Unclassified **TD/TC/WP(2003)40/FINAL**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **14-Jun-2004**

English - Or. English

TRADE DIRECTORATE
TRADE COMMITTEE

TD/TC/WP(2003)40/FINAL
Unclassified

Working Party of the Trade Committee

MANAGING REQUEST-OFFER NEGOTIATIONS UNDER THE GATS: THE CASE OF LEGAL SERVICES

OECD Trade Policy Working Paper No. 2

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JT00166062

English - Or. English

ABSTRACT

This study forms part of on-going OECD work on trade in services, in co-operation with UNCTAD, aimed at assisting WTO Members in managing request-offer negotiations under the GATS. The key objective is to help officials of WTO Members in both gaining a greater insight into the particular issues of importance in the legal services sector and how they might be approached in the negotiations. While only modest liberalisation of legal services trade was achieved during the Uruguay Round, the current negotiations offer the opportunity to achieve greater levels of liberalisation, which may lead to significant economic benefits to all countries. In addition, the peculiar characteristic of legal services is that the potential downsides stemming from liberalisation — both in terms of market failures to achieve social objectives and of the displacement of local suppliers — are likely to be less significant in these services.

Keywords: legal, services, barriers, benefits, exports, liberalisation, regulation.

ACKNOWLEDGEMENTS

This study has been prepared by Massimo Geloso Grosso of the OECD Trade Directorate. The report benefited from significant contributions by Maxine Kennett and was supervised by Julia Nielson and Dale Andrew, Head of the Trade Policy Linkages Division. It has been discussed in the Working Party of the Trade Committee which has agreed to make these findings more widely available through its declassification under the responsibility of the Secretary General. It is available on the OECD website in English and French at the following address: http://www.oecd.org/trade

The author wishes to thank Patrick Bourke, Markus Jelitto, Dale Honeck, Alison Hook, and Carlos Gimeno Verdejo for helpful comments and discussions during the preparation of the study.

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KEY FINDINGS

This paper forms part of the on-going project on trade in services to produce a set of sector-specific checklists, in co-operation with UNCTAD, by building on the generic negotiating checklists developed in part II of "Managing Request-Offer Negotiations under the GATS."[1] The aim is to assist WTO Members in gaining a greater insight into the particular issues of importance in the legal services sector and how they might be approached in the negotiations.

The legal sector and legal services trade have experienced continuous growth in the past decades as a result of the expansion of international trade and of the emergence of new fields of practice, particularly in the areas of business and trade law. Modes 3 and 4 are becoming increasingly important for law firms, as their international clients demand multi-jurisdictional advice and an integrated service covering all aspects of a transaction. In order to meet these demands, law firms often attempt to build their own international networks through commercial presence and develop a pool of lawyers with knowledge of many countries, including host countries, and practices relevant for their clients' business.

However, trade in the sector continues to be affected by a variety of measures arising from the national character of the law in each country. These measures affect primarily modes 3 and 4 as the other modes of supply are much more difficult to regulate.

Although the distinction is at times difficult to make, it is important to distinguish between market access and national treatment measures on the one hand and domestic regulatory measures on the other. Market access and national treatment measures are subject to scheduling under GATS Articles XVI and XVII, and consequently to negotiations for their removal. Negotiating proposals and requests from several WTO Members call for the removal of many of these restrictions. For example, given that foreign law firms often do not attempt to re-qualify their lawyers in the host country but seek to associate with and employ locals to expand in the field of host country law, restrictions to associate with and employ locals have been identified as major barriers for removal. Equally, nationality and residency requirements are often seen as overly burdensome and could be replaced by less trade restrictive measures, such as liability insurance.

Non-discriminatory domestic regulatory measures such as qualification requirements, on the other hand, fall under GATS Article VI and do not need to be scheduled. Legal services, like many other professional services, tend to be highly regulated to meet a range of public policy objectives. While the legitimacy of such regulation is not in question, WTO Members are encouraged to use efficient regulation that does not unnecessarily restrict trade. Equally, Members could be encouraged to explore trade facilitating solutions, such as limited licensing systems for foreign legal consultants and mutual recognition agreements.

While only modest liberalisation was achieved in the Uruguay Round, the current negotiations offer the opportunity to achieve greater levels of liberalisation in all countries. This could lead to benefits that go well beyond the growth of the sector, including higher quality and lower prices for all consumers of legal services (both individuals and businesses). As these are for the most part corporate clients, the increased

1 OECD, 2002a.

availability of these services, and the more secure environment they create, can help to attract foreign investment, create business opportunities for local suppliers and enhance overall economic efficiency.

Liberalisation needs to be complemented by the establishment of an appropriate regulatory framework to ensure that public policy objectives such as the protection of consumers are safeguarded. Progressive and transparent liberalisation also allows incumbents to prepare for increased competition. The GATS is well suited to pursue these objectives by allowing Members full freedom to choose the terms of liberalisation.

Two important issues, specific to the legal sector, need to be kept in mind. First, the impact of liberalisation on consumers will be relatively less significant in this sector as most trade in legal services is business to business (B2B) and not business to consumer. In addition, few special risks for consumer protection arise, given that foreign lawyers operate within the scope of their qualifications — that is, when a foreign lawyer provides legal services attached to her home country or international qualifications, or when a locally qualified lawyer provides all local law services on behalf of a foreign firm.

Second, the impact of liberalisation on local suppliers is also likely to be smoother, as they retain a competitive advantage in the practice of domestic law. This is true also in light of the fact that foreign firms have to hire locally qualified lawyers for any expansion into the field of host country law.

While developing countries for the most part do not currently have significant export interests in the sector, they nonetheless stand to gain significantly from liberalisation of imports of legal services. In addition to the wider economic benefits such as increased capacity to attract foreign investment, the presence of foreign suppliers, including through cooperation between domestic and foreign firms and employment of local lawyers by foreign firms, can help create a more competitive sector whereby local lawyers can assimilate knowledge and expertise. This, in turn, can assist in the development of export capacity. The GATS, in particular Articles IV and XIX, provides developing countries with additional flexibility to pursue these objectives. Provision of technical assistance and capacity building to support liberalisation may also be particularly relevant for these countries.

I. INTRODUCTION

1. As agreed by the Trade Committee Working Party at its 14 October 2002 meeting, this paper forms part of on-going OECD-UNCTAD work aimed at assisting WTO Members to successfully conduct request-offer negotiations under the GATS.[2] In particular, it aims at giving greater specificity to the generic negotiating checklists developed in Part II of "Managing Request-Offer Negotiations under the GATS",[3] by applying them to legal services. The objective is to assist WTO Members in both gaining a greater insight into the particular issues of importance in the legal services sector and how they might be approached in the negotiations.

2. The need to enhance the level of bound liberalisation under the GATS is considered as one of the important challenges facing WTO Members in the legal services field. This is so both because the Uruguay Round generated only a modest harvest of liberalisation undertakings, with most Members at best maintaining their existing restrictions. The current set of GATS negotiations offers WTO Members at all levels of development an opportunity to achieve greater levels of liberalisation in a flexible and progressive manner.

3. There is increasing awareness of the benefits of greater market openness in services markets, including in the legal sector. There is, at the same time, growing recognition that opening services markets to foreign competition is no easy task. Doing so involves a broad set of policies, regulatory instruments, institutions and constituencies, domestic and foreign. Considerable care must be given to assessing the nature, pace and sequencing of liberalisation undertakings and regulatory reform in order to both reap the benefits of greater market openness and ensure that public policy goals such as the protection of consumers are attained. These challenges can be particularly acute for developing countries, which are likelier on average to have weaker regulatory regimes and enforcement capacities, and therefore need adequate provision of technical assistance and capacity building.

4. The central purpose of the checklist on legal services developed here is to help officials of WTO Members by highlighting some of the key issues which they may wish to consider in framing and assessing requests and offers. The checklist, though, is indicative in nature. Considering the great diversity of economic interests, export potential and development needs among WTO Members, country-specific fine-tuning is required to enhance its operational value.

5. After an overview of the legal services sector presented in the next section, Section III provides some trends of trade in the sector as well as a description of the key measures currently affecting trade in legal services. Section IV reviews current developments in the GATS, including definition issues, current commitments and progress in on-going negotiations. Section V then presents a discussion of the potential benefits deriving from greater openness of legal services markets, the concerns to be addressed in relation to current market access negotiations and key issues in the area of domestic regulation. An annex provides a list of questions that WTO Members may consider in approaching the request-offer process.

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2 Under this joint OECD-UNCTAD project, sectoral checklists have been completed on insurance (OECD, 2003a) and energy services (UNCTAD, 2003). Two further checklists on environmental and construction services will be completed in 2004 by the OECD and UNCTAD Secretariats, respectively.

