-regional.<sup>18</sup>

One explanation for this phenomenon is that regional prospects have been exhausted.<sup>19</sup> However, another factor is the increasing participation of developing countries in PTA activities, both in terms of the quantity and quality of trade agreements. There has been a shift towards preferential tariffs provided on a unilateral basis by developed countries towards South-South trade supported by preferential trading relationships. As a result, the key factor in PTAs is no longer the specific region, but rather the nature of the preferential relationship.<sup>20</sup>

### *iii) Deepening of PTA Coverage*

Traditionally, PTAs deal with trade in goods and negotiations on tariff reduction. The new generation of PTAs extends the scope of such agreements to include matters covered by the WTO agreements. These include trade in services, trade-related aspects of intellectual property rights, technical barriers to trade and dispute settlement mechanisms. About one-third of PTAs currently in force contain commitments related to trade in services and this trend has accelerated in recent times.<sup>21</sup>

However, new-generation PTAs go beyond the topics covered by WTO agreements. A recent study on PTAs concluded by the EU and the United States demonstrated that these PTAs contain a number of WTO extra provisions, notably in the area of competition, investment and factor mobility (capital or labor). Furthermore, the study showed that these agreements notably extend the depth of commitments with respect to non-tariff measures compared to multilateral commitments.<sup>22</sup>

This new generation of PTAs tends to be bilateral agreements, in the form of FTAs, negotiated between individual states or regional blocs that are not necessarily located in the same region and that do not necessarily have the same level of development. Furthermore, such agreements offer deeper commitments and go beyond the traditional tariff-cutting exercise to embrace new disciplines covered by WTO agreements such as trade in services and intellectual property rights. Some PTAs even go beyond the disciplines covered by WTO agreements to include topics such as competition, investment and factor mobility.

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<sup>17</sup> FIORENTINO/ CRAWFORD/ TOQUEBOEUF (2009), *The Landscape of Regional Trade Agreements and WTO Surveillance*, R. Baldwin & O. Low (eds), Multilateralising Regionalism: Challenges for the Global Trading System, Cambridge University Press, pp. 28-46.

<sup>18</sup> ACHARYA/ CRAWFORD/ MALISZEWSKA/ RENARD (2011), *above note 16*, p. 42-46.

<sup>19</sup> FIORENTINO/ CRAWFORD/ TOQUEBOEUF (2009), *above note 17*.

<sup>20</sup> WTO SECRETARIAT (2011a), *above note 7*, p. 54-58.

<sup>21</sup> Idem.

<sup>22</sup> HORN/ MAVROIDIS/ SAPIR (2010), *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, Bruegel Blueprint Series.

This suggests that the traditional concept of PTAs, namely regional integration among neighboring countries has gradually given way to new types of partnerships driven by other considerations. These considerations are looked at in turn in the following sections.

### **3. The Motivation for PTAs dealing with Trade in Services**

The conclusion of a PTA featuring a chapter on trade in services is based on economic considerations and geopolitical strategies such as the promotion of peace and stability within a region or development aid.<sup>23</sup>

Four main reasons may influence states to integrate a chapter on trade in services in their PTAs.

#### **a. Limitation of Trade Diversion**

By definition the purpose of PTAs is to grant preferential treatment to signatories parties. Therefore, an important reason for entering into a PTA is to ensure that exporters do not become disadvantaged in key markets as a result of PTAs entered into by competitors and other trade partners. This remains a significant reason, even if the actual effect of trade diversion has lessened over time.<sup>24</sup>

This factor is also relevant for the conclusion of PTAs in service sectors. The fear of discrimination against European banks in the Mexican market following the conclusion of the NAFTA was one of the main reasons for the *EU–Mexico* FTA and the *EFTA–Mexico* FTA in 2000. The same logic applies to legal services. South Korea has recently opened its legal market to foreign lawyers. Under the Foreign Consultant Act, only foreign lawyers with home country license from a party to an FTA concluded with South Korea (Article 6) or a law firm with a head office established in a party to a FTA are entitled to practice in South Korea.<sup>25</sup> South Korea concluded FTAs with the EFTA in 2006<sup>26</sup>, the EU in 2011<sup>27</sup> and the United States in 2012<sup>28</sup>. This may push other states interested in exporting legal services (such as Australia) to begin negotiations with South Korea in order to obtain the same treatment.<sup>29</sup>

#### **b. Frustration over Lack of Progress at Multilateral Level**

The current stalemate in the Doha Round negotiations is another important factor. Moreover, the results of Doha Round negotiations related to trade in services are not expected to be far-

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<sup>23</sup> WORLD BANK (2005), *Regional trade and Preferential Trading Agreements: A Global Perspective*, Global Economic Prospects: Trade, Regionalism and Development, World Bank.

<sup>24</sup> MAVROIDIS (2011), *Always Look at the Bright Side of Non-Delivery, WTO and Preferential Trade Agreements, Yesterday and Today*, World Trade Review, Vol. 10, No. 3, 2011, pp. 375–387.

<sup>25</sup> MINISTRY OF JUSTICE OF REPUBLIC OF KOREA (2010), *Foreign Legal Consultant Act*, 5 February 2010.

<sup>26</sup> **EFTA–Korea:** *Free Trade Agreement between EFTA States and the Republic of Korea*, signed on 15 December 2005 at Hong Kong, China, in force on 1 September 2006.

<sup>27</sup> **EU–Korea:** Decision 2011/265/EU of the Council of European Communities of 16 September 2010, *on the signing, on behalf of the European Union, and the provisional application of the Free Trade Agreements between the European Union and its Members States, of the one part, and the Republic of Korea, of the other part*, 14 May 2011, L 127/24.

<sup>28</sup> **US–Korea:** *United States–The Republic of Korea Free Trade Agreement*, signed on 30 June 2007, entered into force on 15 March 2012.

<sup>29</sup> ILSAC (2009b), *ILSAC Submission on Legal Services to the Department of Foreign Affairs and Trade in Respect of a possible Australia–Republic of Korea Free Trade Agreement*, January 2009.

reaching. Consequently, PTAs are a way to increase the pace of liberalization through an early harvest of the revised offers tabled by WTO Members. This was the case for the *EFTA–Korea* FTA where commitments in the legal services sector corresponded to revised offers tabled by parties during GATS negotiations.

The conclusion of PTAs may also enable signatories to deepen existing GATS rules or go further in discussions and deal with issues on a bilateral, rather than a multilateral basis. For instance, the *USA–Australia*<sup>30</sup> FTA concluded in 2006 provided the framework for discussions on the liberalization of legal services, with meeting of various stakeholders and the prospect of the conclusion of a mutual recognition agreement.<sup>31</sup>

Furthermore the conclusion of PTAs is an opportunity for signatories to integrate topics that are not included in the Doha Round negotiations, such as rules on investment, competition and labor mobility that may improve conditions for trade in services.

### **c. The Improvement of Market Access**

Improvements in market access enable law firms to follow their clients to new markets and offer them integrated legal services that combine various legal systems (through the employment of domestic lawyers). They may also enable law firms in signatory countries to export their services to new markets that do not have experience of international business law. They can increase their market share, exploit economies of scale and gain a relative advantage over excluded competing firms.

This situation applies particularly to British law firms that do not enjoy the same market size as their American counterparts, but have been able to increase their market share especially in Germany thanks to preferential treatment granted under the EU Treaty. PTA negotiations can be used to remove trade barriers or gain better access to markets with potential for growth such as India, Brazil, South Korea, Singapore and Malaysia. On the other hand, states that need to improve the attractiveness of their economy can use PTAs for the gradual opening of their market and enable domestic companies to develop competitive capacities. This was the path taken by South Korea (influenced by the Japanese experience), which has used FTAs to gradually open its legal services market to a limited number of trade partners.<sup>32</sup> Other states such as India or Malaysia will probably follow the same path.

### **d. The Promotion of Foreign Direct Investment**

The conclusion of PTAs may be a useful way for governments to signal their willingness to shift towards a more liberal policy. Through binding commitments made in trade agreements, a government may choose to lock-in domestic reforms. The conclusion of a PTA prevents policy reversal and signals a more credible and predictable policy. In the absence of binding commitments undertaken through trade agreements, nothing would prevent a state from introducing new restrictions as needed.

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<sup>30</sup> **US–Australia:** *United States–Australia Free Trade Agreement*, signed on 8 February 2004, entered into force on 1 January 2005.

<sup>31</sup> TERRY (2010), *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, Penn State University, Dickinson School of Law Research Paper No. 21, pp. 962–964.

<sup>32</sup> EUCCK (2008), *Gradual Changes*, Infomag, N°85, June, <http://infomag.eucck.org> (last visit: 1.10.212).

For instance, the International Legal Services Advisory Council (ILSAC) notes that prior to the conclusion of the ASEAN–Australia–New Zealand Free Trade Area (AANZERTA), Vietnam had introduced significant restrictions on lawyers in 1995 and issued a decree that led to the shutdown of foreign offices in 1996. The AANZERTA ensured that existing cross-border legal activities among signatories were safeguarded from the introduction of such barriers.<sup>33</sup> In contrast, there are no trade agreements to protect foreign lawyers against policy reversal in Brazil. Until recently, formal alliances between foreign-trained lawyers and local lawyers were permitted. However, in 2010 the Sao Paulo chapter of the National Bar Association ruled that such an alliance was against its rules and it confirmed that opinion in February 2011. At the time of writing the federal bar association is considering the matter.<sup>34</sup>

Therefore, through their commitments undertaken in PTAs, signatories parties indicate a more credible and predictable policy towards foreign investors, by locking-in the liberalization they provide. The GATS fulfills the same function, although PTAs can offer deeper commitments covering wider areas than WTO agreements. Furthermore, the choice of partner may help reinforce credibility, as they can be perceived as a strong proponent of reform and can indicate a preference for a certain regulatory approach. The commitments made in PTAs can be also complemented by transfer of finance and knowledge. In this regard, the recent International Bar Association resolution on the transfer of skills and liberalization of trade in legal services is worth noting.<sup>35</sup> Finally, the use of PTAs in the pursuit of an ambitious domestic regulatory reform agenda underlies the policy of Mexico, Chile, Costa Rica and Peru.<sup>36</sup>

#### **e. International Production Networks**

Current international trade is radically different from trade in the past century. As Baldwin argues, trade in the twenty-first century is no longer exclusively about goods produced in factories in one nation and sold to customers in another.<sup>37</sup> On the contrary, the production network has become increasingly international and is characterized by production stages that are distributed across borders. While originally multinational companies transferred manufacturing to other countries to decrease costs and exploit comparative advantages, the unbundling and outsourcing of services has resulted in an international production network.<sup>38</sup>

Therefore production costs in foreign countries may turn out to be a new form of trade barrier. These barriers are not border measures, but rather behind-border measures. They may result from a poor business environment caused by inefficient regulation, limitations on intermediary services, restrictions on investment, inadequate protection of intellectual property rights or the absence of competition policy.

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<sup>33</sup> ILSAC (2010), *Review of Bilateral and Regional Trade Agreements*, International Legal Services Advisory Council Submission to the Productivity Commission, September 2010.

<sup>34</sup> THE ECONOMIST (2011), *Foreign Law Firms in Brazil, Keep out, Brazilian Lawyers don't want pesky foreigners poaching their clients*, 23 June 2011; STOLLEY PERSKY (2011), *Despite Globalization, Lawyers Find New Barriers to Practicing Abroad*, Covers Story, ABA Journal, November 2011 Issue.

<sup>35</sup> IBA (2008), *Resolution of the IBA Council on Transfer of Skills and Liberalization of Trade in Legal Services*, Buenos Aires, 16 October 2008.

<sup>36</sup> CHAUFFOUR/ MAUR (2011), *Beyond Market Access*, J-P Chauffour & J-C Maur (eds), Preferential Trade Agreement Policies for Development: A Handbook, World Bank, pp. 17–36.

<sup>37</sup> BALDWIN (2011), *21<sup>st</sup> Century Regionalism: Filling the Gap between 21<sup>st</sup> Century Trade and 20<sup>th</sup> Century Trade Rules*, Centre for Economic Policy Research Policy Insights No. 56, May 2011.

<sup>38</sup> WTO SECRETARIAT (2011a), *above note 7*, pp. 111–114.

The new generation of PTAs tackles these issues, especially in the case of developing countries. These countries are part of the production network, but lack the necessary business law or product regulations. On the one hand restrictions may prevent these countries being part of the international production network and on the other hand, they may be barriers to investment opportunities. PTAs can address complex behind-border measures that the WTO fails to address and fill governance gaps.<sup>39</sup>

It is against this background that the EU and Switzerland have concluded several PTAs. Some of them feature liberalization of services, while others are limited to trade in goods. Therefore clarification of the nature of EU and EFTA/Swiss PTAs is necessary.

## **B. EU Preferential Treatment Agreements (PTAs)**

The conclusion of PTAs with third countries is not a new pattern in EU foreign policy. Besides the fact that the EU itself is a PTA, the organization has a long-standing practice in the conclusion of PTAs with its neighboring countries, former colonies or strategic partners. Of the 228 PTAs notified to the WTO by March 2012, 39 involved the EU, making the EU's network of PTAs the largest in the world.<sup>40</sup>

Historically, EU PTAs have been tailored to specific partners in terms of content and commitments, and they have relatively modest in terms of market opening. In most instances trade is not the primary objective of the agreement, but only one element of a more general process such as the promotion of peace, stability or development. However, since the publication in 2006 of the EU Commission's *Global Europe* report, trade has become the centerpiece of EU strategies for the conclusion of a new generation of PTAs.<sup>41</sup>

Current EU PTAs are a web of agreements that do not contain the same rules and do not pursue the same objectives, but do address trade liberalization to a greater or lesser extent. Originally trade in services was not a major focus of these agreements, but a recent shift in the EU Commission's strategy has changed this. This section identifies those EU PTAs that feature liberalization of legal services. It starts with a brief description of the principles that led to the shift in EU trade policy. Then it presents an overview of EU PTAs in general, which provides the basis for the identification of EU PTAs that are then used in an analysis of the liberalization of legal services.

### **1. The EU's Trade Policy Shift**

In 2005, the renewed Lisbon strategy set out the steps that the EU must take in order to deliver growth and jobs. Consequently, the EU Commission's communication *Global Europe* presented in 2006 aimed to establish the contribution of trade policy to the Lisbon strategy. This communication was an important step in the EU new approach to trade relations and described the reasons for the new generation of PTAs, which are briefly presented below.

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<sup>39</sup> BALDWIN (2011), *above note 37*, pp. 4–9.

<sup>40</sup> WTO SECRETARIAT (2012), *above note 1*.

<sup>41</sup> EU COMMISSION (2006a), *Global Europe: Competing in the World, A Contribution to the EU's Growth and Jobs Strategy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 567 final, 4.10.2006.

## **a. Stocktaking of the Situation**

The EU Commission pointed out some significant changes in the global economic order, such as the deepening of global economic integration, the emergence of new economic powers (e.g. Brazil, China, India and Russia) and changes in the global supply chain. These changes had resulted in opportunities for growth and development on an unprecedented scale with both new markets and new opportunities for production. These rapid changes required significant adjustments from European economies. The Commission noted that while industry in the EU had some key assets, its position was at risk and required action to be taken in order to maintain competitiveness. This involved the development of a modern trade policy both externally and internally.<sup>42</sup>

Internally, the Commission highlighted the promotion of a competitive internal market in order to create globally competitive companies, the rejection of protectionism, the maintenance of economic openness and recognition of the potentially disruptive impact of market opening for some regions and some workers.<sup>43</sup>

Externally, the Commission stressed that the rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad. This activism covered two aspects. First, stronger engagement with major economies (especially China, India and Brazil), which combined high growth with unnecessary high barriers to EU exports. Second, it required a sharper focus on barriers to trade behind borders. The Commission noted that market opening was no longer simply about tariffs and outlined three trade policy issues that could help to secure real market access: non-tariff barriers (NTBs), access to resources, and new trade areas (notably intellectual property, services, investment, public procurement and competition).

The Commission report stressed that services were the cornerstone of the EU economy and that the EU had to negotiate liberalization of trade in services with key trading partners, especially where market access was poor or EU partners had made few WTO commitments.<sup>44</sup>

## **b. Action Plan for the EU's Trade Policy**

Externally, the EU's trade policy included a comprehensive action plan that covered their relationship with the WTO, policy towards Free Trade Agreements, the development of transatlantic trade relationships, the relationship with China, enforcement of Intellectual Property Rights (IPR), the renewal of the market access strategy, and a review of public procurement and defense instruments.

With respect to the WTO and FTAs, the Commission restated their belief that the world needed a strong multilateral trading system and that Europe remained committed to the WTO. At the same time, the Commission presented its new approach to FTAs. It argued that FTAs both built on WTO rules, and went further and faster in promoting openness and integration.

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<sup>42</sup> EU COMMISSION (2006b), *Global Europe: Competing in the World, A Contribution to the EU's Growth and Jobs Strategy*, Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 567 final, 4.10.2006, pp. 3-6.

<sup>43</sup> EU COMMISSION (2006a), *above note 41*, pp. 4-5.

<sup>44</sup> *Idem.*, pp. 6-9.

They made it possible to tackle issues that were not ready for multilateral discussions and prepared the ground for the next level of multilateral liberalization. These included issues such as investment, public procurement, competition and IPR enforcement.<sup>45</sup>

More specifically, it pointed out that past FTAs had had local and developmental objectives, which did not serve the EU's main trade interests. Furthermore, it said, the content of these agreements was limited. As a result, the Commission concluded that economic factors should play a primary role in the choice of future FTAs. It also outlined the key economic criteria for the choice of future FTA partners: market potential (economic size and growth), the level of protection against EU exports (tariff and non-tariff barriers) and relationships between the potential partner and EU competitors. Based on these criteria ASEAN, South Korea, MERCOSUR, India, Russia and the GCC were prime candidates, as they combined market potential, high levels of protection and had concluded FTAs with EU competitors.<sup>46</sup>

The Commission stressed that new competitiveness-driven FTAs would be comprehensive and ambitious, aiming for the highest possible degree of trade liberalization including far-reaching liberalization of services and investment. More specifically, with respect to trade in services the Commission pointed out that this was the sector where EU exports had the highest potential for growth, in particular in the areas of finance, telecommunication, distribution, environment, transport, construction, professional and business services. The Commission noted that EU service producers were highly competitive on world markets but were prevented from providing their services in many parts of the world. Therefore it committed the EU to pushing for negotiations in sectors where it had a comparative advantage, where market access was hindered or where few commitments had been made by third countries.<sup>47</sup>

Legal services are an integral part of these new EU priorities. However, the FTAs of new generation of are not the only trade agreement that deal with liberalization of legal services. Therefore a brief presentation of all EU PTAs is necessary in order to delimit EU PTAs that are relevant to this study.

## **2. Overview of EU PTAs**

Different categories of EU PTAs can be distinguished based on their broad purpose and policy context. Some commentators use geography as main criterion for classification.<sup>48</sup> However, here we will use a distinction based on the level of liberalization, particularly with respect to the liberalization of trade in services. Two main categories of PTAs can be distinguished: those negotiated with candidate countries (which feature deep liberalization) and those with non-candidate countries.

### **a. PTAs with Candidate Countries**

Candidate countries include the EFTA States, the Western Balkans and other countries such as Turkey, Andorra and San Marino. They represent countries with which the EU is prepared to consider accession or some looser relationship. Proposed regimes range from the extension

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<sup>45</sup> *Idem.* p. 10.

<sup>46</sup> *Idem.*

<sup>47</sup> EU COMMISSION (2006b), *above note 42*, p. 9.

<sup>48</sup> AHEARN (2011), *Europe's Preferential Trade Agreements: Status, Content, and Implications*, CRS Report for US Congress R41143, 3 March 2011.

of full freedoms under the Treaty on the functioning of the European Union (TFEU) to cooperation agreements with the potential for further agreements.<sup>49</sup>

*i) PTAs with EFTA States*

The adoption of the European Economic Area (EEA) in 1994 constituted a common market between the EU, Iceland, Norway and Lichtenstein.<sup>50</sup> This agreement extended the four TFEU freedoms to EEA partners but excluded some key elements of the current *acquis communautaire*<sup>51</sup> (such as agriculture, fisheries policy, external trade policy, economic and monetary union). Trade in services and more specifically trade in legal services was an integral part of the agreement through the extension of the four freedoms.

Following a referendum in 1992, Switzerland elected not to participate in the EEA. Therefore relations between the EU and Switzerland are governed by the EC Agreement of 1972 (which deals with the free movement of goods) and 16 other bilateral agreements. Legal services are governed by the agreement on the free movement of people, which covers mode 3 (of the GATS) and some aspect of mode 4 with the exclusion of other modes.<sup>52</sup>

*ii) PTAs with the Western Balkans*

Since the end of the former Yugoslavia, EU relations with the Western Balkans have been governed by the *Stabilization and Association Process (SAP)*. The purpose of this process is to establish a relationship with these countries in exchange for reforms, which align their legislation more closely to EU regulations.<sup>53</sup>

In this context the EU concluded *Stabilization and Association Agreements (SAA)* with Albania<sup>54</sup>, Croatia<sup>55</sup>, Macedonia<sup>56</sup> and Montenegro<sup>57</sup>. The EU's statements on the SAP and EU

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<sup>49</sup> CREMONA (2010), *The European Union and Regional Trade Agreements*, C. Herrmann, J.P. Terhechte (eds), European Yearbook of International Economic Law, pp. 245–268

<sup>50</sup> EEA: Decision 94/1/EC of the Council and the Commission of 13 December 1993, *on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation*, 3 January 1994, OJ L1.

<sup>51</sup> The term refers to the total body of EU law accumulated so far.

<sup>52</sup> EU–Switzerland: Decision 2002/309/EC of the Council and Commission as regard the Agreement on Scientific and Technological Cooperation of 4 April 2002, *Agreement between the European Community and its Member State of the one part, and the Swiss Confederation of the other part, on the free movement of persons*, OJ L 114, 30 April 2002.

<sup>53</sup> WTO-TPRB (2009b), *Trade Policy Review Report by the European Union*, WT/TPR/G/214, 2 March, p.18.

<sup>54</sup> EU–Albania: Decision 2009/332/EC of the Council and the Commission of 26 February 2009, *concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Members States, of the one part, and the Republic of Albania, of the other part*, 28 April 2009, OJ L 107/165.

<sup>55</sup> EU–Croatia: Decision 2005/40/EC of the Council of European Communities and the Commission of 13 December 2004, *concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Members States, of the one part, and the Republic of Croatia, of the other part*, 28 January 2005, OJ L 26/1.

<sup>56</sup> EU–Macedonia: Decision 2004/239/EC of the Council and the Commission of 23 February 2004, *concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Members States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part*, 20 March 2004, OJ L 84/1.

<sup>57</sup> EU–Montenegro: Decision 2010/224/EU of the Council and the Commission of 29 March 2010, *concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Members States, of the one part, and the Republic of Montenegro, of the other part*, 29 April 2010, OJ L 108/1.

policy towards the Western Balkans make it clear that the SAAs are accession-oriented.<sup>58</sup> They include FTAs, which cover the four TFEU freedoms including establishment and the free movement of services. However, unlike the EEA they propose intermediary steps towards the four freedoms, following the pattern established by association agreements with acceding countries. Therefore provisions relating to the liberalization of services constitute an intermediary form of trade liberalization, between the liberalization known in the GATS or NAFTA and the liberalization under the rules of the EU internal market.

### *iii) Other Candidate Country PTAs*

Besides relations with EFTA and Balkan countries, the EU has developed close relations with Turkey. Turkey became a candidate country in December 1999 and negotiations for access were opened in 2005. The current principles and conditions for Turkey's accession are provided in a 2008 Council Decision.<sup>59</sup> In the meantime, trade relations between EU and Turkey operate through a Custom Union established in 1995.<sup>60</sup> While the Custom Union covers industrial goods and processed agricultural items, it does not address trade in services.

Besides Turkey, the EU also has Custom Union agreements with Andorra and San Marino and an FTA with the Faeroe Islands.

## **b. PTAs with Non-Candidate Countries**

Apart from the accession process, the EU has been negotiating PTAs with countries throughout the world. Some are driven by political and strategic concerns, trade being only one element of the process. Therefore they do not necessarily include significant trade liberalization. Political and financial measures, along with trade liberalization, are seen as a means of promoting development and political stability. In these agreements the primary concern is to ensure the EU against social or economic conditions that could adversely affect Member States.<sup>61</sup> At the same time, the EU has been negotiating PTAs that are mainly focused on trade, leading to significant improvements in liberalization.

### *i) PTAs with a Political Focus.*

## **Mediterranean Countries**

Mediterranean countries include Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia, Turkey, and Libya. Trade relations between the EU and Mediterranean countries are governed by the Euro-Mediterranean Partnership. Launched in 1995, the Partnership is a broad framework for political, economic and social relations.<sup>62</sup>

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<sup>58</sup> EU Commission (2006c), *The Western Balkans on the Road to the EU: Consolidating Stability and Raising Prosperity*, COM (2006) 27, 27 January 2006.

<sup>59</sup> **EU-Turkey (a):** Decision 2008/157/EC, Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 51, 26 February 2008.

<sup>60</sup> **EU-Turkey (b):** Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995, *on implementing the final phase of the Customs Union*, 13 February 1996, OJ L 35.

<sup>61</sup> HEYDON/ WOOLCOCK (2009), *The Rise of Bilateralism, Comparing American, European and Asian Approaches to Preferential Trade Agreements*, United Nations University Press, Tokyo, New York, Paris, pp.162–165.

<sup>62</sup> AHEARN (2011), *above note 48*, p. 6.

The objective of a fully-fledged Euro–Mediterranean region by 2010 was a key component of the negotiations.<sup>63</sup> Negotiations continue on Euro–Mediterranean agreements and specifically negotiations on the liberalization of trade in services and freedom of establishment are ongoing with Egypt, Morocco, Tunisia and Israel.<sup>64</sup>

### **States of the Former Soviet Union**

By the end of the 1990s the EU had entered into Partnership and Cooperation Agreements (PCAs) with Ukraine, Moldova, Armenia, Azerbaijan, Georgia, Russia, Kazakhstan, the Kyrgyz Republic and Uzbekistan. As far as trade is concerned, these agreements are very limited in scope. However, they provide for future FTA negotiations with some states (Russia, Ukraine, Moldova and Belarus). Ten years on, the time has come to reconsider these relationships.<sup>65</sup>

With respect to Russia, negotiations for a new trade agreement were launched at the EU–Russia summit in June 2008. The agreement envisaged strengthening and deepening trade and economic relations. By the end of 2010, 12 full negotiating rounds had taken place and negotiations are ongoing.

On 18 February 2008, the EU launched FTA negotiations with Ukraine. This FTA formed part of the New Enhanced Agreement. It aimed for closer economic and political cooperation through a deep and comprehensive FTA, going far beyond WTO rules. It sought not only significant reductions in tariffs, but also a high degree of regulatory approximation. The removal of non-tariff barriers through regulatory alignment, including effective enforcement, was seen as the most important way in which the two markets could be integrated. The seventeenth round of negotiations took place in Kiev in June 2011.<sup>66</sup>

Finally, the EU is considering negotiations on FTAs with Georgia, Armenia and Moldova.<sup>67</sup>

### **Economic Partnership Agreements with ACP Countries**

These agreements are based on historical and developmental factors, and comprise agreements with 71 small and mostly poor developing countries.

The EU have been negotiating *Economic Partnership Agreement* (EPAs) with African, Caribbean and Pacific countries (the ACP countries), which are mainly former colonies of one or other of the Member States. The aim is to create a FTA between the EU and groups of ACP countries, to enhance cooperation in all areas related to trade, support development and eradicate poverty in all ACP countries.<sup>68</sup> A first EPA between the EU and Caribbean countries<sup>69</sup> (*EU–CARIFORUM*), entered into force in October 2008.<sup>70</sup> Negotiations on other

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<sup>63</sup> WTO-TPRB (2009b), *above note 54*, p.18.

<sup>64</sup> WTO-TPRB (2011), *Trade Policy Review Report by the European Union*, WT/TPR/G/248/Rev.1, 28 July 2011.

<sup>65</sup> CREMONA (2010), *above note 49*, pp. 256–259.

<sup>66</sup> EUROPEAN COMMISSION (2012), *International Affairs: Free Trade Agreements*, <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade> (last visit: 1.10.2012).

<sup>67</sup> WTO-TPRB (2009b), *above note 53*, p. 19.

<sup>68</sup> AHEARN (2011), *above note 48*, p. 7.

<sup>69</sup> This includes the 15 CARICOM States plus the Dominican Republic.

<sup>70</sup> **EU–CARIFORUM:** Decision 2008/805/EC of the Council of European Communities of 15 July 2008, *on the signature and provisional application of the Economic Partnership Agreement between the CARIFORUM States*,

EPAs have been continuing with African and Pacific countries. Progress has been reported as uneven.<sup>71</sup> The *EU–CARIFORUM* EPA features a chapter on trade in services, including liberalization of legal services.

*ii) PTAs with a Trade Focus*

Unlike the previous category of PTAs where trade considerations were not the main focus, this category includes PTAs with more distant countries where the primary objectives are to secure commercial benefits for EU exports through access to key foreign markets. They aim to neutralize potential discrimination against EU exports and investment resulting from FTAs between third countries and obtain further liberalization through deeper and wider PTAs that address behind-border measures.

The EU have been negotiating with strategic partners, which include regional blocs such as the Andean Community, the Central America Community, the ASEAN or the MERCOSUR, and individual countries such as South Africa, Chile, Mexico, South Korea, Canada and India.

In this category, four PTAs are currently in force: *EU–South Africa*<sup>72</sup>, *EU–Mexico*<sup>73</sup>, *EU–Chile*<sup>74</sup>, and *EU–Korea*.<sup>75</sup> The *EU–South Africa* PTA does not deal with trade in services, while the *EU–Mexico* PTA only covers financial services. In contrast, the *EU–Chile* and *EU–Korea* PTAs cover trade in services, with substantial commitments in the legal services sector.

Other PTAs are currently being negotiated with the ASEAN countries, Malaysia, Singapore, Indonesia, Canada, the GCC, India, the Central America Community, the Andean Community and MERCOSUR.

**EU–ASEAN FTA:** In the first phase of negotiations, the European Commission decided to take a regional approach. At the EU–ASEAN meeting held in Brunei in May 2007, government representatives agreed to enter into negotiations for a FTA. However, after seven rounds, negotiations were suspended in March 2009. Consequently, the EU changed its approach. While it underlined its intention to remain engaged with the region, the EU undertook bilateral FTA negotiations with individual ASEAN countries.

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of the one part, and the European Community and its Member States, of the other part, 30 October 2008, OJ L 289/I/1.

<sup>71</sup> WTO-TPRB (2011), *above note 64*, p. 20.

<sup>72</sup> **EU–South Africa:** Decision 1999/753 EC of the Council of the European Communities of 29 July 1999, concerning the provisional application of the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, 4 December 1999, OJ L 311/1.

<sup>73</sup> **EU–Mexico:** Decision 2000/658/EC of the Council of European Communities of 28 September 2000, concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, 28 October 2000, L 276/44.