3 OECD, 2002a.

II. GROWTH OF THE LEGAL SERVICES SECTOR

6. Legal services play a crucial role in facilitating business and are a vital part of the infrastructure that underpins world commerce. It is not possible to contemplate conducting business transactions, particularly those of a trans-national nature, without the input of lawyers. Legal firms in many countries are internationalising as their clients seek opportunities in a fast globalising market place and need a consistent level of service across various jurisdictions.[4] If this service is not available domestically, then the majority of the legal work involved in any transnational business will be done offshore.

7. The legal services sector has experienced continuous growth in the past decades as a result of the expansion of trade and the development of new fields of law, particularly in the areas of business and trade law. Segments such as corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property rights and competition law have generated increasing demand for more sophisticated legal services. This also led to the emergence of a new type of lawyer mainly involved in advisory services — as opposed to the traditional local court advocate — expected to provide advice to clients in respect of transactions and investments covering countries around the world,[5] and taking on roles traditionally performed by investment banks (particularly in the co-ordination of global deals).

8. Although there is limited reliable data on the overall size of the sector, the WTO indicates that in the EC the number of professional providers of legal services has grown on average by over 20% in the period 1989-1993, while in the United States it tripled between 1973 and 1993.[6] In 1999, the number of lawyers reached 858 000 in the US, and the practice of law grew from an estimated USD 4.2 billion a year in 1965 to an estimated USD 148 billion a year in 1999.[7] In 2000 there were 617 060 lawyers in the EC, and the output of legal services reached EUR 176 billion in 1999.[8]

9. The legal services sector has also experienced significant consolidation over the past decade, resulting in the creation of a growing number of multinational law firms. Between 1997 and 2002, the head count of the top 50 legal firms grew by 51%, while revenue increased by 62% (see Chart 1 below). The Global 100, compiled annually by Legal Business and the American Lawyer, shows that in 2002 the first 98 law firms based on revenue were from the US (69), the UK (17), Australia (7) and Canada (5). There were only two non Anglo-Saxon firms in the list, both from Spain.[9] Thus, large international firms are for the most part still limited to a few Anglo-Saxon, common law countries. That said, lawyers within these firms are likely to be nationals of, or qualified in, many different countries, including developing countries. Major international law firms increasingly recruit talent globally — for example, the lawyers and other professionals in Baker & McKenzie, an American firm ranked number 2 in 2002 in the Global 100 list, are

4 WTO, 2001a.

5 OECD, 1996; and WTO, 1998a.

6 WTO, 1998a.

7 New York State Bar Association, 2000.

8 Eurostat, 2002.

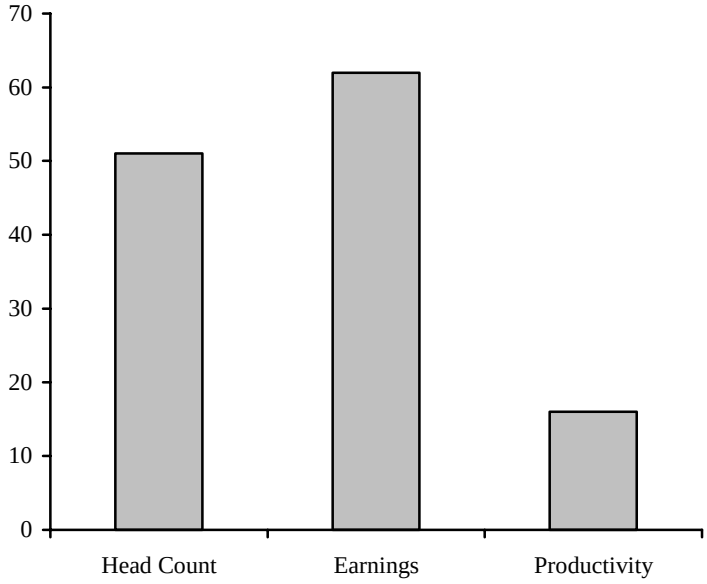
9 International Financial Services London, 2003. Annex Table 2 presents a ranking of the 50 largest firms in the world.

nationals of more than 60 countries.[10] Additionally, in the past few years more large firms have also emerged in other civil law jurisdictions such as France, Germany and the Netherlands.[11]

10. A new feature of the market for international legal services is the growth and emerging export activity of Asian law firms. In Hong Kong, China, for example, the total revenue of the legal sector exceeds USD 1.5bn. There are currently 569 law firms in the country, 49 of them foreign, employing 4,179 solicitors, and 114 firms employing 732 barristers.[12] The total revenue of Singapore domestic law firms was estimated to be SGD 849 million in 2000.[13]

Chart 1. Growth of legal services

% growth of top 50 firms, 1997/98-2001/02



Source: The American Lawyer/Legal Business

10 Baker & McKenzie, 2003.

11 WTO, 1998a.

12 Lowtax.net, 2003. A barrister is a litigation specialist that restricts his or her practice to the court room. A solicitor restricts his or her practice to providing legal advice and does not normally litigate.

13 Singapore Ministry of Law, 2003.

III. TRADE FLOWS AND MEASURES AFFECTING TRADE IN LEGAL SERVICES

11. In recent years, perhaps as a result of the growth of international trade and of the emergence of the new fields of practice, trade in legal services seems to have grown at an even faster rate than the overall sector. The two major exporters are the US and the UK. In 1999, the US exported USD 2.56 billion in legal services, which compares with USD 97 million in 1986, more than a twenty-six fold increase in thirteen years.[14] The UK exported legal services worth GBP 1.838 billion in 2002, roughly equivalent to the UK exports of communications services, an almost 100% rise in legal services exports since 1997.[15] Trade in legal services has also been significantly growing in other countries. Hong Kong, China's exports of legal services, for example, amounted to HKD 817 million (USD 105 million) in 2001, a sharp increase of 87% from 2000.[16] Similarly, Australian exports of legal services have grown from AUD 74 million in 1987/88 to about AUD 250 million in 2000/01.[17]

12. Business law and international law are the segments most affected by international trade in legal services, with most of the demand for legal services in these fields of law coming from businesses and organisations involved in international transactions. Foreign lawyers, for the most part, provide advisory legal services in the law of their home country, in the law of any third country for which they posses a qualification, or in international law. Domestic law (host country law) has traditionally played a marginal role due to qualification requirements, which, like domestic law, are shaped along national lines.[18] Host country law is however gaining ground in international trade in the sector, with foreign law firms or lawyers attempting to have the capacity to associate with, or employ, local lawyers, instead of re-qualifying in the host country.

13. Trade in legal services can take place cross border (Mode 1) and may benefit significantly from the growth of the internet and of electronic commerce, although residency and commercial presence requirements could limit this potential growth. Trade can also take place through the temporary stay of natural persons moving as individual professionals (Mode 4). The establishment of a commercial presence by law firms in other jurisdictions (Mode 3), though limited in the past, is growing significantly. For example, English firms currently have about 600 overseas offices between them and foreign law firms from around 50 countries have offices in London. In China, 189 foreign law firms have established a commercial presence.

14. Commercial presence and the presence of natural persons are of particular relevance to modern legal services, especially as a result of the significant increase in the demand for multi-jurisdictional advice (often with a strong element of local knowledge) and for a fully integrated service covering all aspects of a transaction. Law firms seeking to support the commercial aspirations of international companies often endeavour to build their own international networks through commercial presence in order to have sufficient geographical coverage to provide the advice required by their clients. Law firms also attempt to

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14 Terry, 2001.

15 UK Office of National Statistics, 2003. It should be noted that these figures do not take into account the earnings of the 600 overseas offices of UK firms around the world.

16 Tdctrade.com, 2003.

17 Miller and Gallacher, 2002.

18 WTO, 1998a; and Miller and Gallacher, 2002.

develop a pool of lawyers with knowledge of the many countries (including the host country) and international practices or treaties relevant to their clients' business.[19]

15. Trade in legal services is affected by a range of measures. Many of these measures arise from the fact that the legal profession is divided across national lines and reflects the national character of the law in each country. Most WTO Members maintain tight restrictions on commercial presence and presence of natural persons. The other modes of supply — cross-border and consumption abroad — are less restricted as they are much more difficult to regulate. Besides market access and national treatment restrictions, domestic regulatory measures such as qualification requirements may also have a significant impact on trade in the sector. Table 1 presents some of the key measures impacting upon legal services trade in modes 3 and 4, including both measures that suppliers may encounter in other sectors (horizontal), as well as those specific to the sector.