<sup>74</sup> **EU–Chile:** Decision 2002/979/EC of the Council of European Communities of 18 November 2002, on the signature and provisional application of certain provisions of an agreement establishing an association between the European Community and its Members States, of the one part, and the Republic of Chile, of the other part, 30 December 2002, OJ L 352/1.

<sup>75</sup> **EU–Korea:** Decision 2011/265/EU of the Council of European Communities of 16 September 2010, on the signing, on behalf of the European Union, and the provisional application of the Free Trade Agreements between the European Union and its Members States, of the one part, and the Republic of Korea, of the other part, 14 Mai 2011, L 127/24.

These bilateral FTAs were seen as “building blocks” to be consolidated in a region-to-region agreement at a later stage.<sup>76</sup> As a result, bilateral negotiations began with Singapore in March 2010, Malaysia in December 2010 and Indonesia in November 2011. All three prospective FTAs will feature a chapter on trade in services and significant improvements to commitments in the legal services sector are expected.

**The EU–Canada Comprehensive Economic and Trade Agreement (CETA):** Negotiations were launched in May 2009 with an ambitious, two-year timescale. The agreement addressed tariffs, investment and non-tariff issues, and the strengthening of regulatory cooperation.<sup>77</sup> It featured a chapter on trade in services, including development of the legal services sector.<sup>78</sup>

**EU–GCC FTA:** Negotiations between the EU and the GCC have been going on for two decades with numerous suspensions. They started in 1991 but were suspended when the GCC Customs Union was formed. They resumed in 2003 but were suspended again in December 2008, despite agreement on most chapters and provisions. The agreement includes a chapter on trade in services and liberalization of legal services is expected.

**EU–India FTA:** Negotiations were launched in 2007 and are still in progress. Two main objectives are reciprocally liberalizing all trade in goods and services and tackling existing and future non-tariff barriers to trade. With regard to legal services, India totally prohibits the practice of law by foreign lawyers and foreign law firms. Therefore, one element of the negotiations is the opening of the Indian legal services market to EU lawyers and law firms.

**EU–Central America and EU–Andean Community Regional Association Agreements:** The EU–Latin America and Caribbean Summit held in Vienna in May 2006 resulted in the opening of negotiations for regional association agreements with Central America and the Andean Community. The EU and Central America concluded negotiations for an Association Agreement in May 2010, which was expected to enter into force during the first half of 2012.<sup>79</sup> This wide-ranging agreement includes liberalization of services and more specifically legal services.<sup>80</sup>

Negotiations between the EU and the Andean Community on a region-to-region Association Agreement were suspended in June 2008. They resumed on a bilateral basis with Colombia and Peru, although a region-to-region agreement remained the main objective. The EU reached an agreement with Colombia and Peru in February 2010, and it was expected to enter into force mid-2012.<sup>81</sup> This broad-based agreement includes liberalization of the legal services sector.<sup>82</sup>

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<sup>76</sup> EUROPEAN COMMISSION (2012), *above note 66*.

<sup>77</sup> *Idem*.

<sup>78</sup> No official text is publicly available, however a consolidated text of the draft EU–Canada FTA as of 12 January 2010 can be found at <http://www.bilaterals.org> (last visit: 1.10.2012).

<sup>79</sup> EUROPEAN COMMISSION (2012), *above note 66*.

<sup>80</sup> **EU–CA:** *Agreement establishing an association between the European Union and its Member States on the one hand, and Central American on the other*, signed in May 2010, Pending <http://trade.ec.europa.eu> (last visit: 1.10.2012)

<sup>81</sup> EUROPEAN COMMISSION (2012), *above note 66*.

<sup>82</sup> **EU–Colombia–Peru:** *Trade Agreement between the European Union and Colombia and Peru*, signed in February 2010, <http://trade.ec.europa.eu> (last visit: 1.10.2012).

**EU–MERCOSUR Regional Association Agreement:** Negotiations on an Association Agreement between the EU and the MERCOSUR started in April 2000. They were to be concluded by October 2004, but the target date was missed and negotiations suspended. They resumed in May 2010 and focused on the normative part of the agreement.<sup>83</sup> Although the content of the agreement has yet to be determined, it is expected to include substantive liberalization of services, with a potential impact on the legal services sector.

This description shows that current trade agreements with third countries differ in scope and content. They have different titles (e.g. Association Agreements or Economic Partnerships) but typically feature two degrees of integration: Free Trade Areas and a Customs Union. Some of them include a chapter on trade in services, while others do not. Finally, some of these agreements are in force while other are still being negotiated. The following table summarizes these different elements.

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<sup>83</sup> EUROPEAN COMMISSION (2012), *above note 66*.

**Table 8 Overview of EU Preferential Trade Agreements (as of July 2012)**

|                                | <b>Partners</b>                | <b>Level of integration</b> | <b>Services Chapter</b> | <b>Status</b>                                |
|--------------------------------|--------------------------------|-----------------------------|-------------------------|----------------------------------------------|
| EFTA States                    | Faroe Islands, Norway, Iceland | Customs Union               | Yes                     | In force : 01.01.1994                        |
|                                | Switzerland                    | FTA + bilateral agreements  | No<br>Yes               | In force: 01.01.1973<br>In force: 04.04.2002 |
| Neighbor Countries             | Andorra                        | Customs Union               | No                      | In force: 01.07.1991                         |
|                                | San Marino                     | Customs Union               | No                      | In force: 01.12.1992                         |
|                                | Turkey                         | Customs Union               | No                      | In force: 31.12.1995                         |
| Western Balkans                | Former Republic of Macedonia   | FTA                         | Yes                     | In force: 01.05.2004                         |
|                                | Croatia                        | FTA                         | Yes                     | In force: 1.02.2005                          |
|                                | Albania                        | FTA                         | Yes                     | In force: 01.04.2009                         |
|                                | Montenegro                     | FTA                         | Yes                     | In force: 01.05.2010                         |
| Mediterranean Countries        | Algeria                        | FTA                         | No                      | In force: 01.09.2005                         |
|                                | Egypt                          | FTA                         | No                      | In force: 01.06.2004                         |
|                                | Israel                         | FTA                         | No                      | In force: 01.06.2000                         |
|                                | Jordan                         | FTA                         | No                      | In force: 01.05.23002                        |
|                                | Lebanon                        | FTA                         | No                      | In force: 01.03.2003                         |
|                                | Morocco                        | FTA                         | No                      | In force: 01.03.2000                         |
|                                | Palestinian Authority          | FTA                         | No                      | In force: 01.07.1997                         |
|                                | Syria                          | FTA                         | No                      | In force: 01.07.1977                         |
|                                | Tunisia                        | FTA                         | No                      | In force: 01.03.1998                         |
| Economic Partnership Agreement | CARIFORUM                      | FTA                         | Yes                     | In force: 15.07.2008                         |
|                                | South Africa                   | FTA                         | No                      | In force: 02.11.200                          |
|                                | Ivory Coast                    | FTA                         | No                      | Pending                                      |
|                                | Cameroon                       | FTA                         | No                      | Pending                                      |
| Global Europe                  | Chile                          | FTA                         | Yes                     | In force: 01.02.2003                         |
|                                | Mexico                         | FTA                         | Yes                     | In force: 01.07.2000                         |
|                                | South Korea                    | FTA                         | Yes                     | In force: 01.07.2011                         |
|                                | Colombia– Peru                 | FTA                         | Yes                     | Pending                                      |
|                                | Central America                | FTA                         | Yes                     | Pending                                      |
|                                | Canada                         | FTA                         | Yes                     | Under negotiation                            |
|                                | India                          | FTA                         | Yes                     | Under negotiation                            |
|                                | Singapore                      | FTA                         | Yes                     | Under negotiation                            |
|                                | Malaysia                       | FTA                         | Yes                     | Under negotiation                            |
|                                | Indonesia                      | FTA                         | Yes                     | Under negotiation                            |
|                                | MERCOSUR                       | FTA                         | Yes                     | Under negotiation                            |
|                                | GCC                            | FTA                         | Yes                     | Under negotiation                            |
|                                | Ukraine                        | FTA                         | Yes                     | Under negotiation                            |
|                                | Russia                         | FTA                         | Yes                     | Under negotiation                            |

### 3. EU PTAs and Legal Services

It follows from this description that the EU's PTAs dealing with the legal services differ in terms of coverage. Two categories of agreements can be distinguished based on their level of integration (leaving aside the specific case of the EEA and the *Swiss–EU* bilateral agreement on the free movement of people, which is an application of the four TFEU freedoms).

The first category consists of agreements such as the SAA that are designed to be transitional agreements towards the accession of the signatory party to the EU, which feature an intermediate level of liberalization between that found in the GATS and the *acquis communautaire*.

The second category includes EU FTAs that are in force or under negotiation; these include *EU–Chile*, *EU–CARIFORUM* and *EU–Korea*. Among the FTAs under negotiation, some are already available (such as *EU–CA* and *EU–Colombia–Peru*), while others are not yet public but have important implications for legal services (such as *EU–Singapore*, *EU–Malaysia*, *EU–Indonesia*, *EU–India*, *EU–MERCOSUR* and *EU–GCC*).

This chapter will focus on these agreements. They include the four SAA agreements with Albania, Croatia, Macedonia and Montenegro, together with *EU–Chile*, *EU–CARIFORUM*, *EU–Korea*, *EU–CA* and *EU–Colombia–Peru*. In addition, some comments will be made on prospective agreements, namely *EU–Singapore*, *EU–Malaysia*, *EU–Indonesia*, *EU–India*, *EU–MERCOSUR* and *EU–GCC* and their impact on legal services.

The following table compares the different levels of commitment found in these agreements with GATS commitments. In general, they go further than GATS commitments. This more extensive liberalization is referred as GATS+ in the table. It may either be the result of making commitments for the first time in the sector or from improvements to existing commitments. SAAs are described as *intermediate* as they are designed to prepare for accession to the EU.

**Table 9 Comparison of EU Commitments in Legal Services under PTAs and the GATS**

|                                | <b>Partners</b>               | <b>Level of integration</b> | <b>Level of liberalization of legal services compared to GATS</b> |
|--------------------------------|-------------------------------|-----------------------------|-------------------------------------------------------------------|
| EFTA States                    | Lichtenstein, Norway, Iceland | Customs Union               | Deep (acquis communautaire)                                       |
|                                | Switzerland                   | Bilateral Agreements        | Deep (acquis communautaire)                                       |
| Western Balkans                | Former Republic of Macedonia  | FTA                         | Intermediate, GATS+: improvements                                 |
|                                | Croatia                       | FTA                         | Intermediate, GATS+: improvements                                 |
|                                | Albania                       | FTA                         | Intermediate, GATS+: improvements                                 |
|                                | Montenegro                    | FTA                         | Intermediate, GATS+: improvements                                 |
| Economic Partnership Agreement | CARIFORUM                     | FTA                         | GATS+: First Commitments and improvements                         |
| Global Europe                  | Chile                         | FTA                         | GATS+: improvements                                               |
|                                | South Korea                   | FTA                         | GATS+: First Commitments                                          |
|                                | Colombia–Peru                 | FTA                         | GATS+: First Commitments (Peru) and Improvements (Colombia)       |
|                                | Central America               | FTA                         | GATS+: First Commitments and Improvements                         |
|                                | Canada                        | FTA                         | GATS+ : improvements                                              |
|                                | India                         | FTA                         | GATS+: First Commitments                                          |
|                                | Singapore                     | FTA                         | GATS+: First Commitments                                          |
|                                | Malaysia                      | FTA                         | GATS+: First Commitments                                          |
|                                | Indonesia                     | FTA                         | GATS+: First Commitments                                          |
|                                | MERCOSUR                      | FTA                         | To be determined                                                  |
|                                | GCC                           | FTA                         | GATS+: improvements                                               |
|                                | Ukraine                       | FTA                         | No improvements                                                   |
|                                | Russia                        | FTA                         | To be determined                                                  |

## C. Swiss/EFTA PTAs

Like the EU, Switzerland has concluded numerous PTAs. Switzerland has been a member of the European Free Trade Area (EFTA) since its creation in 1960.<sup>84</sup> In addition to the EFTA Convention (which forms the legal basis for the organization and governs free trade relations between the EFTA States) Switzerland has 26 PTAs with 35 partners outside the EU.<sup>85</sup> Although Switzerland normally concludes its PTAs with EFTA Member States, it preserves the right to conclude PTAs outside the EFTA frameworks (such as those concluded with Japan and the Faroe Islands).<sup>86</sup>

Unlike the EU, the primary objectives of EFTA PTAs are economic and trade related. The focus of trade policy is the improvement of the framework conditions for economic relations with partners. The orientation of EFTA FTAs has evolved over the last decades. In the 1990s, the EFTA concluded FTAs on a regional basis with Central and Eastern European Countries, which dealt specifically with trade in goods. Since the beginning of the 2000s, EFTA States have sought to conclude new-generation FTAs with overseas partners that include chapters on trade in goods, services and intellectual property rights. This evolution is the result of a strategic shift in EFTA Members' trade policy, which takes into account the general evolution of trade relations.

Before identifying relevant EFTA's FTAs that include liberalization of trade in legal services, the following sections describe general Swiss/EFTA trade policy and provide an overview of FTAs in force or under negotiation.

### 1. Swiss/EFTA Trade Policy

The shift in Swiss trade policy started with the observation that while globalization had continued apace and boosted prosperity among developed countries, Switzerland had suffered from stagnating *per capita* income since the beginning of the 1990s. This situation prompted the Federal Council to take action. In 2004 it presented its legislative action plan for the period 2003–2007, which was based on three principles: the promotion of prosperity and sustainability; overcoming demographic change; and the consolidation of Switzerland's standing in the world.<sup>87</sup>

Following this presentation, the Federal Council tabled a report on foreign economic policy. This document outlined the three key principles underlying Swiss trade policy: the promotion of access to foreign markets and international regulation; reform of the domestic Swiss market; and the economic development of partner countries.<sup>88</sup> It pointed out that Switzerland was a small country, poor in natural resources, whose economic welfare was heavily

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<sup>84</sup> Originally the EFTA was composed of seven countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland joined in 1961, Iceland in 1970 and Liechtenstein in 1991. In 1973, the United Kingdom and Denmark left and joined the EC. They were followed by Portugal in 1986 and Austria, Finland and Sweden in 1995. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

<sup>85</sup> In addition, Switzerland has numerous agreements with the EU such as the FTA signed in 1973 plus more than 120 sectorial agreements.

<sup>86</sup> SECO (2012b), *Free Trade Agreements*, <http://www.seco.admin.ch> (last visit: 1.10.2012).

<sup>87</sup> SWISS FEDERAL COUNCIL (2004), *Rapport sur le Programme de la Legislature 2003-2007*, FF 2004 1149, 24 February 2004.

<sup>88</sup> SWISS FEDERAL COUNCIL (2005), *The 2004 Foreign Economic Policy Report: The Strategic Focus of Swiss Foreign Economic Policy*, 12 January, <http://www.seco.admin.ch> (last visit: 1.10.2012).

dependent on foreign trade and investment. For instance, foreign direct investment (FDI) rose from 233 billion Swiss francs in 2000 to 854 billion Swiss Francs in 2010, making Switzerland the fourth largest source of FDI in Europe, after the United Kingdom, France and Germany. But Switzerland also attracted FDI. The level of FDI in Switzerland rose from 142 billion Swiss francs in 2000 to 506 million in 2010.<sup>89</sup> It is therefore a prime objective of Switzerland's foreign economic policy to ensure that investors enjoyed open and predictable market access conditions worldwide. Such conditions include the removal of barriers to trade as well as the setting of transparent, effective and internationally compatible regulations governing economic exchange.

Although the report stressed the pivotal role of the WTO, it nevertheless pointed out that the slow pace of negotiations had led many countries to seek to accelerate market liberalization through PTAs. In order to avoid discrimination resulting from these agreements, it argued that Switzerland should seek to conclude such agreements in parallel with multilateral negotiations. It set out four criteria to determine suitable partners: the economic importance of the country; current or potential discrimination against Swiss exporters; the willingness of partner countries to enter into PTAs; and the political opportunities offered by such agreements.<sup>90</sup>

Based on these criteria, Switzerland determined three groups of countries for PTA negotiations. First, those EU/EFTA countries with which Switzerland enjoyed close relations due to their geographical proximity. Second, non-European countries, namely the United States, Japan, Australia, Canada, New Zealand, South Korea, Mexico and Turkey. Thirdly, the economic giants of the future: Brazil, China, India and Russia. The report stressed that the aim was to negotiate comprehensive PTAs that covered not only trade in goods, but also trade in services, protection of investment and intellectual property.<sup>91</sup>

These new-generation FTAs were seen as the key to maintaining diversified economic relations in both Switzerland and other EFTA States.<sup>92</sup> The next section will look at the change in trade policy in the EFTA States.

## 2. Overview of EFTA PTAs

Negotiations began in early 1990s and can be divided into three phases. The first two phases were mostly defensive and aimed to mitigate disadvantages resulting from EU PTAs. In contrast, the third phase reflects a more offensive strategy, featuring negotiations with partners worldwide in order to secure economic advantages over the EU and other competitors.<sup>93</sup>

The first phase led to the conclusion of a series of FTAs with Central and Eastern European countries. It started in the early 1990s and covered trade in industrial goods. These agreements (in parallel with similar EU agreements) were concluded in order to improve mutual market access and support economic reform in the transition countries. Agreements with Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Lithuania

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<sup>89</sup> SWISS NATIONAL BANK, <http://www.snb.ch> (last visit: 1.10.2012); UNCTAD (2011), *Investment Country Profiles: Switzerland*, October 2011.

<sup>90</sup> SWISS FEDERAL COUNCIL (2005), *above note 88*, pp. 24–25.

<sup>91</sup> *Id.*, p. 29.

<sup>92</sup> DEISS (2006), *EFTA Free Trade Relations*, EFTA Bulletin, Issue 2, July–August, pp.13–14.

<sup>93</sup> HEYDON/ WOOLCOCK (2009), *above note 61*, pp. 172–176.

were concluded on 1 May 2004. These were followed by agreements with Bulgaria and Romania, which were concluded on 1 January 2007, as a result of the accession of these countries to the EU. FTAs between the EFTA States and Croatia, Macedonia, Albania and Serbia are currently in force. A FTA with Ukraine was signed on 24 June 2010 and another with Montenegro on 14 November 2011. Negotiations are ongoing with the Russia/Belarus/Kazakhstan Customs Union and Bosnia-Herzegovina.<sup>94</sup>

The second phase began in 1995 when EFTA ministers announced a change in third country policy at a Ministerial meeting in Bergen. Since then the EFTA has expanded its network of PTAs beyond Europe to include the Mediterranean region. This strategy was probably a response to the Barcelona Process launched by the EU in 1995, which aimed to create a Euro–Mediterranean free trade area. The EFTA has since concluded FTAs with eight Mediterranean countries (Turkey, Israel, Morocco, the Palestinian Authority, Jordan, Lebanon, Tunisia and Egypt). Negotiations with Algeria are currently underway.<sup>95</sup>

In the third phase, beginning at the end of the 1990s, EFTA followed the general trend towards globalization. Most of these new-generation FTAs are more ambitious in terms of coverage, reflecting the shift in trade policy. They are not limited to trade in goods, but include areas such as services, investment, public procurement and competition. So far the EFTA has concluded FTAs with Mexico, Singapore, Chile, South Korea, the SACU States<sup>96</sup>, Canada, Colombia, the GCC States<sup>97</sup>, Peru and Hong Kong. Negotiations are currently ongoing with India, the Central America States, Thailand and Indonesia. Discussions for opening FTA negotiations are currently underway with Malaysia, Philippines, MERCOSUR and Vietnam.<sup>98</sup> Consideration is being given to a FTA with Australia.<sup>99</sup>

Outside the EFTA context, Switzerland has carried out negotiations with other partners. It concluded a FTA with Japan, which entered into force in September 2009. Negotiations with China are currently underway and a feasibility study for a FTA with the United States has been carried out.<sup>100</sup> However, it seems that problems related to the agriculture sector make an agreement unlikely for the time being. However, efforts are being made to strengthen economic relations through the existing *Trade and Investment Cooperation Forum*.<sup>101</sup> Nevertheless, not all these agreements address liberalization of trade in services and particularly legal services. Therefore the next section will clarify the situation.

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<sup>94</sup> SECO (2012b), *above note 86*.

<sup>95</sup> *Idem*.

<sup>96</sup> These include Botswana, Namibia, Lesotho, South Africa and Swaziland.

<sup>97</sup> These include Saudi Arabia, Bahrain, the United Arab Emirates, Qatar, Kuwait and Oman.

<sup>98</sup> EFTA (2012), *Priorities during the Swiss EFTA Council Chair*, Ref. 30103, 15 February.

<sup>99</sup> SECO (2012a), *The Foreign Economic Policy Report 2011*, 21 February, <http://www.seco.admin.ch>, pp. 9–10 (last visit: 1.10.2012).

<sup>100</sup> HUFBAUR/ BALDWIN (2006), *The Shape of a Free Trade Agreement between Switzerland and the United States*, Policy Analyses in International Economics 77, The Paterson Institute of International Economics.

<sup>101</sup> SECO (2012a), *above note 99*, p. 10.

### 3. EFTA PTAs and Legal Services

The incorporation of chapters on trade in services has been recognized as a significant component of trade policy in Switzerland and other EFTA States<sup>102</sup> and EFTA FTAs have followed the general trend with the inclusion of chapters on trade in services.<sup>103</sup> However, it should be noted that despite their stated objectives<sup>104</sup>, the promotion of EFTA/Swiss legal services is not a priority for negotiators and therefore opportunities have been missed.

Overall the EFTA has concluded 24 FTAs<sup>105</sup>; of these, 10 feature a chapter on trade in services: *EFTA–Mexico*<sup>106</sup>, *EFTA–Chile*<sup>107</sup>, *EFTA–Singapore*<sup>108</sup>, *EFTA–Korea*<sup>109</sup>, *EFTA–Canada*<sup>110</sup>, *EFTA–Colombia*<sup>111</sup>, *EFTA–GCC*<sup>112</sup>, *EFTA–Ukraine*<sup>113</sup>, *EFTA–Peru*<sup>114</sup> and *EFTA–Hong Kong*<sup>115</sup>. Ongoing negotiations with India and Indonesia are also expected to offer liberalization of trade in services. In addition, Switzerland has concluded two independent agreements. One, *Switzerland–Japan*, contains a chapter on trade in services, including liberalization of legal services.<sup>116</sup> In addition, ongoing negotiations with China are expected to provide for liberalization of trade in services.

While all these agreements feature a chapter on trade in services, the scope of the liberalization varies greatly. Thus *EFTA–Canada* and *EFTA–Peru* only feature an evolving clause providing for further negotiations on the liberalization of trade in services. *EFTA–Mexico* provides for substantive liberalization, but is limited to the financial services sector. The remaining agreements have a broader coverage but do not include liberalization of the legal services sector (e.g. *EFTA–Singapore*).

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<sup>102</sup> PAULETTO (2004), *Les relations commerciales dans le domaine des services*, la vie économique, Revue politique économique, No 6, pp. 15–18.

<sup>103</sup> ETTER (2006), *Services and Investment*, EFTA Bulletin, Issue 2, July–August, pp. 20–22.

<sup>104</sup> SECO (2012c), *Switzerland and Trade in services*, <http://www.seco.admin.ch> (last visit: 1.10.2012).

<sup>105</sup> EFTA (2012), *Free Trade Agreements*, <http://www.efta.int> (last visit: 1.10.2012).

<sup>106</sup> **EFTA–Mexico:** *Free Trade Agreement between EFTA States and the United Mexican States*, adopted 27 November 2000, entered into force 1 July 2000.

<sup>107</sup> **EFTA–Chile:** *Free Trade Agreement between EFTA States and the Republic of Chile*, adopted 26 June 2003, entered into force 1 December 2004.

<sup>108</sup> **EFTA–Singapore:** *Free Trade Agreement between EFTA States and Singapore*, adopted 26 June 2002, entered into force 1 January 2003.

<sup>109</sup> **EFTA–Korea:** *Free Trade Agreement between EFTA States and the Republic of Korea*, adopted 15 December 2005 at Hong Kong, China, entered into force 1 September 2006.

<sup>110</sup> **EFTA–Canada:** *Free Trade Agreement between the EFTA States and Canada*, adopted 26 January 2008, entered into force 1 July 2009.

<sup>111</sup> **EFTA–Colombia:** *Free Trade Agreement between EFTA States and Colombia*, adopted 25 November 2008, entered into force 1 July 2011.

<sup>112</sup> **EFTA–GCC:** *Free Trade Agreement between EFTA States and the Member States of the Co-operation Council for the Arab States of the Gulf*, adopted 22 June 2009, entry into force pending.

<sup>113</sup> **EFTA–Ukraine:** *Free Trade Agreement between EFTA States and Ukraine*, adopted 24 June 2010 entry into force pending

<sup>114</sup> **EFTA–Peru:** *Free Trade Agreement between the EFTA States and the Republic of Peru*, adopted 24 June 2010 in Reykjavik and 14 July 2010 in Lima; entered into force 1 July 2011 for Peru, Liechtenstein and Switzerland and 1 October 2011 for Iceland.

<sup>115</sup> **EFTA–Hong Kong:** *Free Trade Agreement between EFTA States and Hong-Kong China*, adopted 21 June, 2011 entry into force pending.

<sup>116</sup> **Switzerland–Japan:** *Agreement on Free Trade and Economic Partnership (FTEPA) between Switzerland and Japan*, adopted February 19, 2009, entered into force 1 September 2009.

Therefore among the 11 FTAs which cover trade in services, only seven feature liberalization of legal services and fall within the scope of this study: *EFTA–Chile*, *EFTA–Korea*, *EFTA–GCC*, *EFTA–Colombia*, *EFTA–Ukraine*, *EFTA–Hong Kong* and *Switzerland–Japan*.

These 11 EFTA/Swiss FTAs complement the nine EU FTAs and provide a sample of 20 agreements. These, together with six prospective agreements (*EU–Singapore*, *EU–Malaysia*, *EU–Indonesia*, *EU–India*, *EU–MERCUSOR*, and *EU–GCC*) provide the basis for the analysis that follows.

## II. LIBERALIZATION OF TRADE IN SERVICES IN EU AND EFTA/SWISS PTAs

The previous section described the recent proliferation of a new generation of PTAs, which generally feature a chapter on trade in services. Two agreements have served as models: the NAFTA and the GATS. Although these agreements are similar in many respects, they differ significantly in other aspects. Therefore a distinction can be made between PTAs that follow the GATS approach and those that follow the NAFTA approach.<sup>117</sup> EU and EFTA agreements generally follow the GATS approach. However, they sometimes integrate NAFTA solutions. These adaptations are applied to both horizontal disciplines and specific commitments. Furthermore they integrate new disciplines such as competition rules. The following table synthesizes the differences between GATS and NAFTA architectures.

**Table 10 GATS and NAFTA Architecture**

| Trade Issue                                                               | GATS                                                                                          | NAFTA                                                                                                                                                                                                             |
|---------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Structure                                                                 | Covers all four modes of supply.                                                              | Two chapters on services:<br>- Investment (mode 3)<br>- Cross-border services (modes 1,2 and 4)                                                                                                                   |
| Transparency                                                              | - Article III; VI: 1–3: specific to services.                                                 | Articles 1801–1805: covers the whole agreement including services.<br>Further scope: consultation with private persons before adoption of measures affecting trade.                                               |
| Non-discrimination<br>1) MFN<br>2) Market Access<br>3) National Treatment | 1) Article II general obligation<br>2) Article XVI exhaustive list<br>3) Article XVII         | 1) Article 1103/1203 no general obligation<br>2) Quantitative restrictions without specific list & Article 1105 Performance requirement<br>3) Articles 1102/1202 and a provision on local presence (Article 1205) |
| Recognition                                                               | Article VII                                                                                   | Article 1210:2                                                                                                                                                                                                    |
| Avoidance of unnecessary restrictions                                     | Article VI: 4-5: Qualification/ licensing requirements and procedural and technical standards | Article 12010:1 limited to licensing/ certification on best endeavor basis.                                                                                                                                       |
| Competition                                                               | -                                                                                             | Chapter 15 covering the whole agreement                                                                                                                                                                           |
| Liberalization techniques                                                 | Positive list approach                                                                        | Negative list approach                                                                                                                                                                                            |
| Annex on Professional Services                                            | -                                                                                             | Annex 1210.5; including Annex on legal services. Section B.                                                                                                                                                       |

<sup>117</sup> MARCONINI (2009), *Revisiting Regional Trade Agreements and Their Impact on Services Trade*, International Center for Trade and Sustainable Development, Geneva, Switzerland.

This section analyses horizontal disciplines of EU and EFTA PTAs that are applicable to all service sectors, while the next section focuses on specific commitments related to legal services. This section starts with an analysis of general PTA provisions, such as the scope of the agreement and rules of origin, and then turns to an analysis of horizontal provisions on trade liberalization namely, transparency, discrimination, domestic regulation, recognition and competition.

## **A. General provisions of EU and Swiss/EFTA PTAs**

Before examining the core PTA provisions negotiated by the EU and the EFTA with third parties, it is necessary to analyze the scope of these agreements and identify the actors concerned (rules of origin).

### **1. Scope of EU/Swiss/EFTA PTAs**

Like the GATS, EU/Swiss/EFTA PTAs deal with measures by signatory parties that affect trade in services. Therefore, the terms *services*, *trade in services*, *measures by parties* and *measures affecting trade in services* must be defined.

#### **a. Services**

As described in the previous chapter, the GATS has a broad coverage and in principle includes all service sectors. There are however three exceptions. First, under Article I: 3 (b) GATS services supplied in the exercise of governmental authority are excluded. Second, § 2 of the *Annex on Air Transport Services*, excludes some aspects of air transport services. Third, § 2 and 4 of the *Annex on Movement of Natural Persons Supplying Services under the Agreement* excludes measures affecting access to the employment market and Members' migration policies. Furthermore, negotiations on specific sectors (e.g. finance, telecommunications and maritime services) were concluded after the entry into force of WTO agreements and are subject to specific annexes.

Article 1201 NAFTA features the same coverage but with some differences in the wording. Like the GATS it expressly excludes some aspects of air transport services (Article 1201: 2), services supplied in the exercise of governmental authority (Article 1201: 3 (b)) and measures affecting access to the employment market (Article 1201: 3 (a)). It also features a special chapter on financial services. However, it also excludes government procurement (Article 1201: 2 (c)) and subsidies (Article 1201:2 (d)), which in contrast are the subject of a mandate for further negotiations under the GATS (Article XIII and XV).

EFTA agreements follow GATS principles and contain the same exclusions for air transport services, services supplied in the exercise of governmental authority and movement of natural persons. They all feature a special chapter on financial services. EU agreements contain the same exclusions and also exclude audiovisual services and maritime cabotage.

#### **b. Trade in Services**

The GATS defines trade in services as the supply of a service through four modes (Article I: 2), namely cross-border (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and the movement of natural persons (mode 4).