Table 1. Measures affecting trade in legal services[1]

Types of measures	Mode 3	Mode 4	Modes 3&4
Market access (Art. XVI)	**Restrictions on legal form.** Prohibit or restrict the practice of law by corporate entities in order to ensure that professionals do not limit or evade their professional liabilities and responsibilities. **Restrictions on partnership with locally-licensed professionals or on the hiring of local professionals.** Prevent foreign law firms from expanding into the fields of court representation and host country law by associating with or employing locally qualified lawyers.[2]	**Restrictions on the movement of personnel, such as economic needs and labour market tests.** These restrictions may apply to persons seeking relatively long term establishment related to a mode 3 commercial presence (intra-corporate transferees) or to individuals moving for business purposes for short periods of time (contractual service suppliers).	**Nationality requirements** These requirements are more frequent in the practice of domestic law (including advice and representation). Advisory services in international and home/third country law are rarely the object of these requirements, although they may be inaccessible to foreigners in presence of an overall requirement for legal services.
National treatment (Art. XVII)			**Residency requirements.** These may take the form of *prior residency*, *permanent residency* and *domicile*.[3] Prior residency requirements confer a competitive advantage on those services suppliers who have already been residing in the host country for a number of years - the vast majority of which are nationals. Permanent residency, although potentially less restrictive also imposes an additional burden on foreign service suppliers who unlike already residing domestic ones have to take up residency in the host country. This in the case of natural persons might also lead to the loss of the home country residency. Domicile is the requirement to have an address in the host country, which has minimal trade distortive effects (at least for modes 3 and 4).

19 Department for Constitutional Affairs, UK, 2002.

Domestic regulation (Art. VI:4)	**Restrictions on international and foreign firm names.** They are listed as licensing issues in the WTO Accountancy Disciplines. However, they may constitute national treatment limitations if they affect the conditions of competition between foreign and local service suppliers within the meaning of Article XVII of the GATS.		**Qualification requirements.**[4] These requirements are particularly serious in the practice of host-country law, but they can also be used in relation to home/third country and international law. They are used to ensure that foreign professionals are qualified and licensed for the field of the law they intend to practice in the host country.
Other		**Administrative procedures relating to visas and work permits.** They form part of a country's immigration or labour market policies and benefit from a carve out on the basis of the GATS Annex on Movement of Natural Persons.[5]	

1. A number of the measures included in this table, e.g. nationality or residency requirements, will also impact upon modes 1 and 2.

2. These measures can also be considered national treatment, as they may modify the conditions of competition in favour of host country law firms.

3. In all these cases, where residency requirements represent formally identical treatment of foreign and national service suppliers, a determination on whether they affect conditions of competition within the meaning of Article XVII would have to be made on a case by case basis. In this determination, factors such as the nature of the legal services supplied (representation, advice, notarial activities, etc.), the mode of supply and type of residency would have to be taken into account (see WTO, 1998a).

4. When the requirements impose greater burden on foreign lawyers, these measures should be considered national treatment measures.

5. Although they should not be applied in a manner that nullifies or impairs the benefits of specific commitments. See the GATS Annex on Movement of Natural Persons.

Source: WTO, 1998a; and OECD, 1996.

16. In recent years some preliminary work has been undertaken to quantify the impact of various restrictions on a range of professional services, including legal services (see Box 1).

Box 1. Quantifying the cost of restrictions

Nguyen-Hong (2000) quantified restrictions affecting trade in legal, accountancy, architectural and engineering services in 34 economies worldwide (29 economies for legal services). The paper separately measured the restrictions a domestic firm and a foreign firm faced in establishing a presence and in continuing operations. Of the restrictions in professional services measured, the professions with the highest scores (i.e. those with the most restricted markets) were legal and accountancy services for both foreign and domestic firms, but especially foreign ones. These restrictions, by reducing trade and competition in the market, are likely to affect the cost and price of providing services.

Using econometric techniques, the paper also measured the effect restrictions on engineering services have on price-cost margins. The results suggest that restrictions on foreign supply of engineering services tend to allow firms in the domestic market to raise their prices above costs. The impact of restrictions in engineering services had the effect of raising prices by up to 15%, with most of this price increase attributed to restrictions on the establishment of foreign firms. The study also attributed a rise in costs of 1% to 7% to restrictions on domestic firms. The average restrictiveness index in the sample for legal services is similar to that of the most restricted economy for engineering services. Therefore, it is plausible to assume that there would be a similar effect on the price and cost of legal services.

IV. CURRENT DEVELOPMENTS IN THE GATS

1. Definition of legal services

17. The WTO services sectoral list[20] has a single entry for legal services listed as a subcategory of professional services and a sub-subcategory of business services, with reference to the CPC number 861 in the United Nations Provisional Central Product Classification.[21] As highlighted by the WTO Secretariat, the UN CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was less relevant to Members scheduling commitments than the distinction between advice and representation in host country, home/third country and international law.[22]

18. Even these distinctions are, however, under review during the current negotiations. A number of WTO Members have submitted proposals suggesting alternative definitions of legal services that could be used when countries submit their requests and offers. The proposals aim to refine, improve and bring enhanced flexibility to the current classification to reflect more clearly the commercial realities of

20 Document MTN.GNS/W/120.

21 The revision of the UN CPC (CPC Rev.1), approved by the UN statistical committee in February 1997, leaves legal services substantially unchanged. However, it includes as a subcategory of legal services "Arbitration and conciliation services", previously part of management consultancy services.

22 WTO, 2003a.

international trade in legal services. They also seek to give Members the ability to increase the number and quality of their commitments in legal services without compromising public policy objectives such as the protection of domestic consumers or safeguarding the rule of law.[23]

19. The levels of ambition for classification are varied, including in relation to the field of law, category of professionals and type of service. Some proposals have called for the development of common definitions for foreign legal consultancy services — i.e. professionals practising international, home and third country law — and for the practice of international law.[24] One proposal has suggested that legal services be divided into sub-sectors that focus on the individual professions (lawyers, judges, and other legal professionals not elsewhere classified).[25] Another has proposed defining legal services as including the provision of legal advice or legal representation in such capacities as counselling in business transactions, participation in the governance of business organisations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy and lobbying.[26]

20. More recently, a specific proposal for classification suggested adding 12 new sub-categories based on the area of law and the type of service. The 12 sub-categories are: home-country law (advisory services); home-country law (representation services); third country law (advisory services); third-country law (representation services); host-country law (advisory services); host-country law (representation services); international law (advisory services); international law (representation services); international commercial arbitration services; other alternative dispute resolution services; preparation and certification of legal documents; and other legal advice or consultancy services.[27]

21. A further proposal in this area considers that, for classification purposes, the only parameter to be taken into account should be the nature of the different activities that can be provided by legal professionals and not the underlying qualifications to perform these activities. In this respect, assuming as a guiding principle that legal services suppliers are only able to provide legal services for which they are qualified, this proposal suggests to: 1) keep the current classification of legal services (CPC 861, plus arbitration and conciliation) without further sub-divisions; 2) address any limitations on the provision of legal services, including on the fields of law on which practice would be allowed, through the market access and national treatment columns of their schedules of commitments (see below); and 3) allow for the possibility to enter additional commitments for the supply of legal services in fields of law for which the service supplier is not qualified.[28]

22. The International Bar Association (IBA) has also adopted in September 2003 a resolution in support of a system of terminology for legal services for the purpose of international trade negotiations. The resolution does not take a position on the issue of classification, but recommends a system of

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23 WTO, 2003a; and Miller and Gallacher, 2002.

24 See, for example, one of the communications from Australia on legal services (WTO 2001a) and the communication from Canada on professional services (WTO, 2001b).

25 Communication from India on movement of professionals (WTO, 2000a).

26 Communication from the US on legal services (WTO, 2000b). However, upon further consideration of WTO Members' concerns about lobbying by foreign lawyers, the United States is neither seeking nor requesting that WTO Members schedule lobbying in their commitments.

27 See the latest communication from Australia on legal services (WTO, 2002a).

28 Communication from the EC on legal services (WTO, 2003a).

terminology for legal services that could be used in formulating either commitments or reservations to commitments within the framework of the GATS.[29]

23. All these options need to be considered carefully by WTO Members. The classification system used in the Doha Round will have a significant influence on the evolution of the international market for legal services. It is crucial that the terminology employed in the negotiations be clear and consistent with the reality of modern trade in legal services.