Under the agreement, measures affecting trade in services are analyzed in all four modes of supply according to market access and national treatment obligations.

The NAFTA architecture has two chapters dealing with trade in services. Chapter eleven (Investment) covers all investment issues including trade in mode 3, and chapter twelve (Cross-Border Trade in Services) covers trade in modes 1, 2 and 4 (excluding mode 3). While the content and obligations of chapter twelve do not differ significantly from the GATS, chapter eleven is different. The value of this architecture is that it clearly distinguishes between investment regimes and disciplines related to trade in services. Investment regimes are also covered by bilateral investment treaties (BITs). These treaties have a broad scope and generally include matters covered by the GATS, resulting in an overlap and the risk of converging or conflicting rules.<sup>118</sup>

It is common for recent PTAs to incorporate rules originally contained in BITs. Agreements derived from the NAFTA clearly distinguish between the Investment chapter and the Services chapter. Consequently, there is no conflict and investors in services have the same protection offered to other investors. In contrast, in agreements derived from the GATS investors in services are covered by both the Investment and Services chapters. A recent OECD study distinguished three ways to deal with potential rule conflicts. First, the majority of PTAs give preeminence to the Services chapter. Second, such PTAs specify which provisions from the Investment chapter are applicable. Finally, there are PTAs that do not contain any rules on the interaction of the two chapters, which then depend on an interpretation based on international law.<sup>119</sup>

EFTA and EU agreements are derived from the GATS. Thus they fall into the category of agreements where investments in services covered by both services and investment rules. EFTA agreements generally contain a provision in the Investment chapter that gives preeminence to Service rules. The situation is similar concerning EU agreements, although until the entry into force of Article 207(1) TFEU the EU did not have exclusive competence to negotiate and conclude investment treaties.<sup>120</sup> As for interactions with the Services chapter, the EU has opted for provisions similar to EFTA agreements. Thus for instance, the *EU–Canada* FTA features a chapter on Investment, which provides for the preeminence of the Services chapter in the event of any inconsistency (Article X.2: 1).

### **c. Measures by Parties**

Like the GATS, measures by signatory parties to PTAs generally include measures taken by central, regional or local governments and non-governmental bodies in the exercise of powers delegated by central, regional or local governments and authorities. In contrast, the NAFTA excludes the application to local government (Articles 1108: 1 (a) and 1206: 1 (a)). However, PTAs derived from the NAFTA generally extend its scope to measures adopted by local authorities. EFTA and EU PTAs follow the GATS approach.

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<sup>118</sup> ADLUNG/ MOLINUEVO (2008), *Bilateralism in Services Trade: Is there Fire Behind the (BIT-) Smoke?*, WTO Staff Working Paper ERSD-2008-01, 16 January 2008.

<sup>119</sup> HOODE/ KOLSE-PATIL/ MIROUDOT (2007), *The Interaction between Investment and Services Chapters in Selected Regional Trade Agreements*, OECD Trade Policy Working Papers No 55, COM/DAF/INV/TD (2006) 40/FINAL, 19 June.

<sup>120</sup> HINDELANG/ MAYDELL (2011), *The EU's Common Investment Policy- Connecting the Dots*, Bungenber/ Griebel/ Hindenlang (eds), *International Investment Law and EU Law*, European Yearbook of International, pp. 1–29.

It should be noted that the *EU–Canada* FTA features provisions that expressly extend the scope of the agreement to local authorities (Article 2 (b)).

#### **d. Measures Affecting Trade in Services**

The previous chapters have extensively reviewed the different types of measures that may specifically affect trade in legal services. PTAs do not add any substantial developments and measures affecting the provision of cross-border legal services therefore apply to PTAs.

## **2. Rules of Origin**

PTAs by definition extend trade benefits to signatory parties and not to non-parties. Therefore a key question is what constitutes trade between signatory parties. PTAs resolve this question through rules of origin. Rules of origin apply to service providers rather than the service itself and trade agreements distinguish between rules applicable to natural and judicial persons. Nevertheless, PTAs do not take a consistent approach.

#### **a. Rules of Origin for Natural Persons**

With respect to natural persons, all PTAs refer to national and/or permanent residents. The scope of these concepts depends upon the national legislation of the signatory party. Three types of rules can be distinguished. First, there are restrictive rules that restrict the benefits of the agreement to nationals of signatory parties. Less restrictive rules extend the scope to permanent residents, but require that permanent residents are substantially treated as nationals with respect to measures affecting trade in services (similar to the provisions of Article XXVII (k) GATS). The third set of rules require at least permanent residency; this is the approach taken in the NAFTA.

EFTA and EU agreements include all three types of rules. EU agreements generally fall into the first category and limit the scope to nationals of signatory parties. The *Swiss–Japan* agreement takes the same approach. In contrast, EFTA agreements generally fall into the second category. One exception is the *EFTA–GCC* agreement that only requires permanent residency (without the requirement of receiving the same treatment as nationals).

**Table 11 Rules of Origin: Natural Persons**

| <b>Requirement</b>                                        | <b>Examples</b>                                                                                                                                                                                                                                                                                  |
|-----------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nationality requirement                                   | “Natural person” means a national of one a signatory party according to their respective legislation”.<br>All EU PTAs, Switzerland–Japan                                                                                                                                                         |
| Nationality requirement or equivalent permanent residency | “Natural person of a Party” is, under its legislation, a national of that Party, or a permanent resident of that Party if that Party accords substantially the same treatment to its permanent residents as to its nationals in respect of measures affecting trade in services<br>All EFTA PTAs |
| At least permanent residency                              | “Natural person of another Party” means a natural person who is a national or a permanent resident of signatory parties, under their respective legislation<br>EFTA–GCC                                                                                                                          |

## **b. Rules of Origin for Juridical Persons**

Under Article V: 6 of the GATS a juridical person “constituted under the laws of a party to an agreement”, e.g. a PTA, is entitled to treatment granted under such agreement, “provided that it engages in substantive business operations in the territory of the parties to such agreement”. These criteria can be used to distinguish between different types of agreements.<sup>121</sup>

Some PTAs simply require constitution or incorporation in the territory of the signatory party. Such agreements do not implement any kind of test to prove this is the case and the benefits of the agreement can be withheld if the service provider is from a non-party. Such rules can be found in the Australia New Zealand Closer Economic Relations Trade Agreement (ANCERTA).

In general, most agreements require both constitution and the execution of substantive business. More liberal agreements allow juridical persons to be constituted in one party and carry out substantive business operations in another party. Thus for instance a branch of an American law firm established in Switzerland may take advantage of the *EFTA–GCC* PTA to conduct substantive business in the GCC region. More restrictive agreements require that the business is constituted and carries out substantive business operations in the same territory.<sup>122</sup> Some PTAs go further and require juridical persons to be owned or controlled by a natural or juridical person of one of the signatory parties, which excludes foreign-owned companies from benefitting. Furthermore, a few agreements include a definition of the concept of “substantive business operation”, which can cause difficulties as different tests and degrees of restrictiveness can apply in different countries.<sup>123</sup>

EU and EFTA FTAs have rules of origin similar to those of Article V: 6, with some differences in the formulation. EFTA agreements extend the concept of “substantive business operation” from the territory of the signatory party to the territory of any WTO Member (under the condition that the juridical person is owned or controlled by natural persons or juridical persons constituted or organized within the territory of any party to the agreement). For example, this covers Swiss law firms or foreign law firms with substantive business operations in Switzerland and Swiss law firms or law firms controlled by Swiss lawyers (or lawyers with permanent residency in Switzerland) with substantive business operations in other WTO States. In contrast, EU agreements limit substantive business operations to those carried out on the territory of signatory parties.

EU FTAs, like EFTA FTAs use the term “substantive business operation” which should be interpreted as equivalent to the concept of an “effective and continuous link” with the economy of a Member State as described by Article 54 TFEU and is expressly used in EU Stabilization and Association Agreements. The ECJ has established that this presupposes the fulfillment of two conditions: establishment in the State and the pursuit of genuine economic activity for an indefinite period.<sup>124</sup>

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<sup>121</sup> MIROUDOT/ SAUVAGE/ SUDREAU (2010), *Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?* OECD Trade Policy Working Papers, No. 106, OECD Publishing, pp. 17–20.

<sup>122</sup> FINK/ JANSEN (2007), *Services in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalization?* Paper presented at the conference on Multilateralizing Regionalism, 10–12 September 2007, Geneva, Switzerland.

<sup>123</sup> FINK/ NIKOMBORIRAK (2007), *Rules of Origin in Services: A Case Study of Five ASEAN Countries*, World Bank Policy Research Paper 4130, February.

<sup>124</sup> *Cadbury’s Schweppes*, C-196/04, *Cadbury’s Schweppes v. Commissioners of the Inland Revenue*, [2006],

For instance, in *Stauffer* the ECJ held that the second condition did not apply if the natural person held immovable property, but did not actually manage this property.<sup>125</sup>

**Table 12 Rules of Origin: Juridical Person**

| Requirements                                                                                                                                                                                                                                                     | Examples                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>a. Constitution or organization of juridical persons in the country of a PTA party;<br/>and<br/>b. substantive business operation in the country of a PTA party or presence if non-party ownership and control (commercial or local)</p>                      | <p>Definitions of General Application: “enterprise of a Party” means an enterprise constituted or organized under the law of a Party;</p> <p>Denial of Benefits:</p> <p>1. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service is being supplied by an enterprise owned or controlled by persons of a non-Party, and the denying Party:</p> <p>(a) does not maintain diplomatic relations with the non-Party; or<br/>(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.</p> <p>2. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service is being supplied by an enterprise that has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.</p> |
| <p>a. Constitution or organization of juridical persons in the country of PTA party;<br/>and<br/>b. substantive business operation in the country of <b>one of the parties</b> if non-party ownership and control (commercial or local)</p>                      | <p>A juridical person set up in accordance with the laws of one of one of the signatory parties, and having its registered office, central administration or principal place of business in the territory of one of the signatory parties. Should the juridical person have only its registered office or central administration in the territory of one of the signatory parties, it shall not be considered as a juridical person of the signatory party, unless it engages in substantive business operations in the territory to the signatory parties</p> <p>All EU PTAs</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <p>a. Constitution or organization of juridical persons in the country of PTA party;<br/>and<br/>b. substantive business operation in the country of <b>one of the parties or any Member of WTO</b> if non-party ownership and control (commercial or local)</p> | <p>“Juridical person of another Party” means a juridical person which is either: (i) constituted or otherwise organised under the laws of that other Party, and is engaged in substantive business operations in the territory of: (A) any Party; or (B) any Member of the WTO and is owned or controlled by natural persons of that other Party or by juridical persons that meet all the conditions of subparagraph</p> <p>All EFTA PTAs</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p>a. Constitution or organization of juridical persons in the country of PTA party;<br/>or<br/>b. ownership and control by natural or juridical persons of one of the parties</p>                                                                               | <p>“Juridical person of another Party” means (b) a body corporate established under the law of the signatory party; (c) an association comprising or controlled by (i) persons described in one or both subparagraph a (natural person) or b. (ii) persons described in one or both subparagraph a (natural person) or b and persons so described in relation to other Member States.</p> <p>ANCERTA</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

ECR I-7995, Para. 54.

<sup>125</sup> **Stauffer**, C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006], ECR I-8203, para. 19; **Elisa**, C-451/05, *ELISA v. Directeur general des impôts and Ministère public*, [2007], ECR I-8251, para. 65–67.

## B. Liberalization Provisions Concerning Trade in Services

PTAs dealing with trade in services are numerous and their contents differ. It is nevertheless possible to distinguish some common features based on the principles of trade liberalization mentioned in the previous chapters. Furthermore, PTAs include one of the Singapore issues (Competition rules) that are not included in the GATS. Although all PTAs address the principles, the solutions are different depending on whether they are influenced by the GATS or the NAFTA. This section outlines these differences and their consequences for legal services.

### 1. Transparency

Transparency in regulations and procedures that apply to cross-border service providers is a fundamental step in the liberalization of trade in services. All EU/EFTA/Swiss PTAs include transparency provisions to some extent, with noticeable differences depending on whether they are influenced by the GATS or NAFTA.

#### a. Transparency and the GATS

As analyzed in the previous chapter, the GATS contains two transparency provisions that specify two sets of obligations. Article III deals with the availability of information on law and regulation, while Article VI: 1–3 addresses procedural requirements for the administration of these measures.

Article III addresses transparency issues at intergovernmental level. It includes general obligations (with the exception of Article III: 3) that apply irrespective of any specific commitments. It includes four obligations:

- To *publish promptly* or *otherwise make publicly available* (e.g. through the Internet), all relevant measures of general application related to trade in services (Article III: 1–2);
- To *notify* the Council for Trade in Services of any new laws or any changes to existing laws, regulation or administrative guidelines, which affect trade in services covered by specific commitments (Article III: 3);
- To *respond promptly* to all requests from any other WTO Member for specific information on relevant measures of general application related to trade in services (Article III: 4);
- To *establish enquiry points* that provide specific information to other WTO Members, on all relevant measures of general application related to trade in services (Article III: 4).

Article VI provisions enhance the transparency of the vertical relationship between domestic regulatory authorities and private persons. Unlike Article III it only applies in sectors where specific commitments have been undertaken. Article VI: 1–3 determines the requirements for the administration of domestic regulation that affect trade in services.

- The *general principle*: the measures of general application affecting trade in services must be administrated in a reasonable, objective and impartial manner (Article VI: 1);

- The establishment or maintenance of *independent judicial and administrative review and appeals processes* for the review of administrative decisions affecting trade in services (Article VI: 2);
- Where authorization is required for the supply of a service, to provide *information* on the decision of an application and to *respond promptly* to requests for information about the status of an application (Article VI: 3).

## **b. Transparency and the NAFTA**

NAFTA transparency provisions are generally similar to Articles III and Article VI: 1–3 GATS, with some differences. First, NAFTA provisions do not specifically address trade in services, but cover the whole agreement (Articles 1804–1806). Therefore transparency requirements differ in scope. Under the GATS, they include all relevant *measures of general application and international agreements*, which pertain to or affect trade in services, whereas the NAFTA (Article 1802: 1) covers laws, regulations, procedures and administrative rulings of general application (but not necessarily international agreements). Second, Article 1802: 2 of the NAFTA provides (to the extent possible) for the *publication in advance* of measures a party intends to adopt and gives interested parties reasonable opportunity *to comment* on such measures. Third, NAFTA Articles 1804–1805 set out procedural obligations to guarantee the impartiality and rationality of the administration of all measures included in Article 1802: 1. Similar protection exists under Article VI: 1–3 GATS, but is limited to sectors where commitments have been undertaken.

## **c. Transparency and EU/EFTA/Swiss PTAs**

### *i) Transparency obligations under EU PTAs*

EU PTAs include provisions on transparency, which combine GATS and NAFTA approaches, but the scope of obligations varies depending on the agreement. Like the GATS, EU PTAs contain obligations related to the *publication of measures* affecting trade, *promptly responding to requests*, the establishment of *enquiry points* and *procedural* obligations. Unlike the GATS they do not contain *notification* provisions. Generally, EU PTAs provide for the establishment of enquiry points for investors (and, unlike Article III GATS, not just WTO Members). Moreover, the *EU–Korea* FTA extends procedural transparency obligations to service sectors where no commitments have been made.

Like the NAFTA, the *EU–CA*, *EU–Colombia–Peru* and *EU–Korea* FTAs oblige parties to publish in advance measures pertaining to the agreement (on a best-effort basis), enable any interested person to *comment* on these measures and to *take into account the comments* received. Generally, transparency provisions apply both to the whole agreement and the chapter on trade in services with obvious differences in scope. Obligations related to publication and comments are usually found in the chapter covering the whole agreement, while those relating to responding to requests, the establishment of enquiry points and procedural obligations are in the services chapter.

### *ii) Transparency obligations under EFTA/Swiss PTAs*

ETFA agreements generally contain the same transparency provisions as Article III: 1–2 GATS such as the obligation to publish or make publicly available all measures affecting trade in services. Like Article III: 4 GATS they include an obligation to respond to requests

from other parties. However, they do not contain obligations on the establishment of enquiry points. With regard to procedural transparency, obligations are similar to Article VI: 1–3 GATS, but like the NAFTA, are not limited to sectors where specific commitments have been made.

### *iii) General Considerations*

This assessment shows that recent EU PTAs (*EU–Korea*, *EU–Colombia–Peru* and *EU–CA*) go further than the current GATS regime. Based on the NAFTA approach, they oblige parties to publish in advance any measures pertaining to the agreement, allow comments, and require any comments received to be taken into account. They also offer service providers easier access to information through the establishment of contact points. Finally, the *EU–Korea* PTA goes further than Article VI: 1–3 as it includes procedural transparency obligations in service sectors where there are no specific commitments.

In contrast, EFTA agreements generally do not go much further than the GATS. In particular, they do not allow investors to comment on new measures and generally do not provide for the establishment of enquiry points. On the other hand, EFTA PTAs improve GATS procedural obligations on transparency by extending the scope of the requirements to service sectors where parties have not made specific commitments. It is clear that the scope of transparency requirements varies greatly from one agreement to another. The following table provides an overview of transparency provision under EU and EFTA/Swiss PTAS.

**Table 13 Transparency Provisions under EU and EFTA PTAs**

|                         | <b>Publication</b>                               | <b>Comments</b>                 | <b>Response to Request</b>         | <b>Establish Enquiry Points</b>                               | <b>Procedural obligations</b>                                                                       |
|-------------------------|--------------------------------------------------|---------------------------------|------------------------------------|---------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>EU–Chile</b>         | General Part (Article 190)                       | X                               | Services chapter. Article 105      | Services chapter. Article 105                                 | Replicates Article VI: 1–3 GATS (Article 102)                                                       |
| <b>EU–CARIFORUM</b>     | General Part (Article 235)                       | X                               | Services chapter. (Article 86)     | Services chapter. (Article 86)                                | Replicates Article VI: 1–3 GATS (Article 179)                                                       |
| <b>EU–Korea</b>         | General Part (Article 12.3 (a))                  | General Part (Article 12.3 (b)) | Services chapter. (Article 7.22:1) | General Part (Article 12.4)                                   | Replicates Article VI: 1–3 GATS (Article 7.22/7.23) Extends to sectors with no specific commitments |
| <b>EU–CA</b>            | General Part (Article 339:1)                     | General Part (Article 339:2)    | Services chapter. (Article 178:1)  | Services chapter. (Article 178:1) extension to private person | Replicates Article VI: 1–3 GATS (Article 131)                                                       |
| <b>EU–Colombia–Peru</b> | General Part (Article 288:1)                     | General Part (Article 228)      | Services chapter. . (Article 130)  | Services chapter. (Article 130) extension to private person.  | Replicates Article VI: 1–3 GATS (Article 131)                                                       |
| <b>EFTA–Chile</b>       | General Part (Article 82)                        | X                               | General Part (Article 83)          | General Part (Article 82)                                     | Replicates Article VI: 1–3 GATS (Article 28)                                                        |
| <b>EFTA–Korea</b>       | Services chapter Including Article III: 1–2 GATS | X                               | General Part (Article 10.1)        | X                                                             | Refers to Article VI: 1–3 GATS                                                                      |
| <b>EFTA–Colombia</b>    | Services chapter Including Article III: 1–2 GATS | X                               | General Part (Article 9.3)         | X                                                             | Replicates Article VI: 1–3 GATS (Article 131) not limited to sectors with specific commitments      |
| <b>EFTA–GCC</b>         | Services chapter Including Article III: 1–2 GATS | X                               | General Part (Article 1.6)         | X                                                             | Refers to Article VI: 1–3 GATS                                                                      |
| <b>EFTA–Hong Kong</b>   | Services chapter Including Article III: 1–2 GATS | X                               | General Part (Article 1.6)         | X                                                             | Replicates Article VI: 1–3 GATS (Article 131) not limited to sectors with specific commitments      |
| <b>EFTA–Ukraine</b>     | Services chapter Including Article III: 1–2 GATS | X                               | General Part (Article 1.6)         | X                                                             | Replicates Article VI: 1–3 GATS (Article 131) not limited to sectors with specific commitments      |
| <b>Swiss–Japan</b>      | Services chapter Including Article III: 1–2 GATS | X                               | X                                  | X                                                             | Replicates Article VI: 1–3 GATS (Article 131) not limited to sectors with specific commitments      |

#### d. Transparency and Legal Services

Transparency requirements have implications for the legal services sector, requiring governments and bar associations to publish measures that pertain to or affect cross-border legal services. More precisely, they are obliged to publish laws applicable to foreign lawyers, clarify requirements for limited or full licensing and conditions for association between local and foreign lawyers. Furthermore, signatories are required to establish contact points where foreign lawyers can find relevant information. In Europe the CCBE (an association representing European, including Swiss lawyers) has published two documents that provide information on the conditions of practice for non-EU lawyers in various European jurisdictions.<sup>126</sup>

It is also worth noting the work undertaken by the Asian Pacific Economic Cooperation (APEC). APEC is a forum for discussing various trade issues.<sup>127</sup> The Secretariat is in Singapore and it consists of twenty-one countries, representing approximately 40% of the world's population, 54% of world GDP and 43% of world trade.<sup>128</sup> In May 2008, its Trade and Investment Committee approved a proposal tabled by Australia called the "Legal Services Initiatives".<sup>129</sup>

The purpose of the Initiative is described as: "To enhance transparency of requirements and procedures for professional legal services providers to practice foreign law across APEC economies, identify information gaps, and aid in the development of best practices for the regulation of foreign lawyers. The first stage of the APEC LSI is to collate a 'database' or 'inventory' of relevant regulatory frameworks (together with other relevant information such as contact details for regulators in each jurisdiction) to increase accessibility to the information for regulators, professional bodies, legal firms, business people, higher education institutions and students. In this regard, the focus has been on the rights and licensing of foreign lawyers to provide services in foreign and/or international law; an on the rights for foreign lawyers to work in association with host economy lawyers".<sup>130</sup>

As result, in July 2009 a draft inventory of regulatory frameworks was established. It lists for each APEC Member, the requirements for legal practice under limited and full license, conditions to practice on a temporary basis, conditions for commercial association with foreign lawyers and contact points for enquiries. This initiative was the first of a four-stage process, which *in fine* was expected to lead to the development of an APEC Legal Services Framework that would facilitate the sharing of information and identification of best practices.<sup>131</sup>

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<sup>126</sup> The CCBE (2003b), *CCBE Update the General Agreement on Trade in Services, 31.01.2003 and the CCBE (2005a), Conditions for the admission of lawyers from non-EU Member States to the title of the local legal profession in each EU Member State and conditions under which lawyers from non-EU Member States can perform temporary services in each Member State under their own title home*, 25.01.2005.

<sup>127</sup> It defines itself as "an intergovernmental grouping that operates on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Unlike the WTO or other multilateral trade bodies, APEC has no treaty obligations required of its participants. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis."

<sup>128</sup> The APEC Members are: Australia, Brunei Darussalam, Canada, Chile, China, Hong-Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, The Philippines, Russia, Singapore, China Taipei, Thailand, the United States and Vietnam

<sup>129</sup> APEC (2008), *Chair's Summary Record of Second Committee on Trade and Investment Meeting in Arequipa*, 2008/SOM3/CTI/002, 25-26 May, para. 10.

<sup>130</sup> APEC Legal Services Initiative web site: <http://www.legalservices.apec.org> (last visit 1.10. 2012).

<sup>131</sup> Idem.

This initiative provides a good example of how to improve the transparency of regulations and procedures in the legal services sector at multilateral level or in other regional forums. Such initiatives would be particularly relevant for the EU and Switzerland, starting with their domestic legal services sector, where information on cross-border legal services with third countries is scarce. This would be significant improvement because both the EU and Switzerland have a federal structure where regimes differ between Member States (or cantons). It should however be noted that such information is already available to EU lawyers within the EU.<sup>132</sup> Externally, the promotion of such an initiative would foster cross-border legal practice and improve trading conditions between partners. In the absence of a platform such as that developed by the APEC, PTA negotiations could provide a good opportunity to exchange information and improve transparency.

## 2. Non-Discrimination

Non-discrimination, along with transparency, is the cornerstone of the liberalization process. Generally trade agreements address discrimination issues at two levels. Whereas MFN Treatment generally covers discrimination between signatory parties, national treatment and market access provisions deal with discrimination between domestic and foreign suppliers and some non-discriminatory measures.

PTAs deal with these issues in different ways depending on whether they are influenced by the GATS or the NAFTA. Furthermore, some PTAs go further than others. These differences are also reflected in EU and EFTA trade agreements.

### a. Most-Favored-Nation Treatment (MFN)

The MFN principle forms the basis of the multilateral GATS system. However, it is not limited to the GATS and provisions dealing with non-discrimination between signatory parties are found in PTAs.

An initial difference is found in the text of the agreements. Article II: 1 GATS requires WTO Members to accord to services and service suppliers of any WTO Member no less favorable treatment than it accords to *like services and services suppliers* of any other WTO Member. In contrast, Articles 1103 and 1203 NAFTA are limited to *service providers* (with the exclusion of services). Therefore MFN treatment under the NAFTA is narrower than the GATS. Furthermore, the definition of the treatment differs between the two agreements. The NAFTA uses the term *like circumstances*, whereas the GATS uses the terms *like services or services suppliers* and it is unclear whether these two terms have the same scope.<sup>133</sup>

Another important difference relates to the disciplines applied to the principles. PTAs derived from the GATS take an approach similar to Article II GATS: MFN is a general obligation applicable to all service sectors, but subject to reservations (Article II: 2), which must be recorded and are subject to negotiation. The NAFTA and PTAs derived from it include the same type of obligations that are subject to reservation (Article 1108/1206). Unlike the GATS, the NAFTA permits signatory parties to adopt new non-conforming measures.

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<sup>132</sup> EU COMMISSION (2004b), *European Judicial Network in Civil and Commercial Matters: Legal Professions*, 17.08.2004, <http://ec.europa.eu/civiljustice/htm> (last visit 1.10.2012).

<sup>133</sup> COSSY (2006), *Determining "Likeness" under the GATS: Squaring the Circle?* Staff Working Paper ERSD-2006-08, September 2006.

These are permitted in particular sectors, which countries set out in specific schedules with no timeframe for their elimination.<sup>134</sup>

However, the main difference between PTAs that include provisions on MFN Treatment is the effect on signatory parties and third parties. With respect to the relationship with signatory parties, the MFN Treatment is of little interest in bilateral agreements, but is particularly relevant in plurilateral agreements. MFN obligations on parties to the agreement are similar to Article II GATS (i.e. a prohibition of discrimination between them). The MFN Treatment may also impact on relationships with third parties. The question is whether liberalization granted by one signatory in future agreements is extended to signatory parties to earlier PTAs.

For instance, South Korea has liberalized its legal services sector through PTAs. Only lawyers from signatory parties may practice as foreign legal consultants in this country. In 2006, it concluded a FTA with the EFTA authorizing lawyers from EFTA countries to provide legal advice on home country and international law, while maintaining a prohibition on association with South Korean lawyers and employment of South Korean lawyers. Subsequently, South Korea concluded a PTA with the EU (in 2011) and the United States (in 2012), which offer the same treatment given to EFTA countries. However, unlike the *EFTA–Korea* PTA these agreements enable EU and American lawyers to enter into partnership with South Korean lawyers and/or to hire South Korean lawyers. Therefore the question is whether and under what conditions the *EFTA–Korea* PTA contains a MFN Treatment provision that extends the liberalization undertaken in subsequent agreements to EFTA countries.

A recent OECD study distinguished five types of MFN provisions found in a sample of PTAs.<sup>135</sup> These are typical of the provisions found in EFTA and EU agreements.

- Agreements that contain no MFN provisions. Parties to this type of agreement cannot benefit from the MFN treatment offered in another PTA. The *EU–Chile*, *EU–Colombia–Peru* and *EU–CA* agreements fall into this category of agreements.
- Agreements that provide MFN Treatment only among signatory parties. This type of agreement avoids discrimination within the PTA, but cannot extend MFN treatment contained in other PTAs.
- Agreements that include a MFN Treatment provision among signatories and in addition include a provision on MFN treatment that deals with non-parties; however this specifically excludes other PTAs from the application of the principle. Therefore the more favorable treatment contained in other PTAs is not applied to the signatories to the agreement. However, these agreements generally have a provision related to the extension of preferential treatment granted by other agreements on request or through consultations. EFTA agreements generally feature such provisions.
- Agreements that contain non-parties MFN treatment provisions, which include MFN treatment offered to non-parties in other PTAs. The typical example is Article 1203 NAFTA, which provides MFN Treatment to service providers of any party and non-party. However, such obligations only cover future agreements. The *EU–Korea*, *EU–CARIFORUM* and *EU–SAA* PTAs fall into this category of agreements. In *EU–*

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<sup>134</sup> MARCONONINI (2009), *above note 117*, p. 12.

<sup>135</sup> MIROUDOT/ SAUVAGE/ SUDREAU (2010), *above note 122*.

*Korea* and *EU–CARIFORUM MFN* Treatment applies in modes 1, 2 and 3, but not mode 4, while in the *EU–SAA* PTA it only applies in mode 3. In addition, MFN Treatment in *EU–CARIFORUM* does not require the extension of MFN treatment to any party but specifically to major trading partners.

- Finally the most liberal agreements make no exceptions for non-parties. MFN treatment in any other PTA (past or future) can be extended to the parties to the current PTA.

In the South Korea case, the two first solutions would not enable EFTA States to benefit from subsequent liberalization. The third solution opens the door to further negotiations, but requires a real interest from the interested party to request new negotiations. The last two options are more liberal and introduce an element of automaticity saving time and costs to the interested party. The following table summarizes the different types of MFN provision in PTAs.

**Table 14 Typology of MFN Provisions in PTAs**

| <b>Types of MFN Provision</b>                         | <b>Scope of MFN Treatment</b>                                                                                       | <b>EFTA/EU PTAs</b>               |
|-------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| 1. No MFN provisions                                  | No extension of the liberalization contained in other PTAs                                                          | EU–Chile, EU–Colombia–Peru, EU–CA |
| 2. MFN treatment among Parties                        | The MFN ensures non-discrimination among signatory parties. Non-extension of liberalization contained in other PTAs | -                                 |
| 3. Non-party MFN treatment but excluding other PTAs   | Extension of the liberalization contained in other PTAs upon request                                                | All EFTA agreements               |
| 4. Non-party MFN treatment only for future agreements | The liberalization contained in new agreements is extended to parties of former agreements.                         | EU–CARIFORUM, EU–Korea, EU–SAA    |
| 5. Full non-party MFN treatment                       | More favorable treatment in any agreement can be extended to parties                                                | -                                 |

Beyond discrimination between parties covered by MFN provisions, PTAs include provisions on the prohibition of discrimination between domestic and foreign suppliers related to market access and national treatment.

## **b. Market Access**

As described in the previous chapter, Article XVI GATS sets out an exhaustive list of six prohibited measures, which include both discriminatory and non-discriminatory measures. WTO Members may maintain such measures, but they must record them in their schedule of commitments. PTAs derived from the GATS either reproduce Article XVI or refer to it.