2. Existing commitments and beyond

24. Under the GATS, WTO Members are subject to general rules and disciplines, which apply to all Members and, for the most part, to all services including legal services. These include most-favoured-nation (MFN) treatment and transparency; however, WTO Members were given a one-off opportunity to list MFN exemptions in the Uruguay Round (an opportunity also afforded to subsequent acceding countries). Six Members have MFN exemptions in legal services[30] and four other Members have exemptions for professional services.[31] Reasons given for exemptions include lack of reciprocity, the protection of public policy goals such as ensuring the quality of the service and the need to approve the establishment of foreign law firms on a case-by-case basis.[32]

25. Other obligations concerning market access and national treatment (Articles XVI and XVII, respectively) also apply but only to the extent that a WTO Member voluntarily chooses to list legal services in its schedule of specific commitments and subject to any listed limitations on the application of those obligations. In the Uruguay Round, 45 Members (counting the then twelve Member States of the EC as one) made commitments in legal services.[33] Of the 20 Members that have subsequently acceded to the WTO, all except Mongolia have made commitments in the sector.

26. The number of scheduled commitments is far greater in (advisory) home country and international law than in host country and third country law. Scheduled limitations on market access are quite common. Several Members have set out nationality and citizenship requirements or limitations on the types of legal entity. Some Members have also scheduled national treatment restrictions, particularly relating to residency requirements. Non-discriminatory domestic regulatory measures relating to licensing and qualification requirements have been scheduled by a few Members, even though such scheduling is not necessary and does not exempt the scheduled measure from the disciplines of other provisions of the GATS.

27. The Uruguay Round was only the first step in a longer-term process of multilateral rule-making and trade liberalisation. WTO Members agreed "to enter into successive rounds of negotiations with a view to achieving a progressively higher level of liberalisation."[34] Negotiations on services started on 1 January 2000 as part of the "built-in agenda"; at Doha, in November 2001, WTO Members agreed to begin a new, comprehensive round of negotiations and to build on the work done on services since 2000.

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29 IBA, 2003a.

30 Brunei Darussalam, Bulgaria, Dominican Republic, Lithuania, FRY Macedonia and Singapore.

31 Costa Rica, Honduras, Panama and Turkey.

32 See Annex Table 3.

33 See Annex Table 4.

34 GATS Article XIX.

28. In the first phase of the negotiations, several WTO Members tabled general proposals outlining their interests in the negotiations on legal services. Three Members submitted proposals that specifically address legal services,[35] and four Members, of which one is a developing country, addressed legal services indirectly by tabling proposals on professional services more broadly.[36] Some Members also referred to legal services in more general multi-sectoral or modal negotiating proposals.[37]

29. The proposals articulate a common view that a distinction should be drawn between those measures aimed at ensuring public policy objectives such as the protection of consumers in an efficient manner and those which unnecessarily restrict trade. Nationality and residency requirements are often considered more trade restrictive than necessary to achieve the intended objectives. The importance of facilitating establishment of foreign firms (Mode 3) and movement of foreign practitioners (Mode 4) is also frequently mentioned, as is the recognition of qualifications. Several Members further highlighted the importance of transparency in the sector. (Table 2 lists in more detail the key elements contained in the proposals relating to both professional services and those specific to legal services[38]).

30. The Guidelines and Procedures for the negotiations adopted by the WTO Council for Trade in Services, and later reaffirmed in paragraph 15 of the Doha Ministerial Declaration, set the request-offer approach as the main method for negotiating specific market access commitments in services. At Doha, it was agreed that Members should submit initial requests by 30 June 2002 and initial offers by 31 March 2003.

31. As part of this second phase of the negotiations, Members have thus been exchanging initial requests. As these are communicated between the WTO Members concerned, and not via the WTO Secretariat, there is no central collection point for requests. It is thus not possible to have an exact number of requests, nor to have an overview of their content. Nevertheless, a few Members reportedly made specific legal services requests to other Members. For example, the EC, which has released a summary of its requests, did make specific, tailored requests for market access in legal services to several WTO Members.

32. While requests are addressed bilaterally to negotiating partners, offers are traditionally circulated multilaterally (because of the MFN rule). 42 Members have so far submitted initial offers.[39] Of these, 12 have been derestricted by the Members concerned and are publicly available on the WTO website.[40] Another 13 are available via national or other websites.[41] Of the 25 offers which are publicly available, 8

35 Communications from Australia (WTO, 2002a; WTO, 2001a; and WTO, 2001c); communication from the EC (WTO, 2003a); and communications from the US (WTO, 1998b; and WTO, 2000b).

36 Communication from Canada (WTO, 2001b); communication from Colombia (WTO, 2001d); communication from the European Communities and their Member States (WTO, 2000c); and communication from Switzerland (WTO, 2001e).

37 See e.g. communication from India on movement of professionals (WTO, 2000a).

38 The table does not include issues of definition as these were dealt with in the previous section of this note.

39 Argentina; Australia; Bahrain; Bolivia; Bulgaria; Canada; Chile; China; Chinese Taipei; Colombia; Costa Rica; Czech Republic; European Communities and its Member States; Fiji; Guatemala; Hong Kong, China; Iceland; India; Israel; Japan; Republic of Korea; Liechtenstein; Macao, China; Mexico; New Zealand; Norway; Panama; Paraguay; Peru; Poland; Singapore; Slovak Republic; Slovenia; Sri Lanka; St Kitts and Nevis; Senegal; Switzerland; Suriname; Thailand; Turkey; United States and Uruguay.

40 Australia; Canada; Chile; the European Communities and its Member States; Iceland; Japan; Liechtenstein; New Zealand; Norway; Slovenia, Turkey and the United States.

41 Argentina; Bulgaria; Colombia; Hong Kong, China; India; Israel; Mexico; Panama; Paraguay; Poland; Singapore; Switzerland and Uruguay.

Members offer to include changes to the existing legal services commitments.[42] No Member has offered to make new commitments in the sector.[43]

33. The Members which have offered to make changes in their schedules have done so in their specific commitments in legal services and in some cases also in their horizontal commitments. Some Members have removed market access and national treatment restrictions in relation to nationality or residency requirements or have eased restrictions on legal form. Others have removed restrictions on partnership with local firms or hiring of local professionals. In some cases, the removal of the restrictions concerns only a few jurisdictions of a particular country. Some offers have also included transparency specifications aimed at protecting consumers, such as requirements on liability insurance or compliance with local codes of ethics.

34. Other countries have removed restrictions on scope of practice, thus allowing foreign suppliers to provide legal services in respect of the law in which those foreign lawyers are qualified, including host country law. In such cases, the commitments include transparency specifications (e.g. stipulating that the practice of host country law may be subject to admission to the local bar) and market access limitations on the newly allowed practice of host country law (e.g. in relation to types of legal form). Several countries have also reduced domestic regulatory requirements and eased recognition of qualifications across jurisdictions (these include minimal education requirements, as well as host-country and international practice experience).[44]

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42 Australia; Canada; the European Communities and its Member States; Iceland; Japan; Poland; Turkey and Switzerland.

43 However, Korea's offer, although not publicly available, proposes to make market access commitments in legal services for the first time. See UK Government, 2003.

44 As mentioned earlier, though, scheduling of non-discriminatory regulations is not necessary.

Table 2. Main features of the negotiating proposals

Member	Coverage of negotiations	Market access	National treatment	Modes of supply	Domestic regulation	Mutual Recognition	Other elements
Australia (3 proposals)	Legal services	Nationality requirements should be eliminated	Residency requirements should be eliminated Partnerships with local professionals should be allowed and foreign firms should be able to employ local lawyers	See relevant market access and national treatment restrictions in this table	The right to practice local law is to be granted on the basis of professional fitness only Limited licensing can be a useful scheme to minimise the negative effects of nationality requirements With further strengthening, the disciplines developed in the accountancy sector could be extended to the legal services sector	Limited or no recognition of qualifications affects international trade in legal services	Notes the lack of transparency in regulatory processes and systems
United States (2 proposals)	Legal services	Nationality requirements and restrictions on legal form should be part of current negotiations	Residency restrictions as well as restrictions on partnership with and hiring of locally licensed professionals should be part of current negotiations	Members should seek improvement in the quantity and quality of commitments across all modes	Some useful work on domestic regulatory measures has been undertaken in relation to accountancy services, which may be expanded to other sectors	Members should seek agreement on the mutual recognition of professional licenses, including those benefiting foreign legal consultancies	WTO Members should strive to provide maximum transparency in this sector, including in the operation of domestic regulatory regimes A reference paper could be drafted to address problems faced by lawyers in serving clients internationally
Canada	Professional services	Members should eliminate overt discriminatory requirements in the form of nationality and citizenship requirements	Alternatives to residency requirements should be sought	Members should facilitate the entry and stay of foreign professionals (Mode 4)		The development of mutual recognition agreements should be encouraged	Transparency is key given the highly regulated nature of most licensed professions

Colombia	Professional services	Nationality requirements should be abolished	Residency requirements should be abolished	Residency requirements unduly restrict cross-border trade Restrictions on Mode 3 should be minimised The temporary movement of natural persons (Mode 4) should be facilitated		Countries should be given the opportunity to enter into mutual recognition agreements	Notes developing countries' considerations
EC	Professional services	The nationality requirement is often an inappropriate tool Restrictions on forms of establishment (incorporation) should be minimised	Members should replace residency requirements with less trade restrictive requirements Members should eliminate restrictions on partnerships with or hiring of local professionals and on foreign firms names	Foreign service suppliers have to overcome obstacles to the movement of natural persons (Mode 4)	Qualification requirements are necessary to protect the public	Mutual recognition is an important way of facilitating trade in certain professional services	
Switzerland	Professional services	Nationality requirements should be eliminated	Members should eliminate residency requirements. These requirements significantly restrict cross-border trade		Domestic regulatory measures are becoming an increasingly important aspect of the trade liberalisation of professional services Recent consultations on professional services show that, with some changes, the disciplines on accountancy services could be transposed to other sectors		

V. BENEFITS TO BE ACHIEVED, CONCERNS TO BE ADDRESSED AND REGULATORY REFORM EFFORTS TO BE UNDERTAKEN

1. The potential benefits of open markets for legal services

35. The importance of liberalising trade and investment in legal services should not be underestimated. Not only would liberalisation improve opportunities for legal services providers, but it would also assist the development of trade as a whole. Indeed, without the inputs of lawyers, trade in both other services, as well as goods, would not occur in a structured, secure and predictable manner. Lawyers are increasingly playing a vital role in supporting and facilitating business in the world economy and are more and more regarded as part of the overall infrastructure of commerce.[45]

36. Trade in legal services, as in many other services, represents a challenge to the widespread notion that exports have a positive impact while imports negatively affect the domestic economy. In fact, significant benefits may flow directly or indirectly from the import of legal services. Domestic consumers may benefit in terms of an increase in the breadth, depth and quality of legal services available as well as a reduction in prices paid for legal services, as granting access to foreign lawyers and law firms helps to create a more competitive legal services market.[46]

37. Clients, both domestic and international, may also derive certain efficiency gains from "one-stop shops" within their home jurisdiction that can offer multi-jurisdictional expertise, as opposed to the inefficiencies associated with markets for legal services which are segmented by national systems.[47] Improvements in the trading system itself result from the facilitation of transactions and the ability of lawyers to test regulatory and market reforms on the basis of international standards.[48]

38. International trade in legal services can also be seen as catalyst for foreign investment, contributing to the security and predictability of the local business environment. With the rapid growth of cross-border investment and the search for new sources of capital, foreign investors need stability and predictability to manage risk and increase value. As part of this process, they will often seek the services of lawyers already familiar with their work, who are able to guarantee quality standards, regardless of where business takes place.[49] The ability to offer a fuller and more sophisticated range of services can also attract an increasing number of international clients[50] and lead to local practice of new types of law such as arbitration and conciliation.

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45 Department for Constitutional Affairs, UK, 2003a.

46 Johnston, 2002.

47 Johnston, 2002.

48 Department for Constitutional Affairs, UK, 2003b.

49 Department for Constitutional Affairs, UK, 2003a.

50 Department for Constitutional Affairs, UK, 2003b.

39. The presence of foreign lawyers, through forms of collaboration between foreign and local firms as well as employment of local lawyers by foreign firms, can generate employment for local practitioners. Additionally, this can create a more competitive and dynamic sector whereby domestic firms and lawyers can assimilate the innovation, knowledge and expertise which they are able to share with their foreign counterparts. As domestic firms become stronger and more competitive, they may also develop an export capacity. The increased overall efficiency resulting from liberalisation may in fact help domestic providers position themselves to take advantage of the expanding legal services market place.

40. Equally, there may be non-economic benefits to a country from opening up to outside influences. In some countries with very slow judicial processes, there may be benefits in learning from what others do in order to improve the administration of justice. The profession may also gain from adopting practices followed elsewhere governing the qualification and continuing education of lawyers in other jurisdictions, or from examining how they protect the interests of clients.[51]

2. Issues for consideration in the negotiations

(i) Concerns to be addressed about liberalisation

41. As mentioned in Section III, despite its growing importance, trade in legal services continues to be hampered by a variety of *market access and national treatment* measures that exclude or significantly reduce access to foreign providers of these services. These restrictions, although the intended objectives are often similar, are to be distinguished from *domestic regulatory* measures, which are addressed in Section V.3 below.[52]

42. The paramount consideration that underlies many restrictions relates to protecting the "public function" performed by host-country practitioners involved in the practice of host country law. This comes down to rules aimed at ensuring that legal services are rendered with the necessary knowledge and competence which can be expected by consumers, particularly knowledge of local language, culture, customs and local rules and conditions (e. g. nationality or residency requirements). Other rules are based on the refusal of regulators to recognise foreign lawyers as "lawyers" and are covered by the general prohibition of practising law in partnership with anyone who is not a qualified lawyer, aimed at guaranteeing the quality of the service or the independence of professionals (restrictions on partnerships with, or hiring of, locally licensed professionals). Another key regulatory consideration relates to ensuring accountability and liability of the professional service supplier vis-à-vis its clients (e.g. legal form and residency requirements). An additional issue of potential importance relates to ensuring proximity and availability of legal practitioners to clients (e.g. residency requirements).

43. The legitimacy of the protection of the public interest is apparent in the provision of legal services. Reform efforts must take account of the legitimate role of governments to intervene to offset market failures and to achieve non-economic objectives such as the protection of consumers. As the GATS itself recognises, liberalisation does not entail the removal of all regulation. Indeed, liberalised markets often require more rather than less regulation. The issue, however, is to what extent those public policy objectives are necessarily guaranteed by the measures used and whether they could be equally or better served by less trade restrictive means.

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51 Hook, 2003.

52 Domestic regulatory measures can be considered market access and national measures if they fall under the scope of Articles XVI and XVII.

44. The rationale for nationality requirements, for instance, is not clear. As mentioned above, these measures are used as an assurance that licensed lawyers are knowledgeable of host-country law and culture. The presumption that the capacity to acquire a requisite level of knowledge for licensure is a function of nationality does not seem justifiable. If a foreigner is willing to do what is necessary to acquire or demonstrate the requisite knowledge of the country in question (e.g. full legal education in the country, pass qualifying or other examinations), the same level of consumer protection is provided without the necessity of a nationality requirement.[53] Similarly, no special risk for consumer protection seems to arise when a locally qualified lawyer provides all domestic law services on behalf of a foreign law firm.

45. Claims that residency requirements are necessary to ensure proximity to clients may also need to be re-evaluated in the context of modern information and communication technologies. They may also be evaluated in light of the fact that, generally, in order to compete at all in the host country, a foreign law firm or lawyer will be independently motivated to maintain close consumer contact. Furthermore, where residency requirements are motivated by consumer protection, the issue is to what extent such requirements are actually necessary from the perspective of the consumers. Indeed, as mentioned earlier, the demand for international trade in legal services overwhelmingly involves businesses. It seems likely that these sophisticated consumers are capable of protecting themselves more effectively through private contractual arrangements, including provisions on insurance, indemnification, and dispute resolution, than that which is sought to be assured by residency requirements.[54]

46. Overly restrictive regulatory measures can create distortions that end up simply marginalising the domestic sector, impeding its growth and that of the domestic economy. For instance, a limit on the ability of local lawyers to enter into partnership with or employ foreign lawyers may simply result in foreign lawyers carrying out all the lucrative international commercial work with no transfer of knowledge to the local legal profession. Rules that impose heavy and time-consuming conditions on setting up branches of foreign firms may simply slow up foreign investment and the creation of internationally competitive local law firms.[55]

47. Instead, better adapted and more focused regulation is required to ensure that the full benefits of liberalisation are realised and important public policy objectives are preserved. For example, concerns about ensuring knowledge of local rules and culture appear to be better protected by an objective, fair and transparent process that grants the right to practice local law on the basis of knowledge, ability and professional fitness rather than by nationality requirements.[56] Similarly, consumer protection and the need of proximity could be achieved by other less trade restrictive measures than residency requirements, such as collaboration with locals, bonding requirements to ensure recourse or liability insurance.[57] Moreover, concerns that incorporation may imply a dilution of professional liability may be addressed by allowing partnerships which preserve full individual accountability of practitioners towards the firms' clients.[58]

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53 OECD, 1997.