In contrast, the NAFTA does not include provisions on market access. Instead it contains a provision on quantitative restrictions (Article 1207), which is not a prohibition but a best endeavor clause regarding the “liberalization or removal” of measures through negotiations held at least every two years.

While the oldest NAFTA-type agreements follow this approach, the most recent PTAs follow the GATS approach of an exhaustive list of prohibited measures, although they generally omit restrictions on foreign participation, which is included in the Investment chapter. This prohibition may nevertheless be caught by the national treatment provision.<sup>136</sup>

Therefore, most PTAs contain similar provisions on market access, regardless of whether they are GATS-type or NAFTA-type. However, it should be noted that some PTAs, such as the *Japan–Mexico* EPA or the *Chile–Korea* FTA do not establish market access disciplines, instead excluding non-discriminatory market access-type measures from the scope of the agreement.<sup>137</sup> If PTAs have generally similar provisions on market access, they differ widely in how signatories schedule their commitments. There are three approaches: the negative list, the positive list and hybrid list, which will be analyzed in greater detail in the next section. As both EU and EFTA agreements are influenced by the GATS, they generally follow the same approach; either incorporating Article XVI or referring to it.

### c. National Treatment

National treatment is an obligation that is central to the liberalization of trade in services and is therefore found in most trade agreements. However, as described in the previous chapter, it is not absolute and can be subject to reservations or specific commitments. PTAs on trade in services feature national treatment provisions with some differences. First, like market access disciplines, PTAs differ in their approach to specific commitments (this will be analyzed in the next section), but second, differences are found in the formulation of national treatment obligations. For the most part such differences are similar to those found in the formulation of MFN treatment between the NAFTA (and NAFTA-type agreements) and the GATS (and GATS-type agreements). There are three main aspects:

- The beneficiaries: the NAFTA only includes “services suppliers”, while the GATS covers “service suppliers and the services”;
- The comparator: the NAFTA compares differences in treatment in “like circumstances”, while the GATS compares the treatment of “like services or like services suppliers”.
- The effect of discrimination: the GATS uses the criterion of the modification of the conditions of competition in favor of domestic suppliers, while the NAFTA does not contain such requirement.

With respect to national treatment and EU and EFTA agreements, a distinction needs to be made between FTAs negotiated by the EU and the EFTA on the one hand, and Stabilization and Association Agreements (SAAs) on the other hand. EU and EFTA FTAs follow the GATS approach. EFTA agreements generally refer to Article XVII GATS, while EU FTAs incorporate the principle in the establishment chapter (mode 3) and the supply of services chapter (mode 1 and 2) but not in the chapter concerning the temporary presence of natural persons (mode 4).

The situation is slightly different with respect to SAAs. Unlike FTAs they do not contain specific commitment mechanisms. Instead they set out general freedoms similar to those found in the TFEU with significant reservations, which reflect their transitional nature. Thus

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<sup>136</sup> FINK/ MOLINUEVO (2007), *East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas*, Policy Research Paper, World Bank, p. 20-22.

<sup>137</sup> Idem.

protection is not universally applicable, but depends largely in which chapter (or mode of supply), potential discrimination might occur. Chapters on the free movement of workers feature a prohibition on *discrimination based on nationality* for workers who are nationals of the signatory parties and who are legally employed in the territory of a Member State. However, protection is limited to working conditions, remuneration and dismissals.

The chapter on establishment distinguishes between juridical and natural persons. For juridical persons agreements provide for *no less favorable treatment* for companies of signatories compared to domestic and third party companies, with respect to the establishment and operation of subsidiaries and branches. In contrast, for natural persons agreements provide a period of time after the entry into force of the agreement for parties to examine whether they will extend national treatment to nationals of both parties.<sup>138</sup> Finally the supply of services chapter requires signatory parties to progressively allow the supply of services by nationals or companies of signatory parties.

Therefore national treatment provisions under SAAs are relevant to the free movement of workers (with a prohibition on discrimination based on nationality) and the establishment of juridical persons (with no more favorable treatment than domestic companies). However, the lack of a specific commitments mechanism in SAAs raises the question of the scope of national treatment protection and more specifically, whether they provide the same level of protection found in the TFEU.

With respect to the free movement of workers, the ECJ ruled that such provisions do not set a principle equivalent to that found within the EU, but do act in workers' favor. From the moment they are lawfully employed in an EU Member State, they have a right to equal treatment with respect working conditions, remuneration or dismissals, as that offered by the TFEU to nationals of the EU.<sup>139</sup> In *Pavlov–Famira*, the ECJ ruled on a Bulgarian national with an Austrian law degree, who worked for an Austrian lawyer and was denied inclusion in the list of trainee lawyers by Austrian authorities on the grounds that he was neither an Austrian nor an EU national.<sup>140</sup> It was claimed that this decision discriminated on the basis of nationality. At the time, Bulgaria was not yet an EU Member State and the relationship between Bulgaria and the EU was governed by an Association Agreement with similar provisions to the SAA.<sup>141</sup>

The ECJ ruled that the activities of trainee lawyers could take place in the context of an employment relationship and at the same time form the practical training necessary to access the profession. *In casu*, it concluded that inclusion on the trainee list constituted a condition of access to the profession and held that the case had to be examined under the chapter on establishment.<sup>142</sup> The question was then whether the requirements set out in the chapter on

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<sup>138</sup> Unlike the association agreements with Bulgaria or Poland, which did not contain such distinctions and provided less favorable treatment for both natural and juridical persons.

<sup>139</sup> **Pokzeptowicz-Meyer**, C-162/00, *Land Nordrhein-Westfalen v Beata Pokzeptowicz-Meyer*, [2002], ECR I-1049, para. 40-41; **Deutscher Handballbund**, C-438/00, *Deutscher Handballbund v Maros Kolpak*, [2003], ECR I-4135, para. 34-35; **Simutenkov**, C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2003] ECR I-2579, para. 6.

<sup>140</sup> **Pavlo-Famira**, C-101/10, *Gentcho Pavlov, Gregor Famira v Rechtsanwaltskammer Wien*, [2011], ECR I-00000.

<sup>141</sup> **EU-Bulgaria**: European Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, on the other part, 31 December 1994, OJ L 358/3.

<sup>142</sup> **Pavlo-Famira**, *above note 140*, para. 23–27.

establishment had the same scope as Article 49 TFEU and could prohibit discrimination based on nationality. ECJ jurisprudence holds that, “agreements concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its working and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation, which is not subject, in its implementation or effects, to the adoption of any subsequent measure”.<sup>143</sup>

In *Kondova* the ECJ ruled that similarities in the wording of TFEU provisions and that of an international agreement were not sufficient to make the two texts equivalent.<sup>144</sup> Extension of protection provided by the TFEU to agreements concluded by the EU with non-member countries depended *inter alia* on the aim of the provision in the particular context. In *Demirel*, the ECJ stressed that association agreements only set out aims and laid down guidelines for their achievement without establishing how to do so. Only certain matters are detailed in rules laid down by protocols annexed to the agreement.<sup>145</sup>

In *Pavlov–Famira*, the ECJ noted that nothing in the Association Agreement led to the conclusion that the contracting parties intended to eliminate all discrimination based on nationality. It follows that the provisions on establishment deal with access to regulated professions without imposing an obligation not to discriminate on the grounds of nationality equivalent to Article 49 TFEU.<sup>146</sup>

### 3. Avoidance of Unnecessary Trade Restrictions

As the previous chapter has shown, Article VI GATS provisions on domestic regulation relate to measures not covered by market access (Article XVI) and national treatment (Article XVII), but that still affect trade in services. Put differently, they include non-discriminatory measures that are not included in the list of quantitative measures but still affect trade in services. They aim to ensure that WTO Members do not apply licensing and qualification requirements, procedures and technical standards that nullify or impair specific market access and national treatment commitments.

Article VI: 5 sets out a necessity test for licensing qualification requirements, procedures and technical standards. However, this provision is limited in two respects. First, it only applies to sectors in which WTO Members have undertaken commitments. Second, it only applies when the contested requirements could not reasonably have been expected at the time the commitment was made (Article VI: 5(a) (ii) GATS). These two limitations considerably reduce the scope of the test. Article VI: 4 GATS gives a mandate to the CTS to develop any necessary disciplines on domestic regulation in order to ensure that measures relating to qualification, licensing requirements and procedures and technical standard do not constitute unnecessary barriers to trade in service. It specifies that such measures should be based *inter alia* on objective and transparent criteria and be no more burdensome than necessary to ensure the quality of the services.

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<sup>143</sup> *Sürül*, C-262/96, *Sema Sürül v. Bundesanstalt für Arbeit*, [1999], ECR I-2685, para. 60.

<sup>144</sup> *Kondova*, C-235/99, *The Queen and Secretary of State of the Home Department v. Elenaora Ivanova Kondova*, [2001], ECR I-6427.

<sup>145</sup> *Demirel*, C-12/86, *Demirel v Stadt Schwäbisch Gmünd*, [1987], ECR I-3719.

<sup>146</sup> *Pavlo-Famira*, above note 140, para. 27.

Agreements derived from the GATS generally feature a provision on domestic regulation with more and less the same content as Article VI: 4–5, together with a reference to the results of GATS negotiations on domestic regulation. The NAFTA contains a similar provision (Article 1210), but is limited to licensing and certification and is based on best endeavor. However, agreements derived from the NAFTA have incorporated a provision on domestic regulation and make reference to negotiations foreseen in Article VI: 4 GATS.

EFTA agreements provide various solutions with respect to the necessity test. Agreements with Ukraine and Hong Kong do not address the issue. Those with Chile, South Korea and the GCC reflect the content of Article VI: 4–5 GATS. *EFTA–Colombia* and *Switzerland–Japan* go further than the GATS solution. They apply the necessity test to licensing and qualification requirements, and procedures and technical standards, without the restrictive conditions of Article VI: 5 (a) (ii). The *Switzerland–Japan* agreement applies the necessity test to all service sectors<sup>147</sup>, while the *EFTA–Colombia* agreement applies the necessity test to service sectors where specific commitments have been undertaken.<sup>148</sup>

In contrast, EU agreements do not go so far. They either reproduce Article VI: 4 (e.g. *EU–Chile*, *EU–Korea* or *EU–Colombia–Peru*) or simply do not address the issue (e.g. *EU–CARIFORUM* or *EU–CA*). In the first situation a test may apply depending on the result of the GATS negotiations. In the second situation, signatories will not apply a necessity test regardless of the result of WTO negotiations.

As Sauvé/Mattoo point out, the lack of significant improvements on domestic regulation issues under PTAs tends to suggest that they no longer have a role as rule-making laboratories.<sup>149</sup>

#### 4. Recognition

The recognition of professional qualifications is another fundamental step in the development of cross-border legal practice. Recognition is understood as the acceptance of foreign suppliers' qualifications or licenses as equivalent to those of domestic suppliers. Such a process can take the form of autonomous recognition or be the result of recognition agreements between two or several partners.

In the legal services sector, it can take the form of limited or full recognition (limited or full licensing). The most common form is the limited license, whereby foreign lawyers (also known as foreign legal consultants) are authorized to provide legal advice on home country or international law but not host country law. It usually consists of autonomous recognition of foreign legal qualifications, sometimes with additional licensing requirements. In some instances, autonomous recognition may be conditional on reciprocal treatment.

In contrast, full licensing, whereby foreign lawyers are fully integrated into the foreign jurisdictions through recognition of their foreign qualifications, is far rarer. It generally takes place between countries that share historical ties.

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<sup>147</sup> *Switzerland–Japan*, above note 116, Art. 48:3.

<sup>148</sup> *EFTA–Colombia*, above note 111, Art. 4.7:4.

<sup>149</sup> SAUVÉ/MATTOO (2011), *Chapter 12: Services*, J-P Chauffour & J-C Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook*, World Bank, pp. 235–274, pp. 247–248.

The best example is the EU recognition mechanism that operates under Directive 2005/36.<sup>150</sup> Full licensing can be regarded as the ultimate stage of the recognition process.

It is against this background that regional discussions on the recognition of legal qualifications have taken place. Again, PTAs are influenced by GATS and NAFTA approaches. PTAs influenced by Article VII of the GATS exempt recognition agreements from MFN Treatment but attach certain conditions to the conclusion of such agreements. In contrast, PTAs derived from the NAFTA focus on facilitating recognition of professional qualifications by establishing procedures and/or adopting other elements. In most cases PTAs combine both approaches.

As we have already seen, Article VII of the GATS does not address the content of recognition, but ensures that the mechanism is not used to discriminate against other WTO Members. Under Article VII, WTO Members may depart from MFN Treatment (Article II) and recognize qualifications from particular Members to the exclusion of other Members (Article VII: 1). At the same time they must offer those other Members the opportunity to negotiate the same treatment. Most PTAs that have established a binding MFN obligation include a similar provision. Therefore one party's recognition agreement with a third country may need to be extended to other party to the PTA.<sup>151</sup>

Unlike the GATS, the NAFTA does not contain a specific provision dealing with recognition. However, it features a Professional Services Annex (Annex 1210.5), which includes a General Provisions section (Annex 1210.5 *Section A*) and a Foreign Legal Consultants section (Annex 1210.5 *Section B*). These sections provide a procedural framework for the development of mutual standards.

*Section A* contains two mandates that need to be addressed on a best endeavor basis. First, it encourages parties to consult relevant bodies in order to develop mutually acceptable standards and criteria for licensing and certification of professional services providers and to offer recommendations on mutual recognition. It provides a list of matters that need to be addressed (such as education, examination, practice, ethics, scope of practice, local knowledge). Second, it encourages parties to consult relevant bodies in order to develop procedures for temporary licensing of professional services' providers.

*Section B* includes two types of rules. First, it reproduces the mandate contained in *Section A* for the authorization of foreign legal consultants. In addition, it requires consultation with relevant bodies concerning their recommendations on the form of association or partnership between lawyers authorized to practice in the signatory party's jurisdiction and foreign legal consultants. Second, it sets out a procedural framework and establishes a work program for the development of rules on foreign legal consultants. As a result, a NAFTA Trilateral Working Group was created which led to the production of the *NAFTA Model Rule Respecting Foreign Legal Consultants*. However, the document was rejected and no further progress has been made.<sup>152</sup>

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<sup>150</sup> Directive 2005/36 EC of the European Parliament and of the Council of 7 September 2005, *on the Recognition of Professional Qualification*, 30 September 2005, OJ L 255/22.

<sup>151</sup> See for instance for ASEAN PTAs FINK/ MOLINUEVO (2007), *above note 137*, pp.45–47.

<sup>152</sup> TERRY (2010), *above note 31*, pp. 962–964.

All subsequent American FTAs contain a similar Annex. However, only one specifically addresses foreign legal consultants.<sup>153</sup> All the others only have a general provision on professional services, which includes legal services. Of these agreements, the *US–Australia* FTA prepared the ground for significant progress towards liberalization.<sup>154</sup> In 2006, under the mandate provided by Annex 10-A of the *US–Australia* FTA, representatives of American and Australian governments, bar associations and regulatory organizations met to discuss regulatory issues related to legal services. In addition to the removal of trade barriers, the discussions *inter alia* dealt with the recognition of qualifications and cooperation on disciplinary actions.<sup>155</sup> Although these discussions have not produced tangible results, they launched a process of useful exchanges between Australian and American stakeholders.<sup>156</sup>

Moreover, the negotiation processes generated by the *US–Australia*, *US–Singapore*<sup>157</sup> and *Australia–Singapore*<sup>158</sup> FTAs have improved recognition in the legal sector. Under these agreements Singapore recognizes the law degrees of four American and ten Australian law schools<sup>159, 160</sup> for admission in the Singapore Bar. However, recognition is limited to Singapore citizens or persons who were permanent residents of Singapore at the time they received their degree. Therefore, they represent liberalization of legal education services rather than legal services.

EU and EFTA agreements also contain provisions dealing with recognition issues, although they differ in content. Generally EFTA agreements, with the exception of *EFTA–Korea*, prefer the GATS approach. Therefore they contain provisions that aim to ensure that due consideration is given to requests to recognize qualifications. They also include provisions that make it possible for third parties to negotiate equivalent treatment in the event of a MFN provision. Furthermore *EFTA–Colombia*, *EFTA–GCC* and *Switzerland–Japan* PTAs include specific provisions dealing with recognition procedures.

In contrast, EU agreements generally follow the NAFTA approach and establish a procedural framework for consultations with relevant professional bodies on a best endeavor basis. However, only the *EU–Chile* FTA contains a provision on temporary services.<sup>161</sup> With regard to legal services, the agreement between Québec and France on the Mutual Recognition of Professional Qualifications, which was signed in 2008 in the context of the negotiations on the Economic Partnership Agreement between the EU and Canada, should be noted.

<sup>153</sup> **US–Chile:** *United States–Chile Free Trade Agreement*, signed 6 June 2003, entered into force 1 January 2004, Chapter 11: Cross-Border Trade in Services, Annex 11.9, Section B Foreign Legal Consultant, pp. 11–12.

<sup>154</sup> **US–Australia**, *above note 30*.

<sup>155</sup> ARUP (2009), *Legal Services and Professional Regulation Internationally?* Australia Abroad, Federal Law Review, Vol. 37, No 3, 2009, pp. 417–440, pp. 435–440.

<sup>156</sup> TERRY (2010), *above note 32*, pp. 888–891.

<sup>157</sup> **US–Singapore:** *The United States–Singapore Free Trade Agreement* signed 6 May 2003, entered into force 1 January 2004, Side letter.

<sup>158</sup> **Australia–Singapore:** *Australian–Singapore Free Trade Agreement*, signed 17 February 2003, entered into force 28 July 2003, Annex 4-III: Additional Commitments to Chapter 7 (Trade in Services) and Chapter 8 (Investment).

<sup>159</sup> The four law schools are: Harvard, New York University, Columbia University and the University of Michigan.

<sup>160</sup> The ten law schools are Monash University, the University of Melbourne, the University of New South Wales, the University of Sydney, the Australian National University, Flinders University, the University of Queensland, the University of Western Australia, the University of Tasmania and Murdoch University.

<sup>161</sup> **EU–Chile**, *above note 74*, Art. 103.

This aims to increase and facilitate access to regulated professions. Furthermore, the Quebec and French bar associations negotiated a recognition agreement on professional qualifications which entered into force on 8 December 2010. This may open the door to further discussions on legal services in the context of the *EU–Canada EPA*.<sup>162</sup>

It is also worth noting that the CCBE (Europe) and the ABA (United States) have begun work on the wording of potential Mutual Recognition Agreement. This would facilitate cross-border movement of legal professionals both on a temporary or a permanent basis. It is seen as a preliminary step towards a binding agreement on the recognition of educational and professional qualifications between the EU and the United States.<sup>163</sup> However, no significant progress has yet been made.

## 5. Competition

The inclusion of competition rules in PTAs is generally based on the premise that anti-competitive practices can undermine trade liberalization, including the legal services sector. Some of these practices include hard-core cartel conduct, abuse of dominant position or attempts to monopolize a given market. As a result all new-generation PTAs include provisions on competition issues, although they are not always binding.<sup>164</sup> While most are found in a specific chapter on competition, some rules may be found in other chapters.<sup>165</sup>

Competition rules can be found both in horizontal provisions that apply to all services and in sector-specific provisions. Most PTAs have used “conditions of competition” as criteria for the definition of national treatment, which is accorded when the conditions of competition are alike for domestic services suppliers and service suppliers of other PTA parties.<sup>166</sup> All EU and EFTA PTAs feature such provisions. Some include a provision related to monopoly or exclusive suppliers (Article VIII GATS). This requires PTA signatories that have exclusive services suppliers in their territory to not undertake actions that prevent competition. All EFTA PTAs feature such a provision at the horizontal level unlike EU PTAs. Finally sector-specific provisions on competition may be found in telecommunications, financial and maritime transport services.<sup>167</sup> Competition rules in PTAs are usually found in a specific chapter dedicated to competition. This covers all trade issues, including trade in services.<sup>168</sup>

The purpose of PTAs is not to create regional law, but rather to develop common criteria and cooperation mechanisms for national authorities to deal with practices that are detrimental to the functioning of the PTA. A first problem that emerges is recognition of the merits of competition law.

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<sup>162</sup> CNB (2010), Arrangement en vue de la Reconnaissance Mutuelle des Qualifications Professionnelles entre le Barreaux du Québec et le Conseil national des Barreaux, 8 December 2010.

<sup>163</sup> CCBE (2007), *CCBE-Info*, no 18/2007, p. 7.

<sup>164</sup> HORN/ MAVROIDIS/ SAPIR (2010), *above note* 23.

<sup>165</sup> ANDERSON/EVENETT (2006), *Incorporating Competition Elements into Regional Trade Agreements*, Paper prepared for the Inter-American Development Bank and World Trade Organization project titled Regional Rules in the Global Trading System, 17 July 2006.

<sup>166</sup> TEH (2009), *Competition Provisions in Regional Trade Agreements*, A. Estevadeordal/ K. Suominen/ R. Teh (eds), Regional Rules in the Global System, Cambridge University Press, pp. 418–419.

<sup>167</sup> *Id.* p. 467.

<sup>168</sup> SOLANO/ SENNEKAMP (2006), *Competition Provisions in Regional Trade Agreements*, OECD Trade Working Papers, No 31, OECD Publishing.

While the desirability of competition law is taken for granted in most industrial economies, the same cannot be said for developing countries.<sup>169</sup> Furthermore, PTA signatories do not necessarily have a system of competition law or mechanisms for dealing with competition issues.

All EU PTAs include a chapter on competition. However, they differ in the binding nature of obligations and their scope. As Horn *et al.* argue, chapters on competition in PTAs may be legally enforceable or not, which has consequences for the implementation of obligations.<sup>170</sup> The SAA and the *EU-CARIFORUM* PTA include binding obligations. In contrast, other EU PTAs expressly exclude recourse to dispute settlement for matters related to competition.<sup>171</sup>

EU PTAs diverge in their scope regarding competition rules. On the one hand, SAAs go further, in the sense that the EU requires the signatories to adopt the *acquis communautaire*.<sup>172</sup> On the other hand, other EU PTAs contain the same type of rules. First, they all feature a provision in which signatories explicitly recognize the importance of free and undistorted competition and all EU PTAs (except *EU-Chile*) define practices that may affect trade between parties. These include abuse of dominant position and the concentration of undertakings. However, it should be noted that the *EU-CARIFORUM* PTA does not include concentration of undertakings in the list of harmful practices.

With the exception of the *EU-Chile* PTA, the chapter on competition in EU PTAs also includes provisions regarding implementation, which require signatories to have established competition authorities and enacted competition law. The *EU-CARIFORUM* and *EU-CA* PTAs provide a timeframe to comply with these requirements, while *EU-Korea* and *EU-Colombia-Peru* PTAs require parties to maintain their regimes. They also set out procedural requirements on transparency, non-discrimination, timeframes and other procedural requirements. EU PTAs also contain provisions on Monopolies and State Enterprises. These agreements recognize the right of parties to establish or maintain public or private monopolies and state enterprises according to their legislation but require them to be subject to competition law. Furthermore, EU PTAs include provisions that deal, on a best endeavor basis, with the relationship between competition authorities and provisions on cooperation, exchange of information, and notification. Finally, EU PTAs recognize the need for technical assistance (except in *EU-Korea*) and exclude the use of dispute settlement mechanisms for issues addressed by the competition chapter.

EFTA PTAs contain similar rules. The *EFTA-GCC* and *EFTA-Korea* PTAs include binding obligations, while others expressly exclude all competition provisions from the scope of dispute settlement.<sup>173</sup> It should be noted that the *EFTA-Ukraine* PTA excludes all provisions except the obligation for consultation.<sup>174</sup> Otherwise, the *EFTA-Chile*, *EFTA-Korea*, *EFTA-Colombia* and *EFTA-Ukraine* PTAs all include the same rules as EU PTAs with the exception of provisions on the implementation of competition authorities and competition

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<sup>169</sup> DAWAR/ HOLMES (2011). *Competition Policy*, P Chauffour & J-C Maur (eds), Preferential Trade Agreement Policies for Development: A Handbook, World Bank, pp. 17–36.

<sup>170</sup> HORN/ MAVROIDIS/ SAPIR (2010), *above note* 23, p. 5.

<sup>171</sup> **EU-Chile**, *above note* 74, Art. 180; **EU-Colombia-Peru**, *above note* 82, Art. 266; **EU-Korea**, *above note* 27, Art. 11.8; **EU-CA**, *above note* 80, Art. 283.

<sup>172</sup> PADADOPOULOS (2010), *The International Dimension of EU Competition Law and Policy*, Cambridge University Press, pp. 93–114.

<sup>173</sup> **EFTA-Chile**, *above note* 107, Art. 78; **EFTA-Colombia**, *above note* 111, Art. 8.6 **EFTA-Hong Kong**, *above note* 115, Art. 7.5; **Switzerland-Japan**, *above note* 116, Art. 106.

<sup>174</sup> **EFTA-Ukraine**, *above note* 113, Art. 7: 7.

law. In contrast, the chapter on competition in the *EFTA–GCC* and *EFTA–Hong Kong* PTA has a narrower scope. It is limited to recognition of the negative effect of some competition practices without defining them. In addition, these chapters provide for cooperation, exchange of information and consultation on a best endeavor basis.

Having examined the liberalization of trade in services through PTAs at the horizontal level, we now turn to sector-specific liberalization, with a particular focus on liberalization of the legal services sector in EU and EFTA PTAs.

### **III. LIBERALIZATION OF TRADE IN LEGAL SERVICES IN EU AND EFTA/SWISS PTAs**

In addition to the horizontal disciplines that are applicable to all service sectors, most PTAs feature disciplines specific to each sector. Under these disciplines each state undertakes specific commitments regarding discriminatory measures. These commitments provide the basis for negotiations, where states seek to improve market access conditions for their services providers. Although most PTAs provide such a mechanism, they differ in how it is implemented depending on whether they are influenced by the NAFTA or GATS approach. Two mechanisms have been adopted; these are known as the *negative-list* approach (for NAFTA-type agreements) and the *positive-list* approach (GATS-type agreements). While the two approaches can produce equivalent outcomes, they can also generate qualitative differences.

GATS market access negotiations have not resulted in significant progress with respect to commitments undertaken in 1994 during the Uruguay Round. This holds true for all service sectors, including legal services. One explanation is that WTO Members have turned to PTAs instead. Recent studies on PTA commitments related to trade in services tend to confirm this trend; they conclude that PTA commitments outweigh not only those found in GATS schedules, but also those found in initial and revised GATS offers. Furthermore they include commitments from WTO Members who have not taken part in GATS negotiations (e.g. the Caribbean States).<sup>175</sup> Legal services are no exception and have benefitted from liberalization undertaken through PTAs. The EU and to a lesser extent the EFTA States, as exporters of legal services, have sought to secure improvements in specific commitments from their trading partners. In most cases they have used a GATS approach, although in some instances they have adopted the NAFTA approach.

This section analyzes the improved legal services commitments found in the EU and EFTA PTAs. It first presents scheduling modalities under the GATS and how these are different to PTA solutions, and then turns to the analysis of legal services commitments found in EU and Swiss/EFTA PTAs.

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<sup>175</sup> ROY/ MARCHETTI/ HOE (2007), Services Liberalization in the new Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?, World Trade Review, Vol. 6, No 2, pp. 155–192; ROY (2011), Services Commitments in Preferential Trade Agreements: An Expanded Dataset, WTO Staff Working Paper ERSD-2011-18, 9 November 2007.

## A. Scheduling Modalities

One of the most significant differences between the GATS and the NAFTA is the procedure for entering a specific commitment in a schedule, referred to as scheduling modalities. These differences are reflected in PTAs. Most EU and EFTA PTAs feature a *positive-list* approach, although in some instances the *negative-list* approach has been adopted. Therefore a brief description of the two approaches is necessary.

### 1. Positive-list versus Negative-list Approaches

Most PTAs have adopted a mechanism to progressively liberalize their service sectors through specific commitments. However, the mechanisms differ depending on whether they are influenced by the GATS or NAFTA models. The GATS modality is referred to as *positive-list*, while the NAFTA approach is called *negative-list*.

The GATS modality is referred to as a positive-list approach because once WTO Members have decided to make a commitment related to a service sector, they record this sector or sub-sector in a schedule. On the other hand, sectors in which they have no intention to make a commitment are left out of the schedule. In other words, they retain the right to undertake no commitments. The default position is that there are no commitments in any sectors and it is therefore up to WTO Members to take positive action.

In contrast, the negative-list takes the opposite approach. Here, states only record sectors or sub-sectors in which commitments are not equivalent to full liberalization. They leave out sectors or sub-sectors that are fully liberalized. Therefore the default position is that trade is unrestricted across all service activities, unless scheduled limitations indicate otherwise. Service sectors or sub-sectors are presumed to be fully liberalized and it is up to parties to record current restrictions. This approach requires full disclosure from parties of the regulatory situation in all sectors or sub-sectors covered by the agreement. The situation is clear for all service sectors and sub-sectors as the lack of a commitment means full liberalization.<sup>176</sup>

Here, we will focus on the negative-list approach. Its most important characteristic is the greater level of transparency. Parties are obliged to reveal non-conforming measures, which must be comprehensively listed in all service sectors. Therefore the annexes of such PTAs generally provide a complete and accurate picture of market access and national treatment restrictions in a given market.<sup>177</sup> Furthermore, the negative-list approach requires parties to commit to the statutory or regulatory status quo. In other words, unlike the positive-list approach that allows parties to bind their regulation at a lower level than their existing regime, the negative-list approach requires parties to commit for existing and even future regulatory or statutory practice.

Moreover, unlike the positive-list, the negative-list approach does not allow for *unbound* commitments. Each annex includes all existing or future measures that are fully bound.<sup>178</sup> It should be noted that the negative-list approach does allow parties to record reservations that

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<sup>176</sup> MARCONINI (2009), *above note 117*, pp. 18–24.

<sup>177</sup> STEPHENSON (2002), *Regional versus Multilateral Liberalization of Services*, World Trade Review, Vol. 1, No 2, 2002, pp. 187–209, pp. 193–207.

<sup>178</sup> MARCONINI (2009), *above note 117*, pp. 18–24.

preserve future regulatory freedom and function in the same way as *unbound* GATS commitments, but they must be recorded in the annex, which provides greater clarity.<sup>179</sup> The negative-list approach also features the so-called *ratchet mechanism*. This means that PTA signatories must immediately apply any liberalization in their regulatory regime to all other parties and this must be reflected in subsequent schedules of commitments. The mechanism obliges PTA parties that unilaterally liberalize a service sector to automatically extend the benefits to all parties without further negotiation.

While the negative-list approach does not necessarily bring about greater liberalization, it has important advantages with respect to transparency and the ability to lock-in the regulatory status quo. However, it can be an administrative burden especially for developing countries. Therefore it is favored by countries that are confident their regulatory regime is stable or want to promote their investment climate.