54 OECD, 1997.

55 Hook, 2003.

56 WTO, 2001a.

57 WTO, 2001b.

58 OECD, 1997. In the broader context of professional services, discussions at the OECD addressed ways and means to advance regulatory reform. This included a search for alternative, less burdensome approaches to restrictions on investment in four professional services (accounting, legal, architectural and engineering services). In many instances, discussions were inspired by comparisons across the four professional fields considered and by the positive experiences of those OECD Member countries which maintain more open markets for professional services while addressing adequately consumer protection and public interest concerns. These alternative regulatory approaches were subsequently supported by the OECD Council [see OECD (2003b)].

48. One can even go further and create regulatory frameworks which not only safeguard traditional objectives but actually stimulate, for instance, the transfer of knowledge and skills, by requiring (and not preventing) co-operation between domestic and foreign firms or training of the domestic lawyers. It is only through such mechanisms of direct co-operation that local firms can achieve the international quality they need in order to be internationally competitive.[59]

49. Aside from the need for regulation to address market failures and secure non-economic and social policy objectives, some countries perceive liberalisation as a threat to their own legal services sector and feel that some level of protection is necessary for this purpose.[60] Opposition from incumbent firms and affected workers, which will often perceive liberalisation as a threat to employment or profitability, add to the complexity of efforts to liberalise the sector.

50. Trade liberalisation is rarely without distributional consequences. Many of the benefits deriving from greater market openness will take time to occur, while the costs associated with the rationalisation of the sector will appear early with changes in the structure of ownership and possibly displacement of labour. However, it is also important to recognise that, as mentioned in the previous section, liberalisation also exposes the domestic economy to greater levels of competition, foreign investment, and overall efficiency. These benefits may well offset losses in the competing legal sector.

51. An important dimension of the liberalisation of trade and investment in the legal services sector, as well as in many other services sectors, is that the adjustment associated with greater market openness generally takes place in a dynamic sectoral environment, where expanding firms can more readily absorb affected workers. Those that face the greater risks of being negatively affected by such changes may find it easier to re-position themselves within a dynamic sector that generates favourable income and employment opportunities than in a stagnant system that resists change. In addition, a peculiar characteristic of legal services is the fact that domestic providers will still retain a competitive advantage in the practice of host-country law, so that the adjustment associated with greater market openness is generally smoother than in other services sectors. This is true also in light of the fact that foreign law firms have the tendency to hire local lawyers to expand into the field of host country law.

(ii) The GATS framework for negotiations

52. Liberalisation pursued in a progressive, orderly and transparent manner can, in addition to helping realise the benefits mentioned earlier, allow incumbents to prepare for greater competition and enable governments to ensure that the appropriate regulatory framework for governing newly competitive market conditions is put in place.

53. The GATS is particularly well suited to support these objectives, by affording WTO Members full freedom to choose the terms on which market opening can be achieved. In the context of current request-offer negotiations, WTO Members face a number of options. For instance, where Members *voluntarily* choose to schedule a commitment for the legal services sector, they can, *inter alia*:

- exclude parts of the sector (e.g. the practice of host-country law), sub-sector (e.g. court representation) or a particular mode of supply.

- limit access, or discriminate against foreign suppliers in the sector, in any sub-sectors or modes of supply by scheduling market access and national treatment measures. As mentioned in the

59 Hook, 2003; and Department for Constitutional Affairs, UK, 2003a.

60 The remaining of this section draws, primarily, on OECD, 2002b.

previous section, though, care must be taken to design regulatory reforms so that public policy objectives such as the protection of consumers continue to be attained in an efficient manner.

- developing countries may include qualifications in their schedules of specific commitments in order to strengthen their domestic services capacity, including through access to technology and know-how. The GATS framework provides developing countries with sufficient flexibility to pursue these objectives, especially through Articles IV and XIX. However, care should be exercised in crafting any such qualifications to ensure that they do not ultimately deter trade and investment, thereby retarding the development of domestic capacity.

- pre-commit for future liberalisation in order to give the local industry time to adjust or additional time to ensure that the appropriate regulatory framework is established.

- maintain any non-discriminatory domestic regulatory measures, such as insurance liability, with no obligation to schedule them. These fall within the scope of Article VI of the GATS.[61]

54. A key issue for many developing countries is the question of regulatory capacity, whether they have the human and institutional resources to devise, administer and enforce the required regulatory framework for successful liberalisation. Assessment of this capacity will necessarily determine the nature and pace of liberalisation. Provision of technical assistance to developing countries to build regulatory capacity will thus be an important dimension of the GATS negotiations.

3. Domestic regulation[62]

(i) Qualification requirements

55. The removal or reduction of market access and national treatment measures, though crucial, may not be sufficient to grant meaningful market access in the legal sector. Qualification requirements, while legitimate, may have an important impact on trade in legal services, particularly for the practice of host-country law. Legal education differs from country to country and, in some instances, these differences are so wide that foreign lawyers are required to re-qualify in order to be able to practice in the host country. In most countries, legal qualification requirements include a university degree of three to five years (in some cases supplemented by postgraduate studies) and a period of practice followed by a professional examination.[63] Furthermore, the procedural aspects of these requirements, e.g. treatment of applications or frequency of exams, may constitute impediments to trade in the sector.

56. Mutual recognition agreements (MRAs) can be used as means to address or minimise these differences and to help avoid potential duplication in credentialisation or licensing requirements. This regulatory mechanism may hold significant promise in the context of legal services. The European Union already has considerable experience in the harmonisation and mutual recognition of legal requirements as part of its development of a single internal market (see Box 2). At issue are equivalencies between different

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61 The EC, though, has suggested in its communication on classification that a reference in a note may prove useful.

62 This section deals with general qualification issues (i) and licensing for foreign legal consultants (ii). Another controversial issue of domestic regulation is the treatment of multidisciplinary practices. Many countries prohibit the association between lawyers and non-lawyers on grounds of consumer protection and to ensure the quality of the service. See WTO, 1998a.

63 WTO, 1998a.

educational programmes and requirements; the fields of the law to be covered; and the specific means through which practitioners can be held accountable across borders for unprofessional practice.[64]

Box 2. Mutual recognition and establishment in the EU

Previous EU approaches to recognition were based on recognition of professional experience (normally 3-6 years) and recognition of professional diplomas, aimed at the comprehensive harmonisation of education and training. However, these approaches proved to be too cumbersome and complex and were replaced with a new approach based on mutual recognition. Instead of harmonizing the conditions for access to the professions, a general system of recognition of higher education diplomas was adopted whereby Member States recognize the comparability of higher education diplomas, in particular for granting authorization to exercise a regulated profession. The current system thus encompasses both sector-specific directives covering particular professions and a more general approach covering those regulated professions which are not the subject of specific directives. The EC system of mutual recognition is intended to facilitate the free movement of EU nationals and does not extend to third country nationals.

For those professions not covered by specific directives, a general system of recognition exists. Directive 89/48/EEC provided for an initial general system for the recognition of higher education diplomas awarded on completion of professional training of at least 3 years' duration. Directive 92/51/EEC expanded this system to diplomas, certificates and qualifications that are not part of long-term higher education, covering both shorter post-secondary or professional courses and secondary courses. Finally, Directive 99/42/EC introduced a system of mutual recognition of qualifications for access to certain commercial, industrial or craft occupations that were not covered by Directives 89/48/EEC and 92/51/EEC, repealing at the same time the sectoral directives in this specific area.

In all three cases, the host Member State may not refuse access to the occupation in question if applicants have the qualifications required in their country of origin. This is a type of semi-automatic recognition, based on the principle that the training should be recognised when the regulated professional activities the person wishes to perform are the same as those s/he is entitled to perform or has performed in the home state and where there is no substantial difference between the qualifications required in the host country and those possessed by the applicant. If the training the applicant received was of a shorter duration than in the host country, the host state may demand a certain length of professional experience. If the training differed substantially, the host state may require the applicant to undergo an adaptation period or course or to sit an aptitude test.

Legal services, which are covered by the general system of recognition, have also been the subject of sector-specific directives, in order to deal with the challenges posed by the diversity of legal systems within the EU. Directive 77/249/EEC set the rules for the free provision of legal services under home title and, more recently, Directive 98/5/EC has developed the regulatory framework for the establishment of EU lawyers in different Member States. The "establishment" Directive allows lawyers from one EU Member to practice on a permanent basis under home title in another Member State, with the proviso that the host country can require them to be assisted by a local lawyer when representing and defending their clients in court. After 3 years' work on this basis, they acquire the right to full exercise their profession under the host country's title without having to take a qualifying examination.