A significant number of PTAs concluded by countries from the Western Hemisphere and the Asia-Pacific region feature the negative-list approach.<sup>180</sup> In contrast, those concluded by the EU and the EFTA mainly use the positive-list approach, with the exception of *EFTA-Hong Kong*, *Switzerland-Japan* and the future *EU-Canada* (although in the latter case the EU Commission have stated that this should be seen as an exception and not serve as a precedent).<sup>181</sup>

More recently a hybrid approach has been adopted that combines components of both approaches. In this case, parties preserve their right to choose the sector or sub-sector and mode of supply in which they intend to undertake commitments; at the same time they must schedule the regulatory status quo and exchange a binding list of non-conforming measure to promote greater regulatory transparency. Such an approach was adopted in the *EU-CARIFORUM EPA*.<sup>182</sup>

We now turn to EU and Swiss commitments in the legal services sector under the GATS and PTAs.

## 2. EU and Swiss PTA Commitments in the Legal Services Sector

As shown in the previous chapter, the GATS provides that for some quantitative (Article XVI) and discriminatory measures (Article XVII) WTO Members may voluntarily undertake commitments in specific service sectors. Furthermore they are free to indicate the level of liberalization they offer. Thus they may inscribe *none*, which correspond to full liberalization or *unbound*, which correspond to no liberalization. A third option is to define the restrictions they intend to maintain. This procedure does not differ substantially in EU and Swiss PTAs that are generally based on GATS agreements.

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<sup>179</sup> MATTOO/ SAUVE (2011), *above note 149*, pp. 251–254.

<sup>180</sup> STEHENSON/ ROBERT (2011), *Evaluating the Contributions of Regional Trade Agreements to Governance of Services Trade*, ADBI Working Paper Series No. 307, August 2011.

<sup>181</sup> EP (2011), *European Parliament Resolution on EU-Canada Trade Relations*, B7-0344/2011, 26 May 2011, indent J4.

<sup>182</sup> SAUVE/ WARD (2009), *The EC-CARIFORUM Partnership Agreement: Assessing the Outcome on Services and Investment*, ECPE, January.

## a. EU PTA Commitments in the Legal Services Sectors

EU commitments in the legal services sector under the GATS have evolved. They initially focused on the provision of legal advice under home country and international law, with the exclusion of EU law. The EU later changed its practice and recorded all legal services including advisory, representation, arbitration and conciliation, documentation and certification services in its schedule of commitments. These commitments include the provision of services under international, EU and home country law. The EU has specified licensing requirements for the practice of each type of law. In addition, it has recorded limitations in each mode (these were described in great detail in the previous chapter).<sup>183</sup>

These changes are reflected in PTAs negotiated by the EU. While the *EU–Chile* Association Agreement does not contain such commitments, subsequent PTAs with the Caribbean States, the Republic of Korea, Colombia, Peru and Central America do. Furthermore, they improve on them. EU PTA commitments include general restrictions covering all modes of supply. There are nationality requirements for the practice of host country in some Member States and quotas in some areas of domestic law (France, Belgium). Modes 1 and 2 are generally fully liberalized. Commitments in mode 3 are generally more liberal in PTAs than under the GATS. Restrictions on legal form, in particular mandatory practice as a sole proprietorship in Ireland, the United Kingdom, Germany, Estonia and Slovenia have been removed. In contrast, restrictions on foreign equity (Austria and France), on control of the company (Denmark) and on legal form (Hungary and Poland) have been maintained.

However, the most significant changes in EU PTA commitments relate to mode 4 (the temporary presence of natural persons). In this mode provisions related to the liberalization of services are found in the main text rather than the schedules of commitments. This means that definitions, requirements and commitments are common to both parties. However, they are still subject to reservations from each party in each sector. This new practice provides a general framework that enhances clarity, security and predictability and leads to further trade liberalization.

EU PTAs generally include five categories of service suppliers in mode 4: key personnel, which include Business Visitors (BV) and Intra-corporate Transfers (ICTs), Graduate Trainees (GT), Business Services Sellers (BSS), Contract Services Suppliers (CSS) and Independent Professionals (IP). Trade in legal services in mode 4 includes all these categories except BSS.<sup>184</sup> For each of these categories EU PTAs provide the same definitions and requirements subject to sectorial reservations:

- Business Visitors (BV): are natural persons working in a senior position responsible for setting up a commercial presence. They do not engage in direct transactions with the general public and do not receive remuneration from a source located within the signatory party. The length of stay is generally 90 days in any 12 month period.
- Intra-corporate Transfers (ICT): are natural persons, who have been employed by a juridical person or have been a partner in it for at least one year and are transferred to a commercial presence in the territory of the other party. The length of stay is generally three years.

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<sup>183</sup> See *above* pp. 103–105/ 99–100.

<sup>184</sup> See *above* pp. 99–100.

- Graduate Trainees (GTs): are natural persons of the signatory, who have been employed by a juridical person of that signatory for at least one year, possess a university degree and are temporarily transferred to a commercial presence or the parent company of the juridical person of the territory of the other party for career development purposes or to obtain training in business techniques and methods. The length of stay is generally one year. The juridical person with a commercial presence in the signatory party territory may be required to submit a training program covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training. In Spain, France, Germany, Austria and Hungary, training must be linked to the university degree, which has already been obtained.
- Contract Service Suppliers (CSS): are natural persons of the signatory party employed by a juridical person of that signatory party, which has no commercial presence in the territory of the other party and which has concluded a *bona fide* contract to supply services with a final consumer in the latter party requiring the presence on a temporary basis of its employee in that party in order to fulfill the contract to provide services. The length of stay is a cumulative period of not more than six months (25 weeks in Luxemburg) in any 12 month period or for the duration of the contract whichever is less. Entry is subject to three conditions. First, the services suppliers must be a natural person and an employee of a juridical person, which has obtained a service contract not exceeding 12 months. Second, this employee should have worked for this juridical person for at least one year preceding the submission of an application for entry into the territory and possess at least three years' professional experience in the sector of activity. Third, the employee must hold a university degree and professional qualification, where this is required to exercise an activity pursuant to the law, regulation or requirements of the applicable signatory party
- Independent Professional (IP): are natural persons of the signatory engaged in the supply of a service and established as self-employed in the territory of that signatory, who have no commercial presence in the territory of the other party and who have concluded a *bona fide* contract to supply services with a final consumer in the latter party requiring their presence on a temporary basis in order to fulfill the contract. The length of stay is for a cumulative period of not more than six months (25 weeks in Luxemburg) in any 12 month period or for the duration of the contract whichever is less. Entry is subject to three conditions. First, the services must be provided on a temporary basis as self-employed person for a contract not exceeding 12 months. Second, the services provider must have at least six years of professional experience in the sector of activity. Third, the services provider must hold a university degree and professional qualification, where this is required to exercise an activity pursuant to the law, regulation or requirements of the applicable signatory party.

The following table summarizes the different categories of suppliers in mode 4 in the legal services sector.

**Table 15 Categories of suppliers in mode 4 in the legal services sector**

| <b>Categories of suppliers in mode 4</b> | <b>Definition</b>                                                                                                                                | <b>Examples for legal services</b>                                                                                                                         |
|------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Business Visitors (BV)                   | Natural person working in a senior position responsible for setting up a commercial presence                                                     | Partner of a law firm established in country A comes on a temporary basis to country B to prepare the establishment of a branch in country B               |
| Intra-corporate Transfers (ICT)          | Natural person employed by juridical person transferred to commercial presence in the territory of the other party                               | Partner or associate of a law firm established in country A, with a branch office in country B, sends the latter to country B for a certain period of time |
| Graduate Trainees (GT)                   | Natural persons employed by juridical person, who possess a university degree and transferred to a branch office for career development purpose. | Legal trainee of law firm established in country A sent to a branch office in country B for training purpose.                                              |
| Contract Service Suppliers (CSS)         | Natural person employed by juridical person which has no commercial presence                                                                     | Lawyer working for a law firm established in country A supplies a legal service in country B on a temporary basis.                                         |
| Independent Professional (IP)            | Natural persons engaged in the supply of a services as self-employed in the territory of the other party                                         | Independent lawyers established in country A                                                                                                               |

The EU has recorded restrictions in all modes of supply on licensing requirements for the practice of host country law. Some EU Member States have recorded restrictions relating to the provision of legal advisory services under international and foreign law, while others (Austria, Cyprus, Germany, Estonia, Ireland, Luxemburg, Netherlands, Sweden and the United Kingdom) have undertaken full liberalization. Bulgaria, the Czech Republic, Denmark, Finland, Hungary, Lithuania, Malta, Portugal, Slovenia and Slovakia maintain economic needs tests in all these categories. Estonia, Italy, Greece and Poland limit the economic needs test to IPs, while Latvia has registered the test for CSS. France has recorded that an aptitude test is required for full (simplified) admission to the French Bar, while Denmark restricts the marketing of legal advice to lawyers with a Danish license.

The EU has used this new mode 4 procedure in four agreements: *EU-CARIFORUM*, *EU-Korea*, *EU-Central America* and *EU-Colombia-Peru*. However, in *EU-Korea* and *EU-Central America*, signatories have made no commitments for CSS and IPs.

#### **b. Swiss PTA Commitments in the Legal Services Sector**

With respect to Swiss commitments in the legal services sector, the main improvement involves their scope. Initially, Switzerland made commitments on the provision of legal advice under home country and international law with some restrictions. Their revised offer includes the provision of legal advisory services in all areas with no distinction made between host, home, third-country or international law. Switzerland has also removed numerous specific restrictions and made commitments related to mediation and extra-judicial conciliation services, and patent attorney services.

However, as mentioned earlier, these changes may be too liberal compared to the actual state of regulation and may place the country in breach of WTO and PTA obligations. The evolution of Swiss commitments is reflected in PTAs. Early agreements with Chile and Singapore correspond to the initial GATS offer and include commitments on the provision of advisory services under home country law and the removal of most restrictions. In contrast later PTAs with the Republic of Korea, Colombia, Japan, the GCC, Ukraine and Hong Kong include changes contained in the revised offer.

### **c. EU and Swiss GATS Commitments in the Legal Services Sector**

As a result of the Uruguay Round negotiations, 76 WTO Members (out of a total of 153) have undertaken commitments in the legal service sectors. Most distinguish between advisory/representation services under host/home/third-country/international law. In most cases WTO Members have made commitments related to the provision of advisory services in home country and international law.<sup>185</sup> Current market access negotiations have not led to substantial progress.

As mentioned earlier, the plurilateral negotiation process has led *demandeur* WTO Members (namely Australia, Canada, the EU, Japan, New Zealand, Norway and the United States) to submit requests for further liberalization. They have identified 16 WTO Members that have not undertaken any commitments in the legal services sector or have made commitments that contain significant restrictions. The Members who received the request for further liberalization are Brazil, China, Egypt, Hong Kong, India, Indonesia, the Republic of Korea, Malaysia, Mexico, Peru, Chinese Taipei, Singapore, South Africa, Thailand, the Philippines and Turkey. Negotiations have not resulted in significant progress.<sup>186</sup> In particular, relatively few Members have since recorded commitments concerning legal services for the first time.<sup>187</sup> Furthermore, relatively few Members have improved significantly their commitments either in the legal services sector or other services sectors. This leaves room for improvement on a regional basis; a process that can be addressed through PTAs.

## **B. Liberalization of Legal Services in EU and EFTA PTAs**

The first section of this chapter identified a group of 20 agreements concluded by the EU or the EFTA with third countries that are relevant for the analysis of liberalization of trade in legal services. However, negotiations are ongoing and not all commitment schedules are available, notably in the case of the *EU–Canada* Comprehensive Economic and Trade Agreement. Furthermore, agreements such as the SAAs with Albania, Croatia, Macedonia and Montenegro do not feature scheduling mechanisms and must be excluded from the scope of the analysis.

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<sup>185</sup> WTO-CTS (2010d), *Legal Services*, Council for Trade in Services Special Session, Background Note by the Secretariat, S/C/W/318, 14 June 2010.

<sup>186</sup> WTO-CTS (2007), *Review of Progress in Legal Services*, Council for Trade in Services Special Session, Communication from Australia, JOB (07)/198, 5 December 2007; WTO-CTS (2011a), *Communication from Australia, Assessment of Progress in Legal Services, April 2011*, Council for Trade in Services Special Session, JOB/SERV/48, 15 April 2011.

<sup>187</sup> Based on available data only Korea, Indonesia and Pakistan have done so.

The analysis therefore focuses on the following agreements classified on a regional basis:

- Chile (*EU–Chile; EFTA–Chile*),
- Colombia (*EU–Colombia; EFTA–Colombia*),
- Peru (*EU–Peru; EFTA–Peru*),
- Central America (*EU–CA*),
- The Caribbean States (*EU–CARIFORUM*),
- Ukraine (*EFTA–Ukraine*),
- The GCC (*EFTA–GCC*),
- Hong Kong (*EFTA–Hong Kong*),
- Japan (*Switzerland–Japan*)
- The Republic of Korea (*EU–Korea; EFTA–Korea*).

In addition, there are ongoing negotiations between the EU and WTO Members who were recipients of the collective request (the group includes Singapore, Malaysia, Indonesia, India and Brazil). These may yet result in substantive liberalization and deserve some attention.

PTAs generally take as a starting point the results of GATS negotiations. In some cases partners have already liberalized their market to a certain extent and the purpose of the agreement is to refine commitments. Others have never made commitments in the legal services sector and negotiations aim to secure a commitment for the first time. Therefore the objectives of these agreements are diverse and depend on the needs of partners.

## **1. Chile: EFTA–Chile and EU–Chile**

Chile undertook commitments in the legal services sector during the Uruguay round.<sup>188</sup> It subsequently submitted an initial and revised offer during the Doha round negotiations.<sup>189</sup> Only the revised offer provides for improvement to commitments in the sector.

The 1994 commitments were made in the area of international legal services, particularly the provision of legal advice under international and international commercial law. Nevertheless these commitments were not significant as it recorded *unbound* in modes 1 and 2 for both market access and national treatment, but recorded *none* (total liberalization) in mode 3. In mode 4, Chile made *unbound* commitments except for the transfer of natural persons within a foreign company. In this category, Chile recorded residency and domicile requirements for senior and specialized personnel who can be admitted temporarily for a renewable period of two years subject to the labor and social legislation in force.

The Chilean 2005 revised offer extended the scope of their commitments to include the provision of legal advice under foreign law. For these services it proposed full liberalization in modes 1, 2 and 3. In addition, the revised offer included arbitration and mediation/conciliation services, which were fully liberalized except in modes 1 and 2 for arbitration that falls within the sole jurisdiction of the national arbitration courts. Commitments in mode 4 remained unchanged.

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<sup>188</sup> GATS (1994c), *Schedules of Specific Commitments, Chile*, GATS/SC/18, 15 April 1994, p. 5.

<sup>189</sup> WTO-CTS (2003a), *Chile: Initial Offer*, Council for Trade in Services, Special Session TN/S/O/CHL, 16 July 2003; WTO-CTS (2005e), *Chile: Conditional Revised Offer*, Council for Trade in Services, Special Session, TN/S/O/CHL/Rev. 1, 5 July 2005.

FTAs concluded in 2003 with the EU<sup>190</sup> and in 2004 with the EFTA<sup>191</sup> feature the same commitments. In these agreements, Chile did not make commitments for the provision of legal advices under international and foreign law or arbitration and mediation/conciliation service as it did in the GATS negotiations. Instead it made commitments for all legal services and then specified reserved activities. Thus mode 2 is fully liberalized. Modes 1 and 3 are also fully liberalized with the exception of a list of activities that are subject to nationality requirements (public defenders, public notaries, custodians, archivists, arbitrators at law, registrars, court attorneys, public auctioneers, and bankruptcy receivers). A list of domestic law activities are also reserved for Chilean nationals. They include legal representation before the Chilean court and a non-exhaustive list of other activities.<sup>192</sup> Finally, commitments in mode 4 remain the same as under the GATS.

The EU and EFTA FTAs represent significant improvements compared to the 1994 GATS commitments. They are more liberal than the revised offer as they include, to a certain extent, commitments concerning the provision of legal advice under host country law. However, the greater change relates to the commitments process. While under GATS Chile used the positive-list approach, in the FTAs it recorded the whole legal services sector and then listed restrictions or reserved activities. This is closer to the negative-list approach and makes the regime more transparent.

These schedules of commitments are very similar to those found in *US–Chile*, although they do not list the regulatory measures in question. This latter agreement does not provide for greater liberalization than that found in *EU–Chile* and *EFTA–Chile*, but like the NAFTA, it includes an Annex<sup>193</sup> on Foreign Legal Consultants, which could serve as a basis for the development of a standard.

Chilean FTA commitments are more liberal than their GATS commitments. Furthermore they offer greater transparency and meet the actual needs of foreign lawyers in Chile. Chile does not provide rules for temporary practice (mode 4) therefore there are no regulatory restrictions on foreign lawyers practicing on a temporary basis.<sup>194</sup> However, there is a Foreign Legal Consultant regime without the need of foreign consultant licence. The only option available is the full license, which requires permanent residency and full qualification as a local lawyer.<sup>195</sup> As the nationality requirement for lawyers was removed in 2007, this change is not reflected in FTA commitments. As a result, foreign lawyers may re-qualify but must undertake a five years law degree at a Chilean University and obtain a license from the Supreme Court.<sup>196</sup>

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<sup>190</sup> *EU–Chile*, above note 74.

<sup>191</sup> *EFTA–Chile*, above note 107.

<sup>192</sup> These activities are among other things: Drafting of articles of incorporation and amendments thereto; mutual termination of obligations or liquidation of corporations; liquidation of community property between spouses; distribution of property; articles of incorporation of juridical persons, associations, water canal members, and cooperatives associations; agreements governing financial transactions; corporate bond issuance agreements; and sponsoring applications for legal representation made by corporations and foundations.

<sup>193</sup> *US–Chile* above note 154, Annex 11.9, Section B.

<sup>194</sup> FORD (2009), *Practice Guide: Chile*, 26 February 2009 <http://international.lawsociety.org.uk> (last visit: 1.10.2012).

<sup>195</sup> APEC LEGAL SERVICES INITIATIVES (2009b), *APEC Economy: Chile; Jurisdiction: Chile*, <http://www.legalservices.apec.org> (last visit: 1.10.2012).

<sup>196</sup> FORD (2009), above note 194.

## 2. Colombia: EFTA–Colombia and EU–Colombia

Colombia's 1994 GATS commitments in the legal services sector covered legal advisory services in foreign and international law with the exclusion of advice and litigation under national law. For these services, Colombia recorded *none* in modes 1 and 2 under both market access/national treatment columns, while it recorded *unbound* in modes 3 and 4.<sup>197</sup> Their initial offer did not contain any improvements to these commitments, while their revised offer is not available.

Colombia has also made commitments in the legal services sector in the FTA concluded with the EFTA in 2011<sup>198</sup> and the pending FTA with the EU<sup>199</sup>. Commitments in *EFTA–Colombia* essentially replicate GATS commitments. The only improvement concerns recording *none* in mode 3, which should only have a minor impact on advisory services provided under foreign and international law. In mode 4, Colombia has made commitments for business visitors and installers and maintainers, which are not related to legal services.

In the *EU–Colombia* agreement, Colombia made commitments concerning all legal services, but specified that only locally qualified lawyers could supply services under domestic law. Colombia recorded *none* in modes 1, 2 and 3, which do not differ substantially from other agreements. In contrast, the agreement provides for significant improvements in mode 4. In mode 4, *EU–Colombia* incorporates the practice described earlier, which means that rules on temporary services are included in the main text of the agreement and subject to reservations recorded in schedules. In the main text of the agreement the parties have made commitments for all categories of temporary services. Furthermore Colombia has recorded no reservations therefore the EU model described earlier applies fully.

It appears that foreign lawyers are authorized to provide legal advice on foreign and international law without the need for a specific license. Furthermore the absence of a national bar association means that no membership is required. A re-qualification procedure makes it possible to practice Colombian law provided that the applicant submits evidence of a law degree and a certification of knowledge of a specific area of Colombian law. This last requirement can be achieved either by undertaking academic courses at an approved Colombian university or by obtaining satisfactory results in the national examination for final year law students. The process takes 2–4 months.<sup>200</sup> With respect to law firms, foreign law firms can only operate in Colombia by forming a joint venture with a Colombian law firm and operating under their license.<sup>201</sup> These issues are not covered by market access and national treatment but rather by provisions on domestic regulations.

The *EU–Colombia* agreement incorporates obligations laid down in the GATS, which are mainly transparency requirements. The *EFTA–Colombia* goes further with the incorporation of a necessity test.<sup>202</sup> Liberalization of legal services under *EFTA–Colombia* and *EU–Colombia* does not differ substantially from GATS commitments in modes 1 and 2.

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<sup>197</sup> GATS (1994d), Schedules of Specific Commitments, Colombia, GATS/SC/20, 15 April, p. 4.

<sup>198</sup> *EFTA–Colombia*, above note 111.

<sup>199</sup> *EU–Colombia–Peru*, above note 82.

<sup>200</sup> BONILLA (2012), *How to qualify as a Lawyer in Colombia*, International Bar Association, <http://www.ibanet.org> (last visit: 1.10.2012).

<sup>201</sup> USTR (2011), *2011 National Trade Estimate Report on Foreign Trade Barriers*, Ambassador Kirk, Office of the United State Trade Representative, March 2011, pp. 97–103.

<sup>202</sup> *EFTA–Colombia*, above note 111, Article 4.7.

However, mode 3 commitments are improved, and now offer full liberalization for the provision of legal advice in foreign and international law. Moreover *EU-Colombia* contains substantial improvements for the liberalization of legal services provided on a temporary basis.

### 3. Peru: EFTA-Peru and EU-Peru

In 1994 Peru did not make any commitments in the legal services sector. In the Doha Round negotiations, their initial offer did not contain any improvements and their revised offer is not available. *EFTA-Peru* does not provide for substantive liberalization of trade in services in general or legal services in particular. In contrast, *EU-Peru* includes significant liberalization of services including legal services.

As a general rule, for all professional services, Peru requires the recognition of a diploma obtained abroad by the competent authority in Peru. For the recognition of diplomas, residency in Peru is required. Furthermore in some professions, membership of the relevant professional body may be necessary. With regard to legal services, Peru has made commitments concerning all legal services without any distinction between advice/representation on international/home/third country law. There are restrictions regarding notary services in modes 1 and 3, which are subject to quantitative restrictions and nationality requirements. Peruvian commitments do not go any further and lack transparency in modes 1, 2 and 3.

In contrast, *EU-Peru* offers significant improvements in mode 4. Like *EU-Colombia*, *EU-Peru* incorporates rules on temporary services in the main text of the agreement, which are subject to reservations in schedules. Peru has only made commitments for ICT and GT categories with the exclusion of BV and IP categories. It has recorded the requirement to obtain a contract approved by the Ministry of Labor, another to train a Peruvian for the same position and quotas. Furthermore, it has recorded requirements concerning the recognition of qualifications, residency requirements and a requirement to be an active member of the bar association.

In current domestic regulation on legal services, it appears that the Peruvian regime does not provide for temporary legal practice. Similarly, Peru does not have a Foreign Legal Consultant regime, which means that foreign lawyers must re-qualify and professional practice is subject to the recognition of qualifications. The preliminary step is the recognition of degrees obtained in countries with which Peru has signed a recognition agreement.<sup>203</sup> Degrees from other countries have to be validated by a recognized university. In addition to the recognition of foreign degrees, foreign lawyers who want to practice in Peru must be a member of the Lima Bar Association.<sup>204</sup> Therefore the regime provides for the full integration of foreign lawyers into the Peruvian legal system under conditions that remain to be established.

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<sup>203</sup> These countries are: Argentina, Bulgaria, Bolivia, Colombia, Costa Rica, Cuba, Chile, China, Ecuador, El Salvador, Spain, Guatemala, the Holy See, Honduras, Hungary, Mexico, Nicaragua, Panama, Romania, Russia, Ukraine, Uruguay and Venezuela.

<sup>204</sup> APEC LEGAL SERVICES INITIATIVES (2009c), *APEC Economy: Peru; Jurisdiction: Peru*, <http://www.legalservices.apec.org> (last visit: 1.10.2012).

While *EU–Peru* goes further than the GATS in the sense that Peru has made commitments in legal services for the first time, the agreement does not provide for substantive liberalization in modes 1, 2 and 3. Notably, it does not promote a Foreign Legal Consultant regime. With respect to liberalization in mode 4, Peruvian commitments feature liberalization for intra-corporate transfers and contract service suppliers. In contrast liberalization is more limited for independent professionals and graduate trainees.

#### 4. Central America: EU–CA

The EU and the States of Central America (CA) began negotiations on an Association Agreement in 2007. These were successfully concluded in 2010 in Madrid. The agreement is expected to come into force in mid-2012. The Central America countries are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

Two of these countries (El Salvador<sup>205</sup> and Panama<sup>206</sup>) undertook commitments in the legal services sector during the Uruguay Round. El Salvador made commitments concerning legal advisory services, but did not specify under which law, which may therefore include home country law. For these services, it committed to full liberalization in modes 1, 2 and 3 under market access and national treatment. Strangely, the mode 4 market access column mentions national licensing requirements in order to practice in the country, where only a diploma from a national university gives the right to practice. Panama made commitments concerning legal consultancy under international and home country law with the exclusion of representation services in local courts, maritime and arbitral authorities and the drafting of legal documents. For these services, Panama committed to full liberalization under modes 1, 2 and 3. Horizontal commitments apply in mode 4, but do not relate to legal services.

In the *EU–CA* agreement all Central American countries made commitments in the legal services sector. With the exception of Panama, these concern all legal services with the exclusion of advisory, documentation and certification services provided by legal professionals entrusted with public functions, such as notaries. Panama mirrors its GATS commitments and has made commitments concerning legal consultancy under international and home country law with the exclusion of representation services in local courts, maritime and arbitral authorities and the drafting of legal documents.

It appears that these commitments reflect the same concern to reserve the practice of local law (advice and representation services) to national lawyers. Thus in mode 1, with the exception of El Salvador and Panama, all CA States have recorded the requirement for local qualification, which is subject to nationality requirements. Mode 2 is generally fully liberalized. In mode 3, Costa Rica reserves the practice of domestic, international and foreign law to lawyers who are fully qualified in Costa Rica and nationals of the country. In contrast, Guatemala, Honduras and Nicaragua reserve the practice of domestic law (both the provision of legal advice and representation) to locally qualified lawyers (subject to a nationality requirement), but liberalize the practice of other law. Guatemala requires foreign lawyers to provide legal services only in partnership or in association with national lawyers. El Salvador has recorded *none* under commitments concerning legal consultancy and information and Panama has done likewise for international and qualification law.

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<sup>205</sup> GATS (1994f), Schedules of Specific Commitments, El Salvador, GATS/SC/29, 15 April 1994.

<sup>206</sup> GATS (1997), Schedules of Specific Commitments, Panama, GATS/SC/124, 15 April 1994.

Finally in mode 4, *EU-CA* incorporates the practice described earlier, which means that rules on temporary services are included in the main text of the agreement and subject to reservations recorded in schedules. In the main text parties have made commitments concerning ICT and GT categories while excluding CSS and IP categories. In their schedules Costa Rica, El Salvador and Nicaragua have inscribed *unbound* in their commitments, which is equivalent to no liberalization. Honduras has recorded restrictions like residency requirements, which *de facto* correspond to no liberalization. Finally, Guatemala has undertaken full liberalization; while Panama has recorded economic needs test requirements.

Overall the major benefit of the *EU-CA* agreement in the legal services sector is to increase the number of states that have undertaken commitments. It also provides a model, which demonstrates improvements in the quality of commitments and is closer to the current state of national legislation. Furthermore, it has provided for further liberalization and clarification in mode 4, although there is still room for improvement.

## 5. The Caribbean States: EU-CARIFORUM

*EU-CARIFORUM* is an Economic Partnership Agreement (EPA) concluded between the EU and 15 Caribbean States on 15 December 2007 that entered into force 1 November 2008. It aims at promoting trade between the two partners through trade development, sustainable growth and poverty reduction. Similar agreements with African and Pacific countries are underway. This agreement includes liberalization of trade in legal services.

The 15 Caribbean states are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and Grenada, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Five of these states undertook commitments in the legal services sector during the Uruguay Round: Barbados<sup>207</sup>, the Dominican Republic<sup>208</sup>, Jamaica<sup>209</sup>, Guyana<sup>210</sup> and Trinidad and Tobago<sup>211</sup>.

Barbados made commitments concerning legal documentation and certification services, although not in modes 1 and 2. In mode 3, only natural persons can practice law and in mode 4 only attorneys who are registered and admitted to the local bar can practice law. The Dominican Republic made commitments concerning legal advisory and information services. It undertook full market access liberalization under modes 1, 2 and 3 and in mode 3 under national treatment. Jamaica and Trinidad and Tobago made commitments concerning legal advice under international law, and Jamaica added home country law. For these services, Trinidad and Tobago committed to full liberalization in all modes under market access and national treatment conditions, while Jamaica committed fully in modes 1 and 2 but required re-qualification to the local bar in mode 3 and did not make any commitments in mode 4. Finally Guyana committed fully for all legal services in modes 1, 2 and 3. It also recorded *unbound* in mode 4 for market access and included re-qualification requirements in order to practice on a temporary basis.

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<sup>207</sup> GATS (1994g), Schedules of Specific Commitments, Barbados, GATS/SC/9, 15 April 1994.

<sup>208</sup> GATS (1994i), Schedules of Specific Commitments, the Dominican Republic, GATS/SC/28, 15 April 1994.

<sup>209</sup> GATS (1994h), *Schedules of Specific Commitments*, Jamaica, GATS/SC/45, 15 April 1994.

<sup>210</sup> GATS (1994j), Schedules of Specific Commitments, Guyana, GATS/SC/37, 15 April 1994.

<sup>211</sup> GATS (1994k), Schedules of Specific Commitments, Trinidad and Tobago, GATS/SC/86, 15 April 1994.

With the exception of the Bahamas, Haiti and Surinam, all Caribbean States have undertaken commitments in the legal services sector. Overall there are wide differences in the scope and the depth of these commitments. The most liberal commitments cover all legal services, which include legal advice and representation under host country, home country and international law. Three Caribbean States have undertaken such commitments: Jamaica, Dominica and Guyana. All three states have committed to full liberalization in modes 1 and 2. In mode 3, Jamaica and Guyana have made a full commitment, while Dominica recorded *unbound*. However, they have all recorded re-qualification requirements. Horizontal commitments apply to all of them in mode 4.

A less liberal approach has been taken to commitments on the provision of legal advice (with the exclusion of representation services), which include home country, third country, international and host country law. Three Caribbean States have undertaken such commitments: Antigua and Barbuda, the Dominican Republic and Trinidad and Tobago. These states have undertaken full liberalization under market access and national treatment in modes 1, 2 and 3. However, Trinidad and Tobago has recorded unbound in mode 1 under both market access and national treatment. In mode 4 horizontal commitments apply to all.

Most of the Caribbean States have made commitments concerning legal advice on home country law and international law (Antigua and Barbuda, Belize, the Dominican Republic, Grenada, Saint Lucia, and Trinidad and Tobago). Generally, they have undertaken full liberalization in modes 1, 2 and 3 except Belize and St Lucia where mode 3 is *unbound*. In mode 4 horizontal commitments apply to all.

Finally, the minimum level of commitments concern legal advisory services on home country law. Three Caribbean States (Barbados, Saint Christopher and Nevis and Saint Vincent and the Grenadines) have limited their commitments to these services. Barbados has undertaken full commitments in modes 1 and 2 but has entered reservations in modes 3 and 4, while the other two states have recorded *unbound* in modes 1, 3 and 4, which *de facto* corresponds to no commitments.

In mode 4, *EU-CARIFORUM* incorporates the EU practice described earlier, whereby rules on temporary services are incorporated into the main text, and are subject to reservations entered in schedules annexed to the agreement. In *EU-CARIFORUM* agreement parties have made commitments concerning all categories of temporary services. Specifically, most states have committed to conditions related to key personnel and graduate trainees where work permits may be required.

Overall the *EU-CARIFORUM* agreement represents significant progress, as many Caribbean states have undertaken commitments in the legal services sector for the first time. For states that had already made GATS commitments, the agreement does not introduce any new commitments in modes 1, 2 and 3. In contrast, new mode 4 commitments offer greater security and transparency.

## **6. Ukraine: EFTA-Ukraine**

Ukraine joined the WTO on 16 May 2008. As result its schedule of commitments has benefited from previous work and discussions that have taken place within the organization. At the same time, as a latecomer the price of accession was probably higher and it has had to liberalize more fully than the original Members.

Furthermore, Ukraine did not operate a market economy and did not regulate the legal profession.<sup>212</sup> The general perception in the former Soviet Union was that a lawyer was a professional paid by the government to undertake legal aid cases and the understanding of a lawyer as client's general advisor was underdeveloped.<sup>213</sup> Therefore, the legal profession in Ukraine (as in Russia) is relatively unregulated. This probably explains their very liberal commitments in the sector.

Unlike the majority of WTO Members, Ukraine's commitments are not limited to the provision of legal advice under international and home country law, but include a broader scope of legal services. Not only did Ukraine undertake commitments in consultancy services under home country, international and third country law, it also included advisory and representation services in criminal law and juridical procedures in other fields of law, legal documentation and certification services, advisory and information services other than notary services and notary services. For all these services, Ukraine committed to full liberalization in modes 1, 2 and 3 and recorded *unbound* in mode 4.<sup>214</sup>

These commitments reflect the current state of regulation in Ukraine, which does not have a national bar association. There are two categories of private sector lawyers: (a) advocates, consisting of regulated professionals who are law graduates that have passed a qualifying examination; and (b) legal advisers consisting of law graduates who practice law without further qualifications. However, advocates do not have a monopoly on the provision of legal services and there are no areas of legal practice reserved solely for advocates. Thus there is no requirement for foreign lawyers to register with the bar association in order to practice and theoretically there are no restrictions on the type of activities that they can perform. In the same vein, foreign law firms are only subject to legislation related to commercial activities. While it is likely that regulation will be introduced<sup>215</sup> the very liberal commitments undertaken under the GATS will make this difficult without breaching GATS obligations.

In this context commitments undertaken under the *EFTA-Ukraine* agreement do not contain substantive improvements regarding the liberalization of trade in legal services. It is not expected that the future *EU-Ukraine* agreement will provide for further liberalization in modes 1, 2 and 3. On the other hand, more specific rules in mode 4 might significantly improve the provision of cross-border legal services on a temporary basis; an improvement that is not found in the *EFTA-Ukraine* agreement.

## 7. The GCC: EFTA-GCC

The Cooperation Council for the Arab States of the Gulf (GCC) is a customs union consisting of six members: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE). Only two of these members undertook commitments in the legal services sector, either as a result of the Uruguay Round or following their accession to the WTO (Saudi Arabia<sup>216</sup> and Oman<sup>217</sup>).

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<sup>212</sup> CHARNOVITZ (2008), *Mapping the Law of WTO Accession*, M.Janow/ V. Donaldson/ A. Yanovich (eds), The WTO: Governance, Dispute Settlement and Developing Countries, World Trade Organization, pp. 855-919.

<sup>213</sup> IBA (2012), *2<sup>nd</sup> International Legal Forum St Petersburg*, Report by Hans-Jürgen Hellwig, 16-19 May 2012.

<sup>214</sup> GATS (2008), *Schedules of Specific Commitments, Ukraine*, GATS/SC/144, 10 March 2008 pp. 7-8.

<sup>215</sup> THE LAW SOCIETY OF ENGLAND AND WALES (2011b), *How to Practise in Ukraine*, The Law Society International Division, 11 December 2011, <http://international.lawsociety.org.uk> (last visit: 1.10.2012).

<sup>216</sup> GATS (2006), *Schedules of Specific Commitments, The Kingdom of Saudi Arabia*, GATS/SC/141, 29 March 2006, pp. 2-5.

<sup>217</sup> GATS (2000), *Schedules of Specific Commitments, Oman*, GATS/SC/132, 22 December 2000, pp. 1-11.

Not all of the offers made during the Doha round have been made public and none of the published offers feature improvements in the sector.

Saudi Arabia undertook commitments concerning the provision of advisory services under home country and international law. In modes 1 and 2 under market access and national treatment it undertook full liberalization. In mode 3, it recorded a foreign equity limit of 75% under market access, and under national treatment a nationality restriction for court appearances. In mode 4, it undertook commitments for ICT, CSS and IP categories. For ICTs it committed to a renewable two year stay which is conditional on three years of experience in the same field. Furthermore, ICTs are limited to 25% of the total workforce of the company although a minimum of three persons is allowed. With regard to CSS and IPs, Saudi Arabia allows a renewable stay of no more than 180 days. IPs are required to have academic and professional qualifications and three years of experience in the same field.

Oman undertook commitments concerning the provision of advisory services under home country, third country and international law. Specifically, it undertook full liberalization in modes 1, 2 and 3 under market access and national treatment. However, in a horizontal commitment in mode 3, it limited foreign equity to 49% for companies incorporated in Oman and imposed minimum capital requirement for foreign companies. In mode 4, Oman has made commitments concerning BVs and ICTs. ICTs may stay for up to two years, and subject to renewal, another two years making a maximum of four years.

The *EFTA–GCC* agreement also features commitments related to the legal services sector. All GCC Members have made commitments with the exception of Kuwait that has recorded *unbound* for all modes under both market access and national treatment (in practice this means no commitments). Other GCC Members have all made commitments related to advisory services but they vary in scope. Bahrain and Oman are more liberal; their commitments cover both foreign and international law, while UAE, Saudi Arabia and Qatar commitments only relate to home country and international law. For the provision of advisory services, all five GCC Members have committed to full liberalization under modes 1 and 2. In mode 3, they have recorded different types of restrictions. Under market access, the UAE, Saudi Arabia and Oman limit foreign equity restrictions to a maximum of 75% for the UAE and Saudi Arabia and 70% for Oman. However, the UAE has committed to lifting this restriction five years after the entry into force of the agreement.

Qatar stipulates that law firms can only take the form of a sole proprietorship or a partnership. Bahrain has licensing requirements. Non-Bahraini or GCC citizens may provide legal advice only if employed by a lawyer licensed to practice law in Bahrain. However, this requirement does not apply to EFTA lawyers, who can provide home country legal advice. Under national treatment, Bahrain and Oman have undertaken full liberalization while the UAE, Saudi Arabia and Qatar have recorded nationality requirements for representation before national courts.

In mode 4, all GCC Members have made commitments concerning ICTs, CSS and IPs. ICTs can stay for a renewable period ranging from two years (Bahrain, Saudi Arabia and Oman) to three years (the UAE and Qatar for executives/managers) or more (Qatar for specialists). Authorization is generally subject to the condition that the ICT has worked for their company for at least one year (the UAE, Bahrain, and Qatar) or have at least three years of experience (Saudi Arabia). There are also limitations on the percentage of ICTs out of the total number of service supplier personnel. These limits range from 50% (the UEA) to 25% (Saudi Arabia) or

20% (Oman). Bahrain requires the hiring of a certain percentage of nationals. Qatar has made no commitments in relation to CSS while other GCC Members allow varying lengths of stay: 90 days (Oman), 90 days renewable (the UAE), 180 days maximum (Bahrain) and 180 days renewable (Saudi Arabia). With the exception of Saudi Arabia, GCC Members have made no commitments regarding IPs. Saudi Arabia authorizes a renewable stay of 180 days subject to academic and professional qualifications and three years' experience in the same field.

It seems that these countries' regimes correspond to *EFTA–GCC* commitments. Jurisdictions like Oman have gone further in authorizing foreign lawyers to represent their clients before the courts. However, this may change in the near future as the Ministry of Justice has adopted a decree that will bar foreign lawyers from appearing in all of its courts (these restrictions do not fall within the scope Oman's *EFTA–GCC* commitments).<sup>218</sup> It appears that the most frequent barriers to trade are foreign equity limitations, restrictions on the form of law firms, nationality requirements for court representation and the requirement to be employed by local lawyers in order to provide legal advice.

The *EFTA–GCC* agreement offers significant improvements for the liberalization of legal services. Some states have undertaken commitments in the sector for the first time, namely the UEA, Bahrain and Qatar. It also features improvements on preferential treatment, for instance foreign equity restrictions in the UAE and requirement to work for local lawyers in Bahrain. The *EU–GCC* agreement is expected to offer the same degree of liberalization, and improvements on mode 4 commitments for independent professionals and graduate trainees. Furthermore, it is expected to offer improvements on GCC commitments, which sometimes include unnecessary restrictions such as nationality requirements for representation services.

## **8. Hong Kong: *EFTA–Hong Kong***

In 1994 Hong Kong did not make any commitments in the legal services sector. In the Doha Round negotiations, neither their initial nor their revised offer contained any commitments related to legal services. The *EFTA–Hong Kong* agreement takes a negative-list approach, whereby Hong Kong expressly notes that with respect to legal services, it reserves the right to adopt or maintain any measure. This absence of commitments in the legal services sector stands in sharp contrast with the liberal regime applied in this jurisdiction, which provides for temporary practice, foreign consultant rules and a re-qualification regime.<sup>219</sup> Therefore the *EFTA–Hong Kong* agreement does not offer any significant progress in the sector.

## **9. Japan: Switzerland–Japan**

Japan has gradually liberalized its legal services sector in order to build their domestic capacity. The last two decades have witnessed the removal of the most significant impediments to cross-border legal practice.<sup>220</sup> This process began in 1986 and continued in the context of GATS negotiations.

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<sup>218</sup> USTR (2011), *above note 201*, p. 272.

<sup>219</sup> APEC LEGAL SERVICES INITIATIVES (2009d), *APEC Economy: Hong-Kong; Jurisdiction: Hong-Kong*, <http://www.legalservices.apec.org> (last visit 1.10.2012).

<sup>220</sup> MARTIN (2007), *Liberalization and Cravathism: How Liberalization Triggered the Reorganization of the Legal Profession in Germany and Japan*, Stanford Journal of International Law, Vol. 43, No. 1, Winter 2007, pp. 169-199, p.191.

The Japanese legal profession is divided into six professions that are regulated by the Ministry of Justice, the Japanese Federation of Bar Associations and the Supreme Court. These professions are lawyers (*bengoshi*), Judicial Scriveners (*shihoshoshi*), Tax attorneys (*zeirishi*), Patent attorneys (*benrishi*), Scriveners (*gyoseishoshi*) and Registered Foreign Attorneys (*Gaikoku-Jimu-Bengoshi*, *GJB*).<sup>221</sup> Although Japan has made commitments regarding all these professions, the main discussions revolve around the *GJB* and their relationship with Japanese lawyers.

Originally, foreign lawyers were not allowed to practice in Japan except as in-house counsels. This situation changed in 1986 with the adoption of the *Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers* (the “Foreign Lawyer Act”).<sup>222</sup> Under this act, foreign lawyers (*GJB*) were authorized to practice as legal consultants and provide advice on home country and international law. Foreign legal consultants must be licensed, which meant they met the following requirements: they are qualified in their home jurisdiction, they have practiced as a lawyer for at least five years in their home jurisdiction, they are not subject to disqualification in their home jurisdiction, they intend to undertake the profession in good faith, they possess the means to perform their functions properly and steadily, and they are able to compensate for any damages caused to their clients. Furthermore they were subject to numerous restrictions: they could not form partnership with *bengoshi*, they could not employ *bengoshi*, they could not have more than one office in Japan, they had to use the title *Gaikoku-Jimu-Bengoshi* together with the name of their home jurisdiction, and firms could not use their own name but had to use the name of the lawyers from the parent firm who were admitted to practice in Japan, (which changed every time a lawyer move in or out of the office).

Negotiations between Japan, the United States and the EU on legal services in the Uruguay Round focused on restrictions on partnership, employment of local lawyers, name restrictions and the requirement to have five years’ experience in the home jurisdiction. They resulted in amendments to the *Foreign Lawyers Act* in 1994, which were included in the 1994 Japanese GATS commitments. Some restrictions were lifted, such as those related to naming (although the *Gaikoku-Jimu-Bengoshi* mention remained)<sup>223</sup>, others were relaxed (such as those allowing joint enterprise arrangements) but others were maintained (such as restrictions on partnership with Japanese firms, the employment of Japanese lawyers and the requirement to have five years’ experience in the home jurisdiction).

Otherwise, in modes 1, 2, 3 and 4 Japan recorded the requirement that legal services be provided by natural persons. In modes 1, 2 and 4 they have to stay in Japan for not less than 180 days per year. Furthermore, in mode 4 ICTs are permitted to stay for a maximum period of five years, under the condition that they have worked for their employer for at least one year prior to the date of application.

In the Doha Round, Japan submitted an initial offer in March 2003<sup>224</sup> and a revised offer in June 2005.<sup>225</sup> The initial offer did not offer any substantive improvements to commitments in

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<sup>221</sup> LAW COUNCIL OF AUSTRALIA (2011c), *Country Fact Sheet: Japan*, 11 July 2011.

<sup>222</sup> Ministry of Justice of Japan (1986), *above note 222*.

<sup>223</sup> GATS (1994I), *Schedules of Specific Commitments, Japan*, GATS/SC/46, 15 April 1994.

<sup>224</sup> WTO-CTS (2003b), *Japan: Conditional Initial Offer*, Council for Trade in Services Special Session, TN/S/O/JPN, 31 March 2003.

<sup>225</sup> WTO-CTS (2005j), *Japan: Conditional Revised Offer*, Council for Trade in Services Special Session, TN/S/O/JPN/Rev. 1, 24 June 2005.

the legal services sector with the exception of a reduction in the requirement to have five years' experience in the home jurisdiction and a full commitment to representation services in international arbitration. In mode 4 it extended the length of temporary stay, which became one to three years renewable. However, the revised offer featured a major change that incorporated amendments to the Foreign Lawyers Act that took place in 2003. This amendment allowed foreign lawyers to form partnerships with *bengoshi* provided that foreign lawyer was licensed. Furthermore, it allowed foreign law firms to hire Japanese lawyers. Since then, Japanese and foreign registered lawyers have been able to provide legal advice in a single firm. The revised offer also provided clarification in mode 4 and specified commitments concerning key personnel. For the first time, the revised offer made commitment concerning IPs and CCS. In all these categories Japan lifted the commercial presence requirement under market access and the residency requirement under national treatment, which enabled legal services to be provided on a fly in/out basis.

The revised Japanese offer incorporated legislative changes and reflected the regulatory status quo. Most barriers to trade in legal services have now been removed, although some restrictions remain. It should be noted that the current regime still prevents lawyers with foreign qualifications from setting up offices as incorporated bodies and establishing multiple branches.<sup>226</sup> In its revised GATS offer Japan recorded that legal services provided by GJB must be supplied by natural person in mode 3. Although the restriction has recently been lifted<sup>227</sup>, it remains to be seen whether it will be included in another revised offer before the conclusion of the Doha Round.

The *Switzerland–Japan* agreement does not offer significant liberalization in the legal services sector. Japanese commitments incorporate the revised offer although phrased differently as the parties have adopted the negative-list approach. Therefore the main added-value of the agreement are the early benefits of the results of Doha Round negotiations, as the GATS revised offer is still conditional, while the *Switzerland–Japan* agreement is already in force.

## 10. The Republic of Korea: EFTA–Korea and EU–Korea

The 1994 Korean schedule of commitments does not include the legal service sector.<sup>228</sup> This absence of commitments reflects the state of regulation in Korea at the time, which was closed to foreign lawyers. Subsequently the position of Korea has evolved with the submission of initial and revised offers, which for the first time contain a commitment in the legal service sector.<sup>229</sup>

The opening of the South Korean legal market to foreign legal services has been motivated by the absence of efficient domestic legal services and high transactions costs for both South Korean companies and foreign companies established in the country caused by restrictive regulations.<sup>230</sup> The timeframe for opening up the Korean market has closely followed South Korea's obligations under the *Korea–US FTA*.<sup>231</sup>

<sup>226</sup> USTR (2011), *above note 201*, p. 203.

<sup>227</sup> MATSUTANI (2012), *Foreign law firms aim for equal treatment: revision to expansion rule might be too little, too late*, The Japan Times, 5 April 2012

<sup>228</sup> GATS (1994e), Schedules of Specific Commitments, Republic of Korea, GATS/SC/48, 15 April 1994.

<sup>229</sup> WTO-CTS (2005f), *Republic of Korea, Revised Offers on Services*, TN/S/O/KOR/Rev.1, 14 June 1994.

<sup>230</sup> EUCCK (2004), *Trade Issues and Recommendation 2004*, [www.eucck.org](http://www.eucck.org) (last visit 1.10.2012).

<sup>231</sup> RUPP/ KIM (2008), *Korean Legal Services Set to Open up*, The National Law Journal, 26 February 2008.

Although this agreement entered into force recently (March 2012) negotiations had started much earlier.<sup>232</sup> The *EFTA–Korea* agreement was concluded in 2006<sup>233</sup> and *EU–Korea* concluded in 2011,<sup>234</sup> these agreements also feature substantial liberalization in legal services.

In its revised offer, South Korea undertook commitments related to advisory services under home country and international law with the exclusion of representation services for juridical or statutory procedures in courts, preparation of legal documents for such procedures and the preparation of notarial deeds. Legal services related to property rights, intellectual property rights, mining rights, rights arising from registration with government agencies, and cases concerning family relationships or inheritance were also excluded. For advisory services Korea committed to full liberalization in modes 1 and 2 in market access and national treatment. In mode 3, under market access it recorded that legal services could only be provided in the form of representative offices. Furthermore, it prohibited association with, or employment of local lawyers. Under national treatment it recorded that Foreign Legal Consultants were required to stay in Korea for not less than 180 days per year. In mode 4, it has made commitments regarding ICT and BV categories. More specifically, with regard to ICT the length of stay was up to three years renewable under the condition that the natural person has been in the employ of the firm for less than one year. Furthermore, it includes specific requirements for executives, senior managers and specialists.

Korean commitments made in *EFTA–Korea* replicate the content of the revised offer, but provide market to Korean legal market as only lawyers of state that have concluded a FTA with Korea are entitled to practice in Korea. In contrast, *EU–Korea* commitments are different, as they mention restrictions that affect all legal services (including domestic services suppliers) in an approach that is similar to the new EU approach. This may be relevant to foreign lawyers who have re-qualified under South Korean law. More importantly, with regard to foreign lawyers, they provide for a three-stage liberalization process consisting of the following:

- a) No later than the date of the entry into force of the agreement, law firms of EU Member States and lawyers licensed in EU Member States, are allowed to provide legal advisory services on the law they are qualified in and international law as a foreign legal consultants;
- b) No later than two years after the date of the entry into force of the agreement, foreign representative offices will be allowed to enter into specific cooperative arrangements with Korean law firms in joint venture arrangements, for cases involving domestic and foreign law;
- c) No later than five years after the date of the entry into force of the agreement, Korea will allow law firms from EU Member States to enter into joint ventures with Korean law firms. However, Korea reserves the right to impose restrictions on the control of firms and the employment of Korean-licensed lawyers as partners or associates.

The remaining Korean commitments in the legal services sector offer the same components as the revised offer with the exception of an additional commitment, whereby Korea commits to authorize lawyers (and not only law firms) to use their home title in their own language, provided that it is used together with the title of Foreign Legal Consultant written in Korean.

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<sup>232</sup> **US–Korea**, above note 28.

<sup>233</sup> **EFTA–Korea**, above note 26, Appendix 1 to Annex VII, pp. 1–9.

<sup>234</sup> **EU–Korea**, above note 27, Annex 7-A list of Commitment, pp. 1251–1256.

In mode 4, the *EU–Korea* agreement incorporates the EU practice (described earlier) regarding the provision of temporary services. In this case, the main text does not deal with CSS and IP categories. Therefore, Korean commitments only cover ICT and GT categories. ICTs may stay for up to three years, while GTs may stay for up to one year. In its schedule, Korea specifies that the movement of natural persons is only allowed in relation to commercial presence, which is the situation for both ICT and GT categories. Unlike their revised offer or commitments made in *EFTA–Korea*, the *EU–Korea* agreement offers commitments regarding the movement of GTs.

Possible cooperation between foreign and Korean lawyers is a significant step in the liberalization of the legal services market. This move is not recorded in the *Foreign Consultant Act*, which gives the *EU–Korea* and *US–Korea* agreements a particularly important role. As mentioned, liberalization is phased in a three-stage process, starting from the date of entry into force of the agreement. The *US–Korea* agreement features the same commitments.<sup>235</sup> However, the date of entry into force of the agreements is different. For *EU–Korea* it is 1 July 2011, while for the *US–Korea* agreement it is 15 March 2012, which may have an impact on access by EU and American law firms to the Korean market. In contrast, the *EFTA–Korea* agreement does not contain such commitments. Therefore Swiss lawyers may be discriminated against in the future particularly as the MFN provision in the *EFTA–Korea* agreement does not provide for automatic adoption, but requires the opening of negotiations upon request. However, the lack of interest from Swiss negotiators – and Swiss lawyers makes it extremely unlikely that action will be taken.

Overall, the liberalization process corresponds to the delicate balance that Korean authorities have sought to strike between the need to improve and modernize legal services and the need to develop domestic capacities. The example of the “brutal” market opening in Germany, which saw eight of the ten biggest law firms being taken over by British companies, is seen as a demonstration of a too-liberal approach.<sup>236</sup> Instead, Korean authorities have decided to follow the Japanese model of progressive liberalization, but more rapidly.<sup>237</sup> FTAs are being used to phase the process. Thus Korea adopted the Foreign Legal Consultant Act (FLCA) on 5 February 2010.<sup>238</sup> Under this act only lawyers or law firms from countries that have concluded a FTA with Korea are entitled to practice in the country. Therefore despite their revised GATS offer, lawyers from WTO Members that have not concluded a FTA with Korea will not be able to provide legal services. Furthermore, the FLCA sets out licensing requirements. However, it does not provide the full range of liberalization set out in the *EU–Korea* and *US–Korea* agreements that remains the unique instrument enabling lawyers to determine the Korean regime. In this situation, FTAs have a more significant role than just liberalization, and become a tool for market opening.

## 11. Future Trends in Legal Services Liberalization under EU and EFTA FTAs

As mentioned earlier the conclusion of free trade agreements is an ongoing process; some agreements are already in force, while others are still under negotiation. The EU and the EFTA have launched negotiations with potential partners that offer great market opportunities and the potential for significant progress in the liberalization of legal services, either because partners have not yet made any commitments in the sector or because they have done so in a

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<sup>235</sup> *US–Korea*, above note 28, Annex II–Korea, pp. 44–45.

<sup>236</sup> EUCCK (2008), above note 32.

<sup>237</sup> RUPP/ KIM (2008), above note 231.

<sup>238</sup> Ministry of Justice of Republic of Korea (2010), above note 25.

very limited way and retain significant restrictions. A brief overview of the negotiations with Singapore, Malaysia, Indonesia, India and Brazil demonstrates the future trends for liberalization under FTAs.

#### **a. Singapore**

Singapore has never entered the legal services sector in its GATS schedules of commitments be it in the Uruguay Round or in the Doha Round. This absence of commitments explains why Singapore was among the 16 recipients of the legal services collective request during plurilateral negotiations. However, the Singaporean regulatory regime relating to legal services can be described as liberal. It aims to maintain quality and ensure that there is no oversupply of lawyers in the domestic legal market. While Singapore maintains a liberal policy regarding the practice of foreign law, the domestic market is tightly regulated in order to fulfill these objectives.<sup>239</sup>

To offer advisory services in foreign and international law in Singapore, foreign lawyers must obtain a license. To qualify as a foreign consultant, applicants must be allowed to practice law in a foreign jurisdiction, be employed either by a foreign law practice located in Singapore or a Singapore law practice, practice foreign and international law in their home country and maintain appropriate insurance cover.<sup>240</sup> In early 2008, there were 881 foreign lawyers practicing in Singapore.<sup>241</sup> This number had grown to 1,200 in early 2012.<sup>242</sup>

Foreign lawyers can obtain a full license if they are a Singaporean national or permanent resident, have attained at least a lower second class honors or equivalent degree conferred by an institution specified in the *Legal Profession Rules*, have sat for and passed the Singapore Bar Examinations and have served a twelve-month training period before being qualified and admitted as an advocate and solicitor of the Supreme Court. Foreign lawyers may seek exemptions from one or more of these requirements. Decisions are taken on a case-by-case basis.<sup>243</sup> Typically, foreign lawyers who are qualified to practice in a common law country and have two years' relevant legal experience can seek exemption and obtain a full license after passing one part of the Singapore Bar Examination.<sup>244</sup> It should be noted that Singapore introduced a bill in 2011 that permits foreign lawyers to practice Singapore commercial law if they pass an examination set by the Singapore Institute of Legal Education. Successful candidates receive a Foreign Practitioner Certificate. The requirement for taking the examination is to have at least one year of experience in offshore legal work in Singapore.<sup>245</sup>

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<sup>239</sup> WTO-TPRB (2008c), *Trade Policy Review of Singapore*, Secretariat Report, WT/TPR/202, 14 July 2008, Geneva, pp. 102–103.

<sup>240</sup> SINGAPORE ATTORNEY GENERAL'S CHAMBERS (1967), *The Legal Profession Act (Chapter 161)*; Part VII of The Legal Profession Act (Chapter 161); Part VII of the Legal Profession (International Services) Rules 2008), <http://www.agc.gov.sg> (last visit: 7.10. 2012).

<sup>241</sup> WTO-TPRB (2008c), *above note 239*.

<sup>242</sup> SINGAPORE MINISTRY OF LAW (2011b), *Speech by Law Minister K Shanmugam during the Committee of Supply Debate 2011*, 9 March 2011, <http://www.agc.gov.sg> ((last visit: 1.10. 2012).

<sup>243</sup> SINGAPORE MINISTRY OF LAW (1967), *The Legal Profession Act (Chapter 161)*, 11<sup>th</sup> February 1967, lastly revised on the 26<sup>th</sup> October 2012, [www.app2.mlaw.gov.sg](http://www.app2.mlaw.gov.sg) (last visit: 1.10.2012);

<sup>244</sup> LAW COUNCIL OF AUSTRALIA (2011d), *Country Fact Sheet: Singapore*, 11 July 2011; APEC LEGAL SERVICES INITIATIVES (2009e), *APEC Economy: Singapore; Jurisdiction: Singapore*, <http://www.legalservices.apec.org> (last visit 1.10. 2012).

<sup>245</sup> SINGAPORE MINISTRY OF LAW (2011a), *Legal Profession (Amendment) Bill Foreign Practitioner Examination*, Fact Sheet 2, 10 January 2011, <http://www.agc.gov.sg> ((last visit: 1.10. 2012).

Singapore concluded FTAs with Australia in 2003<sup>246</sup> and the United States in 2004.<sup>247</sup> It has committed to recognizing the law degrees from four American<sup>248</sup> and ten Australian law schools<sup>249</sup> for the purposes of admission into the Singapore Bar. However, recognition is limited to people who were Singapore citizens or permanent residents at the time they received their degree. In 2008, there were 3,500 lawyers in Singapore and this had grown to 3,700 in 2012.

Specific rules dealing with the practice of law firms are contained in the *Legal Profession (International services) Rules 2008* (referred as *LPIS Rules 2008*). This deals with Singapore Law Practice (SLP), Foreign Law Practice (FLP), the Foreign Law Alliance (FLA), the Joint Law Venture (JLV) and the Qualified Foreign Legal Practice (QFLP). In all of these forms of practice, the *LPIS Rules 2008* impose restrictions on foreign lawyers, which are designed to preserve the control of local lawyers or ensure quality. Thus the SLP may employ local and foreign lawyers. However, foreign lawyers may not be a managing partner or managing director. Furthermore, the total equity in an SLP held by foreign lawyers (whether individually or collectively) as shareholders or partners may not exceed 25% of the total SLP equity. Foreign lawyers (whether individually or collectively) may not directly or indirectly have a controlling interest in an SLP. It should be noted that changes in 2012 raised the equity share of foreign lawyers to a maximum of 33%.<sup>250</sup>

Foreign law firms (FLP) may practice in Singapore. They must obtain a foreign law practice license issued by the Attorney-General, which enables them to operate as standalone practice. They may practice home country and international law. Since 2008, they may practice in a limited area of Singapore law, through local lawyers admitted to the Singapore Bar and holding the requisite license from the Attorney General.<sup>251</sup> In early 2008 there were 76 foreign law firms in Singapore, while in early 2012 the number had reached 104, showing the attractiveness of this jurisdiction for FDI in the sector.<sup>252</sup>

FLPs have the option to enter into a Joint Law Venture (JLV) or a Foreign Law Alliance (FLA) with a Singapore Law Practice (SLP). The requirements for JLVs and FLAs are similar. The FLA does not involve the creation of an independent entity, while the JLV is a separate entity from its constituent practices. It follows that each constituent law practice must have joint representation and participation in the management of the JLV. Under *LPIS Rules 2008* both the FLA and the JLV are permitted to practice Singaporean law through lawyers admitted to the Singapore Bar in the following areas: banking, finance and corporate law, arbitration, intellectual property law, maritime law and other areas of legal practice that facilitate or assist in the growth and development of the Singapore economy.<sup>253</sup>

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<sup>246</sup> **US–Singapore**, above note 158.

<sup>247</sup> Australian–Singapore, above note 159.

<sup>248</sup> The four American law schools are: Harvard, New York University, Columbia University and the University of Michigan.

<sup>249</sup> The ten Australian law schools are Monash University, the University of Melbourne, the University of New South Wales, the University of Sydney, the Australian National University, Flinders University, the University of Queensland, the University of Western Australia, the University of Tasmania and Murdoch University.

<sup>250</sup> SINGAPORE MINISTRY OF LAW (2012), *Allowing Singapore Law Practices more Flexibility to Grow and Enhance International Competitiveness*, Media Fact Sheet, 14 February 2012.

<sup>251</sup> SINGAPORE MINISTRY OF LAW (1967), above note 232; SINGAPORE MINISTRY OF LAW (2008), *The Legal Profession International Services Rules 2008*, 19<sup>th</sup> September 2008, lastly revised on the 29<sup>th</sup> April 2011, [www.app2.mlaw.gov.sg](http://www.app2.mlaw.gov.sg) (last visit: 1.10.2012).