The European Commission has recently submitted a proposal for a new directive[65] which aims to make the system for mutual recognition clearer and easier to understand. The proposed new single directive would comprehensively revise all of the directives founded on recognition of title to maintain the principal conditions and guarantees contained therein while simplifying the structure and making improvements to the working of the system. The proposed directive would apply to legal services in relation to any improvement to the general system for recognition (Directives 89/48/EEC and 92/51/EEC). The directive would also simplify recognition for a number of specific professions (doctors of medicine, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects), although this would not include legal services.

Source: OECD, 2002c.

64 OECD, 2002a.

65 See EC, 2002.

57. At present time, though, most MRAs are between developed economies, although there is work underway that involves both developed and developing countries (e.g. in the context of NAFTA and APEC). Most trade agreements delegate the development of recognition agreements to professional bodies. Experience with MRAs suggests that most progress is made where agreements are initiated by the profession itself.[66]

58. The GATS permits the development of MRAs in Article VII (Recognition), which provides that Members may recognise the education or experience obtained in one WTO Member, but not another (i.e. an exception to the MFN treatment). More broadly, qualification requirements come within the scope of Article VI of the GATS, which requires the Council for Trade in Services to develop any necessary multilateral disciplines aimed at ensuring that qualification requirements, licensing requirements and technical standards do not constitute unnecessary barriers to trade in services.[67]

59. As a first step under this mandate, WTO Members developed in 1998 disciplines on domestic regulation in the accountancy sector. These disciplines, which are yet to enter into force, cover qualification requirements, licensing procedures and technical standards in the accountancy sector, and discussions have been on-going with the aim of exploring the feasibility of extending them to the legal sector. As part of the work programme of the Working Party on Domestic Regulation, several WTO Members have consulted government bodies and local professional associations on the possible application of the accountancy disciplines to other professional services.[68] The consultations suggest that in most cases the accountancy disciplines are relevant and generally applicable to other professions, including legal services. However, it also appears that the specific features and conditions of the legal profession should be duly taken into account, as is the need to ensure protection of the consumer and the quality of the service.[69]

(ii) Foreign legal consultants (FLCs)

60. In the fields of home/third country and international law, qualification requirements are less of an issue than in the field of host country law. Hence, FLCs, as they are known, face fewer impediments to trade; however, they may still face significant regulatory requirements, particularly in relation to licensing. For instance, most countries do not allow FLCs to present themselves as members of the local profession, but require the use of a specific title or their home professional title, so as to distinguish them from local lawyers. In some countries, FLCs are required to register with the local bar and/or to pass a professional examination. Although professional examinations for FLCs are often less onerous than the full local professional examinations, they may nevertheless constitute a hurdle, especially if they are held in the local

66 OECD, 2002c.

67 Article VI already contains some basic disciplines aimed at limiting the trade-restrictive effects of domestic regulations. In particular, where specific commitments in relation to professional services are undertaken, Members are to provide adequate procedures to verify the competence of professionals of other Members. More broadly, in sectors where specific commitments are undertaken, regulations are to be administered in a reasonable, objective and impartial manner.

68 To date 11 Members have submitted preliminary communications on the results of the consultations: Canada (2 proposals: WTO, 2001f; and WTO, 2003b), China (WTO, 2002b), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WTO, 2003c), the European Communities and their Member States (WTO, 2000d), Hong Kong, China (WTO, 2000e), Japan (WTO, 2000f), Republic of Korea (WTO, 2000g), Mexico (WTO, 2001g), Poland (WTO, 2000h), Switzerland (WTO, 2001h), and Thailand (WTO, 2001i).

69 The IBA has also contributed to the debate by preparing a discussion paper on: "What Changes are required to the WTO Accountancy Disciplines before they can be applied to the Legal Profession" (IBA, 2003b). Suggested modifications to the accountancy disciplines include, *inter alia*, the need to introduce wording on the core values of the legal profession and the need to clarify the distinction between qualification and licensing requirements.

language. Several countries also require FLCs to have practiced for a number of years in their home country in order to be licensed as FLCs in the host country.

61. Efforts have been underway in recent years both nationally and internationally to ease these requirements while safeguarding the public interest. The legal consultant concept was first adopted by New York in 1974. Foreign lawyers can be licensed as legal consultants without examination (that is without having to qualify as members of the New York Bar) to practice their home country/third country and international law in New York and are also allowed to advise in most aspects of US law if they work alongside a US lawyer. In order to qualify as legal consultants, foreign lawyers must have some practice experience and agree to avoid certain areas of local law.[70] In 1993, the American Bar Association (ABA) issued a Model Rule (or guidelines) for FLCs, which closely resembles the rules which were originally adopted in the State of New York. This was done in an attempt to streamline admission procedures for FLCs and establish greater uniformity and clarity across the US. To date, 23 States and the District of Columbia have adopted similar rules.

62. Rules on FLCs are also provided for in regional agreements. For example, the legal consultant concept is inherent in the far-reaching EC legislation on legal services described in Box 2. In addition, NAFTA Members are required to ensure that FLCs from other Member States are allowed to practice or to advise on the law of the country in which they are qualified to practice as lawyers. The Agreement also contains provisions on future liberalisation and provisions mandating consultations with professional bodies on matters such as partnerships between locally licensed lawyers and FLCs and standards for the licensing of FLCs.[71] Similar provisions are also contained in more recent regional agreements, such as the US-Chile Free Trade Agreement.

63. The IBA has also contributed in promoting clarity and uniformity in relation to international rules on foreign lawyers. It adopted in 1998 a "Statement of General Principles for the Establishment and Regulation of Foreign Lawyers."[72] The Statement sets out some general regulatory principles for the establishment of foreign lawyers, including FLCs. It also identifies two main approaches for the admission and regulation of foreign lawyers: a full licensing approach requiring host-country qualifications with no restriction on scope of practice, and a limited licensing approach which excludes foreign lawyers from practicing host country law and does not require host country qualifications.

64. In the context of on-going WTO negotiations, Australia (in which several jurisdictions have adopted rules consistent with the IBA Statement) has pursued the idea that legal service providers need not be licensed to provide legal services covering the entire body of law of a single jurisdiction or multiple jurisdictions, but only in areas in which they possess competence and/or qualifications. Therefore, foreign lawyers wishing to provide home or third country legal services would not be compelled to obtain a full license by undertaking the often burdensome process of fully qualifying in host-country law. These arrangements could also include association between foreign and host-country legal practitioners so that clients demanding international legal services can obtain a broad range of legal services from a common provider across different jurisdictions.[73]

65. In the current request-offer negotiations, Members interested in making commitments for legal services may do so by defining the sectoral coverage by reference to the concept of FLCs. Some Members have done so during previous commitments and some of the initial offers have also used this definition.

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70 Appearance in State's courts, real estate, family law matters and the preparation of documents governing inheritance. See Cone, 2003; and Silver, forthcoming.

71 Annex 1210 (Chapter 12). See WTO, 1998a.

72 IBA, 1998.

73 WTO, 2001c.

When doing so, countries can further specify in their offers, *inter alia*, the fields of the law (international, home, third country law) that FLCs may be allowed to practice, the relevant experience requirements or whether association with local lawyers is allowed. Another suggestion has been to combine commitments limited to FLCs with additional commitments based on a to-be-developed reference paper, which could ease the problems faced by FLCs serving clients internationally. This could include procedural and administrative issues, such as registration of establishments, processing of applications within reasonable time periods and transparency. Yet another suggestion has been to undertake commitments on all legal services without distinction, keeping in mind that, no matter the width of the commitments, the supply of legal services relating to host country law is still reserved to lawyers qualified therein (unless the qualification requirement is expressly waived). Such commitments would encompass the concept of FLCs and the possibility for foreign lawyers and law firms to associate with and hire lawyers qualified in the host country.[74]

4. Transparency

66. Transparency in the regulatory process is fundamental to ensuring a competitive legal services market. It is particularly relevant to trade in legal services as measures affecting entry and operation in legal markets include a number and diversity of domestic laws, regulations and practices. It is crucial that these be easily available to the public, including individual consumers and businesses, as well as legal service providers.

67. GATS-related transparency provisions are set forth in Article III, which requires WTO Members to publish all relevant measures, to inform the Council for Trade in Services of new and revised laws and regulations in sectors where specific commitments are made, and to establish enquiry points. In the context of domestic regulation, WTO Members have also agreed on further disciplines on transparency for the accounting sector, which could also be relevant for the legal sector. These are aimed in particular at increasing transparency of qualification and licensing procedures, as well as of technical standards.