<sup>252</sup> KRIEGLER (2012), *Singapore Flings*, The Lawyer, 16 April 2012, [www.thelawyers.com](http://www.thelawyers.com) (last visit: 1.10.2012).

<sup>253</sup> On the contrary, Article 3 *LPIS Rules 2008* exclude matters such as the constitutional law, conveyancing,

However, they also set out a number of restrictions. With respect to the JLV, the FLP and the SLP must have five or more foreign lawyers who are resident in Singapore for the FLP and five local lawyers for the SLP, who must each have at least five years of relevant experience. Two of them must be equity partners in the FLP/SLP or be directors of the corporation if the FLP/SLP is constituted as a corporation. Whether the JLV is constituted as a partnership or corporation, the *LPIS Rules 2008* include a mechanism that ensures that the number of foreign equity partners or directors is not greater than the number of Singaporean equity partners or directors. The FLA also contains this regard to the number of foreign/Singaporean lawyers and their experience.

In the *US–Singapore* agreement, Singapore revised some of these requirements. The number of American lawyers required for a JLV or FLA has been reduced from five to three, at least two of whom must be equity partners or a member of the board of directors of the American law firm. Furthermore the minimum number of years of relevant experience of the three American lawyers is calculated on an aggregate basis of 15 years, rather than on individual experience of five years each. American lawyers are required to have a minimum of three, rather than five years of relevant experience. Finally, the scope of practice has been expanded for banking and finance to include the legal software related to these services.<sup>254</sup> This preferential treatment was extended to Australian lawyers in *Australia–Singapore*. Consequently Australian and American law firms enjoy a competitive advantage over European companies.

Since 2008 foreign law firms may also obtain a Qualifying Foreign Law Practice (QFLP) license that enables them to practice in some areas of Singapore law, through local lawyers admitted to the Singapore Bar and holding the requisite license from the Attorney General. In 2008, FLPs were invited to apply for the QFLP license. Six QFLP licenses were granted out of a total of 20 applications (Clifford Chance, Latham & Watkins, Allen & Overy, Norton Rose, White & Case and Herbert Smith). Initially, the QFLP could not form a FLA or JLV, but this restriction was lifted in 2012.<sup>255</sup>

The EU is currently negotiating a FTA with Singapore. This agreement will feature a chapter on services. The liberalization of legal services is one of the priorities of the European negotiators. The main function of the future FTA will be to limit the discriminatory effect of previous FTAs concluded by Singapore with Australia and the United States. Negotiations will probably focus on commitments to recognize European law degree programs as provided for by *US–Singapore* and *Australia–Singapore*. More importantly the FTA will cover requirements for the formation of a JLV and formal alliances, and the EU will seek the same preferential treatment as its American counterparts. It remains to be seen whether the EU delegation will obtain a greater degree of liberalization, particularly regarding the issue of the QFLP license.

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criminal law, family law, succession law and all type of representation services from the scope of permitted areas of legal practice.

<sup>254</sup> *US–Singapore*, above note 157, Annex 8A- Singapore Services Market Access Restrictions, pp. 12–13.

<sup>255</sup> SINGAPORE MINISTRY OF LAW (2012), above note 250.

## b. Malaysia

The 1994 Malaysian schedules of commitments include the legal services sector.<sup>256</sup> Malaysia made commitments concerning legal advisory services under home country, international and Malaysian offshore corporation law. In modes 1 and 2 it has undertaken full liberalization, while mode 3 limits the practice of these services to one region (the Federal Territory of Labuan). In mode 4, Malaysia made commitments related to ICTs, who may stay for up to one year provided that they have worked for the company for one year. Their subsequent initial and revised offers do not offer any changes in the sector.

These commitments reflect the regulatory regime regarding foreign lawyers in Malaysia. At the present time, the *Legal Profession Act 1976* does not allow foreign lawyers to practice as foreign legal consultants in Malaysia with the exception of the Territory of Labuan. Foreign law firms may not operate in Malaysia, associate with local firms or employ local lawyers.<sup>257</sup> Therefore Malaysia can currently be described as closed to cross-border legal practice. However, Malaysian authorities have been working on a Roadmap for the liberalization and reform of the market, which envisages phased liberalization.<sup>258</sup> Internal discussions are ongoing.<sup>259</sup> It appears that Malaysia is ready to open its legal services market, although the question remains of how. *EU–Malaysia* negotiations may provide a forum for discussion on the process. The objective for EU negotiators will be to integrate the results of internal discussions. An interesting question is whether liberalization will follow the Korean example found in *EU–Korea*. In this regard, the *EU–Malaysia* agreement will be used as a liberalization instrument as well as protection tool.

## c. Indonesia

Indonesia did not undertake any commitments in the legal services sector in 1994. However, in the Doha Round it submitted an initial offer that included commitments<sup>260</sup> relating to advisory services in home country and international law. For these services, it has fully liberalized in modes 1 and 2. In modes 3 and 4, it has recorded *unbound*. It has nevertheless specified that foreign lawyers are only authorized to practice as an employee or specialist of an Indonesia law firm. Furthermore they are required to transfer legal knowledge and professional capabilities to Indonesian lawyers and provide free legal services to educational, research or governmental institutions at least ten hours per month free of charge. Finally, it limits foreign equity limit to 20% in Indonesian law firms, and limits the number of foreign lawyers to five per firm.

These commitments reflect the current regulatory regime in Indonesia. The full license is reserved for Indonesian citizens residing in Indonesia. Foreign lawyers can obtain a limited license entitling them to offer advisory services, but they must be sponsored and employed by a local law firm. They can never be a partner or in any formal partnership. Furthermore, there

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<sup>256</sup> GATS (1994m), *Schedules of Specific Commitments, Malaysia*, GATS/SC/52, 15 April 1994, pp. 1–4.

<sup>257</sup> APEC LEGAL SERVICES INITIATIVES (2012a), *APEC Economy: Malaysia; Jurisdiction: West Malaysia*, <http://www.legalservices.apec.org> (last visit 1.10. 2012); LAW COUNCIL OF AUSTRALIA (2011a), *Country Fact Sheet: Malaysia*, 11 July.

<sup>258</sup> See for instance MALAYSIAN BAR (2009), *Roadmap for Liberalization of the Legal Services Sector in Malaysia*, GATS Committee Bar Council, 8 July 2009, [www.malaysianbar.org.my](http://www.malaysianbar.org.my) (last visit 1.10. 2012).

<sup>259</sup> MALAYSIAN BAR (2011), *Preparing for the Liberalization of Legal Services*, Trade in Legal Services Committee Report 2011/12, 30 December 2011.

<sup>260</sup> WTO-CTS (2005i), *Indonesia, Conditional Initial Offers*, TN/S/O/IDN, April 2005.

is a 4:1 ratio limitation on the number of foreign lawyers per firm, up to a maximum of five foreign lawyers. Indonesian firms with up to three Indonesian lawyers are only permitted to hire one foreign lawyer. Moreover foreign lawyers may not provide services in some other form of commercial association with local lawyers. Foreign law firms are not permitted to establish a commercial presence in order to offer advisory services in foreign and international law and therefore foreign lawyers cannot hire local lawyers. In addition, foreign lawyers are obliged to transfer legal knowledge and professional capabilities and provide free legal services to educational, research and government institutions for at least 10 hours per month.<sup>261</sup>

Both the EFTA and the EU are negotiating a FTA with Indonesia, which will include services chapters. The *EFTA–Indonesia* agreement will probably include the content of the Indonesian initial offer. It remains to be seen what the *EU–Indonesia* agreement might offer. Regulatory reform conditions do not seem to be similar to those in India or Malaysia. However, the country's economic growth may incite authorities to implement a more suitable regulatory regime. Negotiations with the European delegations might provide a suitable framework for alternative, less burdensome regulations. In this regard the *EU–Indonesia* agreement may serve as a liberalizing instrument and an investment protection tool.

#### **d. India**

India did not undertake any commitments in the legal services sector in the Uruguay Round or in the Doha Round. This position reflects the current regulatory regime in India, where foreign lawyers are not allowed to practice law. The India *Advocate Act 1961* reserves the practice of law to Indian citizens and natural persons.<sup>262</sup> Furthermore, a 2009 decision of the Bombay High Court in *Lawyers Collective vs Chadbourne and Park and Others* confirmed that the *Advocate Act 1961* applies to litigious and non-litigious matters, and prohibits the provision of legal advice by non-Indian lawyers.<sup>263</sup> More recently, in February 2012 in *Balaji vs Government of India and others* the Madras High Court opened the door giving foreign firms the right to practice in India on a temporary basis when advising clients on non-Indian law. The Court also ruled that foreign law firms may undertake commercial arbitration and be involved in legal process outsourcing. However, the Court confirmed that foreign lawyers are not permitted to practice domestic law in India.<sup>264</sup> It remains to be seen whether this decision survives on appeal.

This restrictive attitude stands in sharp contrast with the India's economic growth, which requires support from modern corporate and transactional legal services. It is estimated that there are over one million lawyers in India, catering to a population of over one billion. As the vast majority of this population consists of solo practitioners who work as courtroom litigators, there are relatively few firms with the capacity and expertise to service India's highly diversified and growing business sector. It is estimated that there are less than fifty elite law firms (about 2,500 lawyers) able to provide such services.<sup>265</sup>

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<sup>261</sup> LAW COUNCIL OF AUSTRALIA (2011b), *Country Fact Sheet: Indonesia*, 11 July; LAW SOCIETY OF ENGLAND AND WALES (2010), *Indonesia: Legal Services Market Report*, December 2010, pp. 5–6.

<sup>262</sup> PARLIAMENT OF INDIA (1961), *Advocate Act, 1961*, 16 August 1961, Section 24.

<sup>263</sup> **Chadbourne**, *Lawyers Collective v Chadbourne and Park and Others*, Bombay High Court, case no. WP/1526/1995, 16 December 2009

<sup>264</sup> **B Balaji**, *Balaji vs Government of Indian and other*, Madras High Court, case no. WP 5614/2010, 21 February 2012

<sup>265</sup> KRISHNAN (2010), *Globetrotting Law Firms*, Georgetown Journal of Legal Ethics, Vol. 23, No. 1, Winter

This situation offers significant potential for foreign lawyers. The Indian legal market is currently estimated to be worth US\$ 4 billion, and expected to grow to US\$ 6.5 billion in 2016. However, if fully liberalized its value could be as much as US\$ 12.3 billion.<sup>266</sup> Therefore, foreign lawyers have intensively lobbied the Indian government to liberalize the sector. However, the Bar Council of India is strongly opposed to the move and to date Indian lawyers have been successful in their opposition. The key actor in the confrontation between promoters and opponents of liberalization is the Indian government. As Krishnan notes, despite recent moves the government has procrastinated for over a decade rather than take a risky stand in favor of one option or the other. This indecision is the main explanation for the current stalemate.<sup>267</sup>

Several initiatives have attempted to change this situation.<sup>268</sup> Discussions have been held at the governmental level. In July 2010 the British Prime Minister David Cameron visited India with Clifford Chance's senior partner, followed in November 2010 by American President Obama with partners from two American law firms, without any meaningful results. In September 2011, British Justice Secretary Kenneth Clarke visited India to discuss the opening up of the legal sector to foreign law firms,<sup>269</sup> but despite the enthusiastic headlines of several newspapers<sup>270</sup>, the principal result was to agree to continue holding discussions.<sup>271</sup> It appears that the lack of progress is due to both domestic concerns and the fact that the British government does not have much to offer in order to overcome internal resistance. Therefore the situation is not expected to change as it has been so far.<sup>272</sup> However, unlike the previous situation current requests to open up the sector come at a time where India is negotiating FTAs with both the EU and the EFTA.

India has a significant interest in obtaining access in European market in various areas, which may encourage the Indian government to liberalize the legal services sector. India is particularly interested in opening up opportunities for its professionals in the information technology sector, together with its architects, engineers, teachers, chefs, medical and paramedical personnel, etc. Their requests focus on mode 1 (cross-border services) and mode 4 (movement of service providers on a temporary basis). More particularly, India sees liberalization of market access in mode 4 as a major benefit and therefore has ambitious goals especially for independent professionals and contract service suppliers. For these categories, they are seeking *inter alia* the extension of the Mutual Recognition Directive to India and free movement throughout the EU and Switzerland.<sup>273</sup>

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2010, pp. 57-102, pp. 61-65.

<sup>266</sup> UK MINISTRY OF JUSTICE (2011), *Kenneth Clarke Heralds New Era in UK-India Trade Relations*, News, Press releases, <http://www.justice.gov.uk> (last visit: 10 May 2012).

<sup>267</sup> KRISHNAN (2010), *above note 265*.

<sup>268</sup> Especially the law Society of England and Wales, which joined the U.K.-India Joint Economic Trade Committee (JETCO) and publish a report: The JETCO Report 2006 on Various models of opening up <http://businesstoday.intoday.in> (last visit: 1.10.2012).

<sup>269</sup> GANZ (2011a), *Senior UK cabinet minister Ken Clarke vows making 'forceful' case to liberalise Indian legal sector in upcoming visit*, 14 September, <http://www.legallyindia.com> (last visit: 1.10. 2012).

<sup>270</sup> WALL STREET JOURNAL (2011), *India Considers Opening Its Doors to U.K. Law Firms*, 27 September, <http://blogs.wsj.com> (last visit: 1.10. 2012); HINDUSTANTIMES (2011), *UK, India Agree on Law Firms*, 27 September, [www.hindustantimes.com](http://www.hindustantimes.com) (last visit: 1.10. 2012).

<sup>271</sup> GANZ (2011b), *Talking Shop: England's Law Soc Pres John Wottom on Liberalization & New BCI Dialogues*, 28 September, <http://www.legallyindia.com> (last visit: 1.10. 2012).

<sup>272</sup> LEWIS (2011), *A Breakthrough in India or Another False Spring?*, *The American Lawyer*, 3 October.

<sup>273</sup> MODWEL/ SINGH (2012), *The EU-India FTA Negotiations: Leading to an Agreement or Disagreement?* Sciences Po Policy Brief, 30 January 2012.

The liberalization of legal services is one of the priorities of the EU trade agenda,<sup>274</sup> unlike Swiss negotiators who have not shown any interest. An internal European Commission document notes that India is expected to make a commitment on a roadmap for the gradual opening of the provision of legal services to European law firms and professionals, following a three-stage approach similar to that taken by South Korea:

- Following the entry into force of the EU–India FTA, representatives of EU law firms and EU-qualified lawyers will be allowed to provide advisory services on home country, third country (of any EU Member State) and public international law;
- Two years after the entry into force of the FTA, EU law firms and independent professionals will be allowed to cooperate with Indian law firms on cases that touch upon both domestic and foreign legal issues and to share profits from such cases;
- Five years after the entry into force of the FTA, the establishment of joint ventures will be authorized;

These commitments are not expected to include representation services in host country law. In addition, they may exclude some categories of law and may include additional conditions such as proportion of voting shares, ownership caps, etc.<sup>275</sup> It follows that the *EU–India* FTA will probably have the effect of liberalizing the trade in legal services and guarantee certainty, stability and predictability in the sector.

#### **e. Brazil**

Like India, Brazil has never made commitments in the legal services sector either in the Uruguay Round or the Doha Round. However, unlike India, this position does not reflect a total prohibition of cross-border legal practice. On the contrary, foreign lawyers may provide legal services as foreign legal consultants.<sup>276</sup> There are no restrictions on the provision of legal services on a temporary basis. Foreign lawyers may provide legal advice on home country and international law. They can either practice individually or set up a foreign law consultancy firm. Authorization and registration with the Brazilian Bar Association (OAB) enables practice as a foreign legal consultant, and firms are able to use their own corporate name followed by the mandatory title “Foreign Law Consultants”.

Licensing requirements include proof of residency in Brazil, a home country license, admission to the bar in the country of qualification, proof of good conduct (including an affidavit by three OAB-registered Brazilian lawyers) and proof that there is an instrument of reciprocity for Brazilian attorneys wishing to practice law in the applicant’s country of origin.<sup>277</sup> However, foreign lawyers may not enter into partnership with a Brazilian lawyer (*advogado*). An *advogado* who enters into partnership with foreign lawyers are not able to use their own title and is not permitted to advise on Brazilian law.

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<sup>274</sup> EP (2009), *An EU-India Free Trade Agreement*, European Parliament Resolution of 26 March 2009 on an EU Free Trade Agreement, P6\_TA (2009) 0189, pt. 21.

<sup>275</sup> SINGH (2012), *India-EU: Where the Europe’s Trade Agenda Headed?*, Global Research, 25 February 2012, [www.globalresearch.ca](http://www.globalresearch.ca) (last visit: 1.10.2012).

<sup>276</sup> For a synthesis see LAW SOCIETY OF ENGLAND AND WALES (2011a), *Brazil: Legal Services Market Report*, March 2011; or WTO-TPRB (2009a), *Trade Policy Review of Brazil*, Secretariat Report, WT/TPR/S/212, 2 February 2009, Geneva, pp. 142-143.

<sup>277</sup> Brazilian Bar Association (OAB) (2000), *Provision No. 91/2000*, adopted on the 13<sup>th</sup> March 2000, [www.oab.org.br](http://www.oab.org.br) (last visit 1.10.2012).

Effectively, they are treated as a foreign lawyer. In the same way, foreign law firms may not employ Brazilian *advogado* except as foreign lawyers. Finally, they cannot form a Multi - Disciplinary Partnership.<sup>278</sup>

Problems have emerged with the formal alliance between foreign and Brazilian law firms. The first such alliance was established in 2001 between Linklaters and the Brazilian firm Lefosse and was authorized by the OAB in 2006. With economic development, the number of foreign law firms has increased significantly and they have sought the same formal alliance. However, the OAB has ruled that these alliances are against its ethical regulations. The matter is under consideration by the federal bar association and if it agrees with the OAB all formal local-foreign legal alliances may have to be dissolved.<sup>279</sup>

The EU is negotiating a FTA with the MERCOSUR, which is expected to include a chapter on services. As the liberalization of trade in legal services is one of the EU's priorities the FTA should include liberalization in this sector. Brazilian commitments are expected to ensure greater security and predictability of the regulatory regime to protect investments in the sector. At the same time they are expected to offer liberalization in the area of the relationship between domestic and foreign lawyers, which needs greater clarity, certainty, security and predictability. Therefore, the most important aspect of the MERCOSUR FTA with respect to legal services is to establish the regulatory regime for European lawyers.

### C. Summary

This analysis of the liberalization of trade in legal services in EU and EFTA/Swiss PTAs has looked at ten agreements and five prospective agreements. These 15 agreements cover the following 41 states (the EU counting as one): the EU, Switzerland, Chile, Colombia, Peru, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Antigua and Barbuda, the Bahamas, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago, Oman, Qatar, Saudi Arabia, the UAE, Ukraine, Hong Kong, Japan, the Republic of Korea, Singapore, Malaysia, Indonesia, India and Brazil.

Of these countries, three have not undertaken any commitments (Bahamas, Haiti and Surinam) or have recorded *unbound* for all modes of supply (Hong Kong and Kuwait). Sixteen have undertaken PTA commitments in the legal services sector, while they have not made any commitments under the GATS (including Peru, Costa Rica, Guatemala, Honduras, Nicaragua, Belize, Dominica, Grenada, Saint Lucia, Saint Vincent, Saint Christopher and Nevis, Bahrain, Qatar, the UAE, the Republic of Korea). In addition, four of the five EU agreements currently under negotiation (Singapore, Malaysia, Indonesia and India) will include commitments in the legal services sector, while these countries have not made any GATS commitments. The remaining 35 countries have already undertaken commitments in the sector and negotiations have led to improvements in quality, especially in mode 4.

The purpose of PTAs differs depending on the partners. With regard to legal services, there are three main objectives. First, the conclusion of an agreement may increase protection for European and Swiss service providers by increasing the number of countries that have undertaken commitments in the sector or by improving existing GATS commitments.

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<sup>278</sup> *Id.* see also Provision No. 99 of 2002.

<sup>279</sup> THE ECONOMIST (2011), *above note 27*.

In this case the objective is to ensure that commitments correspond to the regulatory status quo. As the example of Brazil shows, this is an important issue. The majority of the agreements reviewed here fall into this category.

Second, agreements can seek to prevent domestic service providers being discriminated against. This objective underlies fewer agreements, but its importance will probably increase with the rise of bilateralism. Examples of such agreements include South Korea, Singapore, Malaysia and India.

Finally, a third objective is to negotiate the liberalization of markets that have been totally closed to foreign suppliers or to negotiate the removal of existing restrictions. EU negotiations have played a significant role in the liberalization of legal services in South Korea and will be equally important in negotiations with India and Malaysia. In this context, a three-stage liberalization process appears to be the solution for the liberalization of totally closed markets. The results of the process remain to be seen in, for example, Indonesia that has significant barriers to cross-border legal practice. However, it must be borne in mind that liberalization is made possible by the need for regulatory reform. PTA negotiations may increase the pace of reform or help to shape regulatory reforms necessary for the creation of a modern legal services sector.

This brings us back to a broader analysis of the global approach to liberalization of the legal services sector. This study has looked at the five stages of liberalization in the context of EU and EFTA/Swiss PTAs. The extent to which these stages feature differs between PTAs and the GATS. The following table summarizes the added value provided by the FTA compared to the GATS (referred as *GATS+*).

**Table 16 Added value provided by the FTA compared to the GATS**

|                                      | <b>Level of liberalization of legal services compared to GATS</b>                        | <b>Function of FTA</b>                             | <b>Level of liberalization for FLC</b>                        |
|--------------------------------------|------------------------------------------------------------------------------------------|----------------------------------------------------|---------------------------------------------------------------|
| <b>EU–Chile<br/>EFTA–Chile</b>       | GATS+: Improvements                                                                      | Protection<br>Transparency                         | Regulatory status quo<br>Liberal regime                       |
| <b>EU–<br/>CARIFORUM</b>             | GATS+: First Commitments and Improvements (mode 4)                                       | Protection<br>Transparency                         | Regulatory status quo<br>Liberal/Restrictive regime           |
| <b>EU–Korea<br/>EFTA–Korea</b>       | GATS+: First Commitments                                                                 | Market<br>Opening<br>Trade diversion<br>Protection | Regulatory status quo + liberalization<br>Transitional regime |
| <b>EU–Colombia<br/>EFTA–Colombia</b> | GATS+: Improvements (modes 3 and 4)                                                      | Protection<br>Transparency                         | Regulatory status quo                                         |
| <b>EU–Peru</b>                       | GATS+: First Commitments                                                                 | Protection<br>Transparency                         | Regulatory status quo<br>Restricted regime                    |
| <b>EU–Central<br/>America</b>        | GATS+: First Commitments and Improvements                                                | Protection<br>Transparency                         | Regulatory status quo<br>Restricted regime                    |
| <b>EFTA–GCC</b>                      | GATS+: Improvements (mode 4)                                                             | Protection<br>Transparency<br>Trade diversion      | Regulatory status quo<br>Liberal/Restricted regime            |
| <b>EU–India</b>                      | GATS+: First Commitments                                                                 | Market<br>Opening<br>Transparency<br>Protection    | Restricted regime                                             |
| <b>EU–Singapore</b>                  | GATS+: First Commitments<br>No commitment within the GATS, but commitments in other FTAs | Trade diversion<br>Transparency<br>Protection      | Regulatory status quo<br>Liberal regime                       |
| <b>EU–Malaysia</b>                   | GATS+: First Commitments                                                                 | Market<br>Opening<br>Transparency<br>Protection    | Restricted regime                                             |
| <b>EU–Indonesia</b>                  | GATS+: First Commitments                                                                 | Market<br>Opening<br>Transparency<br>Protection    | Restricted regime                                             |
| <b>EFTA–Ukraine</b>                  | No Improvements                                                                          | -                                                  | Regulatory status quo<br>Liberal                              |
| <b>EFTA–Hong<br/>Kong</b>            | No Improvements                                                                          | -                                                  | Liberal Regime                                                |
| <b>Switzerland–<br/>Japan</b>        | No Improvements                                                                          | Protection                                         | Liberal Regime                                                |

#### **IV. CONCLUSION**

This chapter has examined the trade liberalization process in the legal services sector that is taking place under PTAs negotiated by the EU and the EFTA/Switzerland. It has analyzed the horizontal rules that apply to all service sectors and specific rules applicable to the legal services sector.

Compared to GATS agreements, the major difference is the integration of regulatory issues that were outside the scope of WTO negotiations and that may affect cross-border legal activities, namely investment and competition rules.

Previous chapters identified five major steps for trade liberalization in legal services, namely transparency, non-discrimination, necessity tests, recognition and competition. The GATS framework focuses on transparency and non-discrimination issues and to a lesser extent, necessity tests. The analysis concluded that the results of negotiations on market access and domestic regulation were limited, albeit with some progress on transparency and non-discrimination issues. Their principal contribution seems to have been to establish a foundation for liberalization. In particular, most have focused on the establishment of a foreign legal consultant regime.

This situation forms the background for EU and Swiss/EFTA PTA negotiations that include the liberalization of the legal services sector. These include the five steps of liberalization, and are described in detail as follows:

- a. Transparency: Horizontally, EFTA agreements do not differ from GATS solutions. On the other hand, recent EU PTAs go further with the establishment of contact points for information. Furthermore, they integrate NAFTA obligations (the requirement for parties to publish measures in advance, provide opportunities for comment, and take any comments into account), and procedural guarantees on the administration of measures. These obligations are extended to interested persons and are not limited to governments. With respect to legal services, there are interesting developments regarding transparency. Unfortunately, these have not come about as a result of EU PTAs but Asia-Pacific Economic Cooperation (APEC). Nevertheless, they provide a good basis for the promotion of transparency that could be extended to other forums.
- b. Non-Discrimination: Horizontally, EU and EFTA/Swiss PTAs contain provisions on MFN treatment, market access and national treatment. With respect to MFN treatment, EU and EFTA PTAs have taken a not-too liberal approach. This may have consequences such as those seen in the South Korea PTA. With respect to market access and national treatment, EU and EFTA PTAs do not shed any more light on the problem of the interpretation of GATS Articles XVI and XVII. In contrast, with respect to the liberalization of legal services, the results of negotiations have been far-reaching. PTAs negotiated by the EU have increased the number of countries that have made commitments in the sector. They have also improved existing commitments (especially in mode 4) with the adoption of horizontal rules that are subject to reservations. Overall they have increased protection for European services suppliers and ensured clearer, predictable rules. In addition, they have played a significant role in opening up previously closed markets such as South Korea, India and Malaysia. If this trend continues, the contribution of EU PTAs to improving access of European lawyers to key markets will be significant and meet the objectives set out in the *Global Europe* strategy. In contrast, the contribution of EFTA/Swiss PTAs has been negligible and reflects the lack of interest of Swiss negotiators

- c. Domestic Regulation: Both EU and EFTA agreements tend to replicate or refer to GATS Article VI: 1–3 and WPDR negotiations, which are not expected to offer significant progress especially on the adoption of a necessity test. However, it should be noted that two agreements (*EFTA–Colombia* and *Switzerland–Japan*) propose the integration of GATS Article VI: 5 without the requirements contained Article VI: 5 (a) (ii), which represents significant progress although limited to the scope of these agreements.
- d. Recognition: EU and EFTA PTAs do not offer significant progresses in the legal services sector but changes may be underway. Discussions in the framework of the *EU–Canada* agreement appear promising for the conclusion of a mutual recognition agreement on legal services. The process is only just beginning but EU and EFTA PTAs will serve as the basis for further discussions between interested stakeholders.
- e. Competition: EU and EFTA PTAs have led to significant progress on competition issues. They generally feature the same provisions on relations between competent authorities. However, EU provisions go further and offer clearer definitions of anti-competitive practices. Furthermore, they include the requirement that signatories establish or maintain competition authorities and legislation.

This discussion has shown that the main thrust of trade liberalization within EU and EFTA PTAs lies in transparency and non-discrimination issues. While progress in EFTA agreements has not gone beyond revised GATS offers, EU PTAs offer more significant improvements in both horizontal and sector-specific disciplines. On the other hand insignificant progress has been made on domestic regulation. With respect to recognition and competition, EU and EFTA agreements have laid the foundation for further improvements, the outcome of which will depend of the evolution of trade relations between partners and the actions of stakeholders. Nevertheless, PTAs do not offer a new model for the internationalization of legal services. It remains to be seen whether evolution provides an effective response to the needs of modern globalized economies.

## CONCLUSION

The last two decades have witnessed a dramatic increase in the globalization of economies. These changes have also had an impact on legal services, which have become international and business-oriented. They have also led to the emergence of a new type of lawyering that is focused on providing legal advice concerning multiple jurisdictions to corporate bodies. These activities are very different to traditional practices such as providing representation in local courts; they have not led to the disappearance of the traditional legal practice, but rather have taken a place alongside it. However, in most jurisdictions regulation of legal services has not kept up with these developments and remains focused on traditional activities. Inadequate regulations coupled with domestic protectionism have created impediments to the development and internationalization of the sector. This situation has obliged countries to reconsider the way they regulate their legal services.

It is widely recognized that regulation is necessary in order to preserve the public interest. Therefore the purpose of liberalization is to guarantee that the public interest is preserved, but at the same time, ensure that regulation does not impede the development of the sector. The form liberalization takes differs depending on the level of development of the country concerned and their interest in modernization. Some states, such as the United Kingdom, France and Canada have undertaken autonomous regulatory reform (the OECD provides a good synthesis of this process).<sup>1</sup> However, in most instances liberalization takes place within trade agreements, where countries discuss, negotiate and eventually commit to regulatory changes. Several such trade agreements operate at different levels. The GATS functions at multilateral level while PTAs are found at regional level. While the GATS constitutes the basic framework for the liberalization of trade in services, PTAs generally go into more depth. In this context, the EU Treaty has achieved the highest degree of liberalization of trade in legal services.

This study discussed liberalization of the trade in legal services in the context of the GATS and PTAs negotiated by the EU and Switzerland, using liberalization within the EU internal market as a reference point. Based on OECD work, it distinguished five principles for the liberalization of legal services, namely transparency, non-discrimination, the avoidance of unnecessary restrictions, recognition and the application of competition principles. These principles served as a basis for a cross-cutting analysis of the liberalization of legal services. The findings of the study differ according to each of the five principles of liberalization, and these are discussed in more detail in the sections that follow.

### I. Findings

In general terms, the study found that liberalization under the GATS and EU/Swiss PTAs revolves around the issues of transparency and non-discrimination, while the questions of a necessity test, recognition and competition are not on the agenda for the moment. In contrast, the liberalization of legal services within the EU integrates all five principles. Developments related to these principles vary depending on the agreements that have been negotiated and they are summarized in the following sections.

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<sup>1</sup> OECD (2009), *Competitive Restrictions in Legal Professions*, Policy Round Table, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP (2007) 39, 27 April.

## **A. Transparency**

There are two aspects to GATS transparency requirements. First, they relate to the availability of information. Second, they specify issues concerning the administration of measures affecting trade in services. The PTAs examined in this study use the same framework, and some of them offer improvements.

### **1. Availability of Information on Measures Affecting Trade in Services**

With respect to the availability of information, Article III GATS contains four obligations:

- To promptly publish all measures affecting or pertaining to trade in services;
- To notify Members of any changes to such measures;
- To respond promptly to requests from other WTO Members;
- To establish enquiry points.

However, these obligations only apply to WTO Members and exclude other service suppliers. Therefore the scope is significantly reduced. Requirements concerning the publication of measures appear to have received the most attention. Negotiations on the Disciplines on Domestic Regulation (Article VI: 4) do not appear to have led to any new developments, but instead offer further clarification of existing obligations. EU and EFTA/Swiss PTAs generally incorporate similar GATS-type obligations, although they extend some obligations to service suppliers (such as the requirement to establish enquiry points). In addition, EU agreements include the obligation to publish measures affecting trade in services in advance, to enable interested persons to comment on these measures and to take into account any comments received. Consequently EU PTAs improve transparency by extending some obligations and adding others.

Significant progress on transparency in legal service regulation has been made by the APEC countries through the *APEC Legal Services Initiative*. This document lists, for each APEC Member, information on cross-border legal practice under limited and full license conditions, conditions for practice on a temporary basis, conditions for commercial associations between domestic and foreign lawyers and contact points for enquiries. Such an initiative would be relevant for the EU and Switzerland, where information on cross-border legal services with third countries is scarce. It would be a significant improvement, since both the EU and Switzerland have a federal structure where regimes differ between states (or cantons). Such information is already available within the EU for EU lawyers. Externally, the promotion of such an initiative could foster cross-border legal practice and improve trading conditions. In the absence of a platform such as that developed by the APEC, PTA negotiations provide a good opportunity to exchange information and improve transparency.

### **2. Transparency in the Administration of Measures Affecting Trade in Services**

Transparency in the administration of measures affecting trade in services is enshrined in Article VI: 1–3 GATS, which applies to service sectors in which WTO Members have undertaken specific commitments. As a general principle, Article VI: 1 states that measures affecting trade in services should be administered in a reasonable, objective and impartial manner. Article VI: 2 provides for the establishment or maintenance of an independent judicial and administrative process for the review of administrative decisions affecting trade in services. Finally, Article VI: 3 stipulates that where authorization is required for the supply

of a service, authorities must provide information on the decision concerning the application and respond promptly to requests for information about the status of the application. EU/Swiss PTAs do not go further. They generally replicate or refer to Article VI: 1–3. Some PTAs extend these obligations to services sectors in which no specific commitments have been undertaken.

## **B. Non-Discrimination**

The principle of non-discrimination is a cornerstone of trade liberalization. There are two aspects to GATS non-discrimination requirements: non-discrimination among WTO Members (Article II) and non-discrimination between domestic and foreign suppliers (Articles XVI and XVII). EU/Swiss PTAs feature the same type of obligations.

### **1. Most-Favored-Nation Treatment**

MFN treatment under the GATS is a general obligation; this means that it applies regardless of whether WTO Members have undertaken specific commitments in a service sector. It is nevertheless subject to reservations (Article II: 2). As a result of the Uruguay Round negotiations, five WTO Members have made such reservations in the legal services sector, while five other Members have made reservations concerning professional services. The Doha Round negotiations have not yet resulted in any progress. Article V of the GATS provides an exception to Article II in allowing the conclusion of PTAs. Some PTAs feature MFN obligations, although the content may differ from that of the GATS.

Some PTAs prevent discrimination between parties. However, when there are only two parties, such an obligation makes little sense. MFN PTA provisions may also specify the nature of relationships with third parties and address the question of whether liberalization granted by one signatory in future agreements could be extended to signatories of earlier PTAs. Such issues have implications for legal services, as the FTA concluded with the Republic of Korea has demonstrated. Various solutions are possible. All EFTA PTAs leave open the possibility of further negotiations. Some EU PTAs do not address the question at all (*EU–Chile*, *EU–Colombia–Peru*, and *EU–CA*), while others exclude the extension of future liberalization, with some nuances (*EU–South Korea*, *EU–CARIFORUM* and *EU–SAA*).

### **2. Market Access/National Treatment**

GATS provisions dealing with discrimination between domestic and foreign services and service suppliers are found in Articles XVI (Market Access) and XVII (National Treatment). The obligations only apply if WTO Members have undertaken specific commitments. This mechanism provides a basis for negotiations on the removal of the main barriers to trade in services. It also ensures security and predictability for liberalization of a sector.

Although some questions on the interpretation of these provisions remained to be answered, their main features can be identified. Article XVI contains an exhaustive list of six, mainly quantitative measures that are prohibited. These measures are both discriminatory and non-discriminatory. They include nationality requirements, restrictions on association between domestic and foreign lawyers, restrictions on the employment of domestic lawyers, quotas or economic needs' tests and restrictions on legal form for law firms.

Article XVII prohibits discriminatory measures between domestic and foreign services and services suppliers for measures not covered by Article XVI. This obligation covers *de jure* and *de facto* discrimination. The question of the scope of this provision, particularly for measures that constitute *de facto* discrimination remains to be answered. As things stand, in the context of legal services, the residency requirement is the main measure that fall within the scope of Article XVI.

These obligations only apply in service sectors where WTO Members have undertaken specific commitments. As a result of the Uruguay Round negotiations, 77 WTO Members have made specific commitments in the legal services sector. Most of these commitments concern the provision of legal advice under home country and international law. The current Doha Round negotiations do not appear to have led to any significant improvements as relatively few WTO Members have made new commitments in the sector and those who had already made commitments did not significantly modify their offer. As a result, the outcome of the Doha Round negotiations for the legal services sector can be described as disappointing.

EU/Swiss PTAs provide the same mechanism for specific commitments related to market access and national treatment. However, commitments undertaken in the legal services sector (particularly in EU PTAs) represent significant improvements compared to the GATS. A significant number of partners have made specific commitments in the sector for the first time. In some instances, this has gone hand in hand with market opening (such as in the South Korea PTA and probably future PTAs with Malaysia, Indonesia and India). In other PTAs, new commitments have locked-in the regulatory status quo, which ensures certainty and predictability (examples include PTAs with the CARIFORUM states, Central America and probably Singapore). In other cases EU PTAs have improved commitments in the legal services sector in mode 4.

As a result, EU/Swiss PTAs have led to significant improvements in the liberalization of the legal services. However, the same is not true for other trade issues such as the necessity test.

### **C. Avoidance of Unnecessary Restrictions**

The avoidance of unnecessary restrictions (the necessity test) is found in many WTO agreements. Article VI: 4–5 of the GATS features such a test. Article VI: 5 sets out a test for the necessity of licensing/qualification requirements and procedures, and technical standards. However, its scope is limited in two respects. First, it only applies to service sectors in which WTO Members have undertaken commitments. Second, it only applies in the situation where the contested requirement could not reasonably have been expected at the time the specific commitments were made (Article VI: 5(a) (ii) GATS). These two limitations considerably reduce its scope. Article VI: 4 gives a mandate to the CTS to develop disciplines on domestic regulation in order to ensure that measures do not constitute unnecessary barriers to trade in services. It specifies that such measures should be based *inter alia* on objective and transparent criteria and not be more burdensome than necessary to ensure the quality of the service. Although negotiations are taking place within the WPDR, the adoption of a meaningful necessity test appears unlikely.

EU/Swiss PTAs mostly refer to the WPDR negotiations and do not offer any substantial improvements. However, two PTAs, (*EFTA–Colombia* and *Switzerland–Japan*) provide for a necessity test that is similar to Article VI: 5 but without the restrictive conditions. The

*Switzerland–Japan* agreement applies the necessity test to all service sectors<sup>2</sup>, while the *EFTA–Colombia* agreement applies it to service sectors where there are specific commitments. The necessity test provided by these agreements is a significant step forward compared to current GATS negotiations. However, it is not expected to have major consequences for legal services.

## **D. Recognition**

In general terms, recognition is understood as the acceptance of foreign suppliers' qualifications or licenses as equivalent to those of domestic suppliers. Such a process can take the form of autonomous recognition or result from recognition agreements between two or more partners.

Articles VI: 6 and VII of the GATS deal with recognition issues. These provisions do not address the content of recognition, but the associated procedures. While the GATS agreement acknowledges the benefit of recognition for trade, the process takes place essentially on a regional basis leading to a risk of discrimination among WTO Members. Article VII authorizes WTO Members to recognize the qualifications or licenses of some WTO Members to the exclusion of others. However, it also requires WTO Members to provide the opportunity for other WTO Members to negotiate similar arrangements.

Unlike the GATS, the NAFTA does not contain a specific provision addressing recognition. However, there are sections that provide a procedural framework for the development of mutual standards. Similar provisions can be found in PTAs derived from the NAFTA. With respect to legal services, the procedural framework in *US–Australia* has served as platform for discussions on the development of recognition agreements.

EFTA agreements follow the GATS approach and include provisions that aim to ensure that parties give due consideration to recognition issues. They also enable third parties to negotiate comparable arrangements in the event of a mutual recognition agreement. In contrast, EU agreements generally follow the NAFTA approach. They establish a procedural framework for consultation with relevant professional bodies on a best endeavor basis for the development of mutual recognition agreements. So far there are no concrete developments in the legal services sector. However, it remains to be seen whether the recognition agreement between the Quebec and French bar associations will serve as a basis for further developments related to the FTA between the EU and Canada.

## **E. Application of Competition Principles**

In 2004, a large number of WTO Members rejected the incorporation of competition issues into negotiations. Consequently no agreement is expected on this issue. However, competition rules are found in other WTO agreements, such as Article XVII of the GATS. In contrast, EU and EFTA/Swiss PTAs include competition rules in the services chapter and have a chapter on competition, which covers the whole agreement.

In PTAs most competition rules are located in a specific chapter dedicated to competition that covers all trade issues, including trade in services. In the absence of a centralized regime, the purpose of the PTA is not to create regional law, but rather to develop common criteria and a

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<sup>2</sup> Article 48: 3 *Switzerland–Japan*.

cooperation mechanism for national authorities to deal with practices that are detrimental to the functioning of the PTA. While the desirability of competition law is taken for granted in most industrial economies, the same cannot be said for developing countries. Furthermore, some countries have not implemented competition law or a mechanism for dealing with competition issues. Therefore the main purpose of competition rules in PTAs is to develop minimum standards for the application of competition policy. However, not all these rules are binding and in many cases dispute settlement mechanisms are expressly excluded.

Generally, EU/Swiss PTAs contain the same type of rules. First, they all feature a provision in which signatories explicitly recognize the importance of free and undistorted competition in trade relations, and acknowledge that anti-competitive practices have the potential to affect the proper functioning of markets and reduce the benefits of trade liberalization. Second, they set out procedural requirements on transparency, non-discrimination, timeframes, etc. Third, PTAs contain provisions on Designated Monopolies and State Enterprises that recognize the rights of parties to establish or maintain public or private monopolies and state enterprises according to their legislation, but require them to be subject to competition law. Fourth, they include provisions that deal, on a best endeavor basis, with the relationship between competition authorities, cooperation, the exchange of information, and notification. Finally, EU PTAs recognize the need for technical assistance (with the exception of *EU–Korea*).

## **II. Comments**

This analysis has shown that the main focus of trade negotiations in the legal services sector has been on the questions of transparency and non-discrimination. However, even in these areas improvements are possible that may have a positive impact. Furthermore, new solutions can be proposed to improve the current situation with respect to the liberalization of trade in the sector. These two issues are addressed in turn.

### **A. Comments on Trade Rules**

#### **1. Transparency**

GATS transparency requirements focus on obligations *vis-à-vis* other WTO Members. Some PTAs extend some obligations (such as the establishment of contact points) to investors. With respect to legal services, initiatives have been undertaken at regional level to improve the available information on the conditions for cross-border legal practice in various jurisdictions. However, it appears that transparency requirements in trade agreements generally relate to an exchange of information at governmental level to the exclusion of the private sector. Improvements to transparency requirements should cover both the public and private sector. In this respect, EU Directive 2006/123<sup>3</sup> on *Services in the Internal Market* provides some interesting input.

##### **a. Transparency requirements at Governmental Level**

One major improvement brought about by EU Directive 2006/123 was the establishment of a cooperation mechanism between Member States. This includes a liaison point, an obligation to provide mutual assistance, and an obligation to implement effective cooperation measures

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<sup>3</sup> Directive 2006/123 EC of the European Parliament and the Council of 12 December 2006, *Services in the Internal Market*, 27 December 2006, OJ L 376/36.

in order to ensure the supervision of providers and the services they provide (Article 28). The same type of obligation is enshrined in Article 13 of Directive 98/5 on the *Practice of the Profession of Lawyers in Another Member State*<sup>4</sup>.

Such obligations are not unknown in trade agreements. Chapters on competition typically provide for the same type of obligation. Therefore some form of collaboration could be developed in the services chapter and bar associations have noted that this improvement is necessary in the legal services sector.<sup>5</sup> This does not mean that such collaboration does not exist,<sup>6</sup> but the formalization of requirements would make them mandatory. This improvement would be a fundamental step in building trust among WTO Members and could form the basis for the development of more substantial trade instruments.

## **b. Transparency Requirements at Private Sector Level**

Private sector obligations regarding the provision of information include the requirement to make information available, to establish a contact point and provide a prompt response to requests for information.

Article III: 1 of the GATS sets out the obligation to promptly publish all relevant measures that relate to, or affect trade in services. However, it is too vague and future domestic regulation disciplines must provide more guidance. With regard to legal services, the APEC initiative provides a good example of what could be achieved. This obligation should go hand-in-hand with the establishment of enquiry points and the obligation to promptly provide information. Article III: 4 sets out such an obligation, but it is at governmental level. Current GATS negotiations on domestic regulation disciplines do not appear to offer significant changes, although EU PTAs have extended some obligations to investors.

Drawing from Directive 2006/123, it is possible to imagine an obligation to establish a single point of contact for completing the necessary procedures and formalities (Article 6). Furthermore, this point of single contact should be required to ensure that information on measures relating to trade in services is easily accessible and it should describe these measures (Article 7: 1 of the GATS)<sup>7</sup>. Furthermore, Member States should ensure that it is possible for providers and recipients to request information from competent authorities on the procedures and formalities to be completed in order to access and supply services (Article 7:2).

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<sup>4</sup> Directive 98/5 EC of the European Parliament and the Council of 16 February 1998 *to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>5</sup> IBA (2003b), Exhibit B: Explanatory Memorandum accompanying the IBA's Suggested Changes to the WTO Accountancy Disciplines Before they Can Be Applied to the Legal Profession, p. 15.

<sup>6</sup> See for instance CCBE (2009a), CCBE Resolution in Support of Cooperation among American and European Disciplinary Bodies, 27.03.2009

<sup>7</sup> These include: (a)... the procedures and formalities to be completed in order to access and supply services; (b) contact details of competent authorities related to the provision of services; (c) means and conditions for accessing public registers and database; (d) means of redress; (e) contact details of the associations or organization, other than competent authorities, from which providers may obtain practical assistance.

## 2. Non-Discrimination

GATS provisions dealing with discrimination issues are the most important in the agreement. However, meaningful obligations depend on the specific commitments of each WTO Member and vary from one state to another. In the legal services sector there are no significant improvements of commitments made by WTO Members in the Doha Round compared to the outcome of the Uruguay Round negotiations. In contrast, EU PTAs and to a lesser extent EFTA/Swiss PTAs do offer significant improvements, which have sometimes led to market opening (e.g. in South Korea and probably India, Malaysia and Indonesia).

However, the extent of *de facto* prohibitions needs to be clarified. Although a narrow interpretation severely limits the scope of trade agreements as things stand, this appears to be the dominant approach. It is also the interpretation adopted by the ECJ in the EU context. However, in the EU current thinking concerning measures affecting trade has shifted from an analysis of prohibited discriminatory measures to all measures affecting trade; such measures are tolerated so long they are deemed necessary and proportionate. To a certain extent, such a change could be possible in trade agreements through the adoption of a meaningful necessity test. However, WPDR negotiations on this topic are contentious and the adoption of such a test appears unlikely (despite the GATS Article VI: 4 mandate). Furthermore, as PTAs tend to refer to GATS negotiations there is a deadlock on the issue for the moment. It is clear that a narrow interpretation of national treatment obligations, coupled with the absence of a meaningful necessity test significantly reduces the scope of liberalization. It remains to be seen if this situation will continue in the future.

## B. Comments on Trade in Legal Services

This study has shown that it is very difficult for regulators and trade negotiators to grasp the nature of cross-border legal practice. The absence of a suitable definition in the United Nations' Central Product Classification and the time spend by GATS negotiators on trying to arrive at a definition of the sector demonstrates the problem. The concept of the foreign legal consultant (FLC) appears to have served as the basis for negotiations. However, it does not necessarily reflect the reality of cross-border legal practice. Therefore negotiations may not provide solutions that meet the requirements of the legal services sector in the twenty-first century. Before analyzing the problem and the alternative solution, a brief overview of the current regime is necessary.

### 1. Trade in Legal Services and the FLC Concept

Trade negotiations on the liberalization of legal services have shown that states do not treat foreign lawyers in the same way as their domestic counterparts. The local nature of the legal system found in each jurisdiction means that they do not want to grant the right to practice local law (i.e. provide legal representation and advice) to foreign lawyers. This is motivated by a wish to protect consumers and preserve the integrity of the legal system. Furthermore, the protectionist objectives of local bar associations are an important factor that hampers liberalization.

However, legal practitioners in foreign markets do not practice local law, which is generally poorly paid and culturally specific.<sup>8</sup> On the contrary, foreign lawyers and law firms involved

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<sup>8</sup> HOOK (2008), *Cross Border Panel*, ABA Section of International Law Spring Meeting, 4 April.

in cross-border legal practice generally follow their clients, who are engaged in international transactions. They offer seamless cross-border legal services, and provide multi-jurisdictional advice. Their objective is to provide their legal expertise to both domestic and foreign corporate clients in areas such as corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property, new financial instruments or competition law; such service are not necessarily available on the domestic market. Such legal services are essential for trade and investment, and play a vital role in supporting and facilitating business. They form a critical part of the infrastructure that underpins transnational transactions. However, regulatory barriers in various jurisdictions have hampered the development of genuine transnational legal practices. These barriers generally result from factors such as the absence of an adequate regime for foreign lawyers and the adoption of protectionist measures.

It is against this background that negotiations on the removal of the most significant barriers have taken place. Negotiations involve on the one hand, exporters of legal services (mainly the United States, the EU and Australia) and, on the other hand jurisdictions that maintain high levels of regulatory barriers. Discussions have so far revolved around the concept of Foreign Legal Consultants (FLC). This concept originated in France (under the term of *conseils juridiques*) and thrived when it was adopted in New York in 1974. The purpose of the regime is to facilitate the establishment of individuals and firms engaged in cross-border legal practice. The consultant is licensed to give legal advice, negotiate and prepare transactional documentation, and provide assistance to other legal practitioners.<sup>9</sup> The concept was adopted as the basis for negotiations on the liberalization of legal services within both the GATS and PTAs.

The commitments of WTO Members in the legal services sector concern the provision of legal advice under home country and international law. For these services, numerous restrictions are maintained in important markets. Regardless of an analysis of the results of negotiations on the removal of these restrictions, a more fundamental question is the terms of these negotiations, namely the progressive adoption of a full FLC regime that actually meets the needs of the international legal profession.

## **2. The Relevance of the Current FLC Concept to International Legal Practice**

The first point to note is that this regime perpetuates a local perspective, which is the main characteristic of legal services. Legal practitioners are licensed by local authorities under local rules that find their genesis in local tradition and experience. Therefore, regulations in the legal profession can be described as intensely parochial.<sup>10</sup> Although foreign lawyers may hold a license to practice as FLC, it is itself issued locally. It is not portable and does not enable foreign lawyers to move from one jurisdiction to another. The problem is particularly relevant to the main exporters of legal services, namely the EU and the United States. For instance, a non-EU Member State lawyer, who has an FLC license in Germany cannot practice in France; instead they have to pass the French bar exam to be licensed in France and this process must be repeated in each EU Member State.

Furthermore, the FLC license rarely provides a mechanism that could extend the authorization to provide legal advice under international and home country law to the provision of legal advice under host country law, which would enable foreign lawyers to provide legal advice in

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<sup>9</sup> CONE III (2007), *Legal Services and the Doha Round Dilemma*, Journal of World Trade, Vol. 41, No. 2, pp. 234–272.

<sup>10</sup> CONE III (2003), *Legal Services in the Doha Round*, Journal of World Trade, Vol. 37, No.1, pp. 29–47.

their field of expertise. It is reasonable to assume that a foreign lawyer who is a specialist in competition law (for instance) would be able to provide legal advice in this field regardless of the origin of the law.

Finally, analyses of the use of the FLC license in jurisdictions that also provide a re-qualification mechanism (such as the *Qualified Lawyers Transfer Test* in England and Wales or the completion of an LLM program to sit for the New York bar exam), tend to conclude that the FLC is relatively unused.<sup>11</sup> It seems that a growing number of foreign lawyers who seek re-qualification do not take up practice in the jurisdiction, but rather want something that resembles an international legal qualification. This suggests that foreign lawyers want the precise opposite of the FLC concept: rather than a qualification that is linked to their physical presence, they are seeking a standard (or certification) that is portable internationally.<sup>12</sup>

This suggests that the FLC concept, as it is understood in various trade agreements, does not reflect the reality of international legal practice. The FLC concept prevents foreign lawyers from practicing in legal areas that are oriented towards the protection of consumers. It also preserves an efficient judicial system and reassures states that are hesitant to liberalize their legal market. However, such legal fields are too poorly paid and culturally specific to interest foreign lawyers. On the other hand, depending on the restrictions applied to the FLC, such a license is not very attractive for the development of legal expertise on highly specialized business issues such as finance or cross-border mergers for which small-town lawyers are not well equipped to provide advice on. This situation may negatively impact the development of business environment in various WTO Members. While the model had some virtue prior to the development of trade in the mid-1990s, it needs to be updated. The question is what are the alternatives and what role can trade agreements play in developing them?

### **3. Alternatives to the current FLC Concept**

The first point to make is that international trade involves countries whose legal services sectors are at different levels of development. It follows that for closed, or recently opened markets, the current FLC concept may help in the transition towards the development of legal services that are more integrated into the international legal market. In more advanced jurisdictions the question is how to develop a mechanism, accepted worldwide, that enables foreign lawyers to practice international business law with limited restrictions. The answer seems to be a portable, internationally recognized license.

The specific commitments undertaken by WTO Members in the legal services sector within the GATS negotiations share some common features:

- They exclude the practice of domestic law for legal representation and legal advice services;
- They generally authorize the provision of legal advice with limited scope for international and home country law (or the law of the country where the lawyer is qualified);
- For legal advice under international and home country law, they autonomously recognize foreign qualifications;

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<sup>11</sup> HOOK (2008), *above note*, p.6; SILVER (2005), *Regulating International Lawyers: The Legal Consultant Rules*, Houston Journal of International Law, vol. 27, No 2, pp. 527–577

<sup>12</sup> *Idem*

- Foreign lawyers are sometimes subject to licensing requirements such as a minimum one year of practice, to be in good standing or to hold liability insurance;
- Restrictions are maintained on entering into business relationship with local lawyers;
- FLC licenses are local.

Beyond the WTO, other mechanisms have been developed, for example re-qualification in host country law and the recognition of foreign qualifications. These mechanisms enable foreign lawyers to be integrated into the legal profession of the host country.

#### **a. Re-qualification process**

The re-qualification process authorizes, under some conditions, the extension of the home country qualification into a host country qualification. In England and Wales this process is limited to lawyers from certain jurisdictions, which can sit for the *Qualified Lawyers Transfer Test*<sup>13</sup>. Other re-qualification examinations are available in jurisdictions such as Hong Kong<sup>14</sup> or Singapore<sup>15</sup>. In the United States lawyers who have obtained a certain number of academic credits are authorized to sit for some local bar exams<sup>16</sup>. In the EU, Article 10: 3 of Directive 98/5 enables EU lawyers who have practiced in their host Member States for three years to qualify as host country lawyers.<sup>17</sup> These examples show that the re-qualification process may be subject to different requirements such as academic credits, passing the local bar exam or a period of practice in the host jurisdiction.

#### **b. Recognition Process**

Another mechanism is the recognition of foreign qualifications. This tends to be found in countries with close ties to European countries and former colonies. The most important example is the EU Directive on the *Recognition of Professional Qualifications*, which enables EU lawyers to have their home country qualification recognized as equivalent to a host country qualification.<sup>18</sup> This right is nevertheless subject to an aptitude test. Such a process could be envisaged in the context of trade agreements, but this study has suggested that states have little appetite for the development of meaningful mutual recognition agreements for legal services.

#### **c. Proposal for an International Legal Consultant License**

The adoption of a re-qualification or recognition mechanism does not seem possible at multilateral level. However, some aspects could be included into the development of an international legal consultant license. Such a license could contain the following elements.

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<sup>13</sup> For further information see <http://www.clt.co.uk/qlts> (last visit 10.07.2012)

<sup>14</sup> ALEC LEGAL INITIATIVES (2009d), APEC Economy Hong Kong; Jurisdiction: Hong Kong, <http://www.legalservices.apec.org> (last visit 10.07.2012).

<sup>15</sup> ALEC LEGAL INITIATIVES (2009e), APEC Economy Singapore; Jurisdiction: Singapore, <http://www.legalservices.apec.org> (last visit 10.07.2012).

<sup>16</sup> See for instance New York Bar Exam Eligibility: [www.nybarexam.org](http://www.nybarexam.org) (last visit 10.07.2012).

<sup>17</sup> Directive 98/5 EC of the European Parliament and the Council of 16 February 1998, *to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, 14 March 1998, OJ L 77/36.

<sup>18</sup> Directive 2005/36 EC of the European Parliament and of the Council of 7 September 2005, *on the Recognition of Professional Qualification*, 30 September 2005, OJ L 255/22.

As first step, WTO Members should not focus on what is authorized, but rather define the areas of legal practice that are excluded for foreign lawyers. This solution exists in Singapore. Interestingly, Singapore authorities have defined a policy objective, which is to maintain a certain level of quality and ensure that there is no oversupply of lawyers in the domestic market.<sup>19</sup> Such policy objective is common among WTO Members although not expressly stated. Singapore authorities have delimited areas reserved for the domestic legal market.<sup>20</sup> Such a solution would clarify the scope of the domestic lawyer and the transnational legal practice. This distinction is not always clearly stated and leads to misunderstandings.

WTO Members could adopt a common FLC license, which would be recognized by those Members willing to do so. There is already a convergence of opinion among WTO Members on what they are prepared to authorize as foreign legal practice in their jurisdictions. Although differences remain concerning licensing requirements, they are not extreme and agreement on common licensing requirements should be achievable. Conditions could include the following: to be a recognized lawyer in the home country; a certain number of years of practice; to be in good standing in the home country; to hold recognized liability insurance; to be a member of an internationally recognized bar association; and to provide rules dealing with conflicting deontologies. Furthermore, residency requirements could be reviewed. WTO Members would remain free to regulate the relationship between domestic licensed lawyers and foreign lawyers.

An innovative option would be to incorporate a rule on re-qualification, which would enable foreign lawyers to practice domestic law within a limited domain. This solution would enable foreign lawyers to provide legal advice on business law regardless of its origin. Such a process could depend on the procedures implanted by each WTO Member. There are various models for re-qualification: the requirement to pass an aptitude test, academic credits from a domestic university, examinations or a certain number of years of experience. WTO Members could also negotiate terms regarding business form, the name of authorized law firms and eventually their relationship with domestic firms.

Finally, the FLC regime could feature provisions on cooperation between competent authorities in home and host countries. This collaboration could include mutual assistance on, for instance, double deontology issues or the supervision of lawyers. It could supplement deficiencies found in the transparency provisions of various trade agreements.

#### **d. Remarks on the International Legal Consultant License**

The international legal consultant license would synthesize various mechanisms developed by various jurisdictions to facilitate cross-border legal practice and reflect the current level of liberalization found in trade agreements.

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<sup>19</sup> WTO-TPRB (2008c), *Trade Policy Review of Singapore*, Secretariat Report, WT/TPR/202, 14 July, Geneva, p. 102.

<sup>20</sup> The excluded legal areas are: constitutional and administrative law; conveyancing; criminal law; family law; succession law (including matters relating to wills, intestate succession and probate and administration); trust law; appearing or pleading in any court of justice in Singapore, representing a client in any proceeding instituted in such a court or giving advice on the conduct of such proceeding (...); appearing in any hearing before a quasi-judicial or regulatory body, authority or tribunal in Singapore (...). Part I: 3 of The Legal Profession Act (Chapter 161); Part VII of the Legal Profession (International Services) Rules 2008, <http://www.agc.gov.sg> (last visit 7.10.2012).

The adoption of an international legal consultant regime could foster the liberalization of legal service in the context of trade agreements and offer many advantages such as:

- It would be detached from the local paradigm. As an international license it would be portable and enable foreign lawyers to practice in multiple jurisdictions. It could facilitate the provision of legal services in mode 4.
- It would reinforce transparency requirements through a unique set of requirements. This is an improvement on the current situation where requirements differ from one jurisdiction to another. Furthermore, it could feature a collaboration mechanism between regulatory authorities, which would lead to better monitoring of lawyers.
- It would clearly define activities reserved for domestic legal services. This would enhance the understanding of what foreign lawyers do.
- It would facilitate trade negotiations on the liberalization of legal services by providing a synthesis of what WTO Members are ready to agree to. The license would provide a basis for further negotiations on topics such as requirements for re-qualification.

Another benefit is that the license could be subject to negotiations and WTO Members could progressively agree to its terms, which is in line with the spirit of negotiations at multilateral and bilateral level.

#### **e. Final Thoughts**

An important aspect of the development of an international legal consultant license is that it is in line with current trends on the regulatory reform of legal services that is taking place in jurisdictions such as the EU or other OECD countries. The general view is that regulation is necessary in the legal services sector in order to correct market failures and preserve the public interest. However, the trend is to refocus regulation on where it is really needed; namely to protect consumers in the event of an asymmetry of information or to preserve the juridical system. On the other hand, tight regulation is less relevant in the case of business transactions, where no local courts are involved.

In this context, the proposal for an international legal consultant license leaves out areas of law that are typically local. These would remain the competence of local authorities. On the other hand, it ensures a minimum level of control in order to ensure that the ethical rules of the legal profession are preserved through a cooperation mechanism between regulatory authorities.

However, the adoption of an international legal consultant license (or any other proposal to facilitate cross-border legal practice) cannot be undertaken without the active participation of various bar associations. The European bar association provides a good example of such cooperation.<sup>21</sup> However, it remains to be seen if the same can be achieved at international level. If the legal profession fails to take action, it runs the risk that eventually an entire part of the legal services sector will be liberalized and they will have had no say in the matter.

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<sup>21</sup> HO-DAC (2010), *Les Professions Juridiques et Judiciaires: "Par le Marché Intérieur des Services, au-delà du Marché Intérieur des Services"*, O. Dubos, P. Kaufmann, Pedone (eds) *L'Europe des Services, l'Approfondissement du Marché Intérieur*, pp. 77–95.

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