68. Transparency disciplines beyond Article III form part of the work programme to develop horizontal disciplines on domestic regulation. Several Members[75] have submitted proposals aimed at strengthening the provisions contained in Article III by providing additional requirements. The proposals share the view that further rules could be established to enhance transparency of licensing requirements and procedures as well as technical standards, in line with the provisions already contained in the accountancy disciplines.

69. There is less agreement between Members, however, on whether it would also be appropriate to develop rules on prior consultation requirements. While some Members are in favour of such requirements, others believe that they could be incompatible with their regulatory and legislative systems or that they would constitute a significant administrative burden, particularly for countries at lower levels of development. In this connection, the provisions of the accountancy disciplines, which recognise the potential difficulties involved with prior consultation and call upon Members to endeavour to provide

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74 According to the proponents of this suggestion, when the sectoral coverage of commitments includes the practice of host country law, the possibility for foreign lawyers and law firms to associate with and hire lawyers qualified in the host country is recognised unless expressly ruled out by a market access limitation. Instead, when the sectoral coverage of commitments does not include the practice of host country law, such possibility would require a commitment under the column of additional commitments. This is because, it is argued, by definition any commitment or limitation under the market access and national treatment columns cannot affect the practice of host country law in the second case.

75 Australia (2 proposals: WTO, 1999; and WTO, 2000i), the European Communities and its Member States (2 proposals: WTO, 2001j; and WTO 2003d), and the United States (WTO, 2000j).

opportunities for comment when introducing new measures, could provide a valuable contribution to the current work on regulatory disciplines.

ANNEX TABLE 1
NEGOTIATING CHECKLISTS[76]

GATS-Related Issues

a) Measures affecting cross-border supply, including consumption abroad	1. Can non-resident suppliers of legal services serve the market on a cross-border basis? 2. Which fields of law are allowed or restricted as regards cross-border supply? 3. Are there any restrictions on the electronic transmission of legal services by non-established foreign legal service providers? 4. Where and how clearly are the restrictions spelled out? 5. What are the policy reasons for the restrictions (e.g. ensuring knowledge of local rules or accountability)? 6. Can the policy rationale be addressed through other, less trade restrictive means (e.g. insurance liability)?
b) Measures affecting commercial presence and movement of natural persons	Sector Specific 1. Are there any nationality requirements? If so, do they apply only to the practice of host-country law? Are foreign firms and practitioners interested to practice home country, third country (for which they have qualifications) or international law allowed to do so in spite of the nationality requirements? 2. What is the definition of home country law and is this definition unduly restrictive? 3. Are foreign suppliers required to establish locally through a particular legal form? If so, which one/s? 4. Are there any prior residency requirements for foreign firms and practitioners? What about permanent residency requirements for foreign practitioners? 5. Can foreign firms enter into partnerships with local professionals? What about hiring locally licensed professionals? 6. Are there staffing requirements for the establishment of branch offices, e.g. number of partners or lawyers per office, or ratio of domestic to foreign lawyers? 7. Are there restrictions on the use of international foreign firm names? 8. Where and how clearly are the restrictions spelled out? 9. What are the policy reasons for the restrictions (e.g. ensuring knowledge of local rules, competence, proximity and accountability)? 10. Can the policy rationale be addressed through other, less trade restrictive means (e.g. objective competency-based testing and local practice requirements, appointment of a representative agent or insurance liability)?
	Horizontal Measures 1. Are there any foreign equity restrictions? 2. Are there any restrictions on the movement of professional, managerial and

[76] The checklists below can be used in the following circumstances: developing a WTO Member's own offer; assessing a request from a Member's trading partner; assessing an offer from a Member's trading partner; formulating a request; or assessing whether or not to sponsor a position developed by another WTO Member.

	technical personnel? What about intra-corporate transferees? And contractual service suppliers? Do these restrictions apply to natural persons seeking long-term establishment or to individuals travelling for business purposes for short periods of time? 3. For contractual service suppliers, do the same restrictions apply to employees of law firms and to independent lawyers? 4. Are there prior experience requirements or post qualification experience requirements attached to the granting of visas?
c) Measures relating to licensing and qualification requirements[77]	General 1. What laws and regulations discipline licensing of legal services? 2. By who are licenses issued and monitored? 3. Are licenses required of domestic or foreign companies (or both)? 4. Are foreign service suppliers subject to different or additional licensing conditions from domestic suppliers? 5. Is multi-disciplinary practice allowed? 6. What are the qualification requirements to practice host-country law? How long is the period of local practice required under supervisions before qualification? 7. Is recognition of foreign qualifications provided for? 8. By who are applications treated? How frequent are exams for qualification carried out? Is it a transparent process? 9. Are there differential restrictions on domestic lawyers practising abroad? FLCs 1. Are there any qualification requirements concerning the practice of foreign country law or international law? If yes, is there a different or "limited" licensing scheme for foreign practitioners interested in practising only home country law, third country law (for which they posses a qualification) or international law? 2. Are these practitioners required to observe the host country rules of professional conduct? Are these practitioners considered lawyers? 3. Are these practitioners allowed to provide advisory services on host-country law if such advice is based on the advice of a fully qualified local lawyer? 4. Can these practitioners present themselves as members of the local profession or do they have to use a different title? If so, in which language? 5. Do these practitioners need to register with the local bar and/or pass a professional examination? Is such examination different from a full local professional examination? In which language is the examination carried out? 6. Do these practitioners need to have practiced for a certain number of years in their home country in order to be licensed to practice in the host country? If so, how many?
e) Preferential liberalisation measures	1. Are there any preferential agreements affecting the supply of legal services? Which measures are subject to preferential treatment? Do preferential measures also apply to the movement of natural persons? 2. What conditions must foreign suppliers fulfil to meet the requirements of existing MRAs to which host country providers are parties to? Do foreign service providers need to be locally established in order to be eligible for participation in a MRA? 3. Does the importing country maintain preferential access arrangements for developing country service providers?

[77] Some of these measures can constitute market access or national treatment limitations if they fall under the scope of Articles XVI and XVII of the GATS.

f) Universal access	Does the government maintain pro bono/access obligations? How are these obligations defined?

Non-GATS-Related Issues

g) Competition policy	1. Are there sectoral exemptions to competition law in the importing country affecting conditions of competition in legal services markets? 2. How does the competition law deal with instances of abuse of monopoly power? And cartels?
h) Temporary entry for services related tools	1. Are there any restrictions on the temporary admission of professional equipment necessary to carry out the service in a foreign market?

ANNEX TABLE 2

THE LARGEST LAW FIRMS IN THE WORLD IN 2002

Rank	Firm	Headquarters	Number of lawyers	Lawyers outside home country	Number of countries where firm has offices
1	Clifford Chance	UK - International	3 322	63%	19
2	Baker & McKenzie	US - International	3 094	83%	37
3	Freshfields Bruckhaus Deringer	UK - International	2 430	61%	18
4	Allen & Overy	UK - International	2 197	48%	20
5	Linklaters	UK - International	2 000	52%	22
6	Eversheds	UK - International	1 776	4%	6
7	Skadden, Arps, Slate, Meagher & Flom	US - New York	1 653	10%	12
8	Jones, Day, Reavis & Pogue	US - National	1 565	18%	12
9	Lovells	UK - International	1 432	55%	15
10	White & Case	US - International	1 427	60%	24
11	Latham & Watkins	US - National	1 400	17%	10
12	Sidley Austin Brown & Wood	US - National	1 400	11%	6
13	Holland & Knight	US - National	1 212	0%	1
14	Mayer, Brown, Rowe & Maw	US - National	1 197	26%	5
15	Minter Ellison Legal Group	Australia - National	1 139	5%	6
16	Morgan, Lewis & Bockius	US - National	1 097	4%	5
17	Shearman & Sterling	US - New York	1 085	37%	11
18	Akin, Gump, Strauss, Hauer & Feld	US - National	986	3%	4
19	DLA	UK - National	984	3%	4
20	Herbert Smith	UK - London	970	26%	8
21	Foley & Lardner	US - Milwaukee	944	0%	1
22	Garrigues	Spain - National	929	11%	3
23	Morrison & Foerster	US - San Francisco	916	9%	6
24	McDermott, Will & Emery	US - National	914	9%	3
25	Mallesons Stephen Jaques	Australia - National	909	3%	3
26	Norton Rose	UK - London	907	33%	13
27	Weil, Gotshal & Manges	US - New York	883	21%	8
28	Denton Wilde Sapte	UK - London	861	36%	15

29	Brobeck, Phleger & Harrison	US - San Francisco	834	0%	1
30	Winston & Strawn	US - Chicago	825	5%	3
31	Vinson & Elkins	US - Houston	814	5%	5
32	Hammond Suddards Edge	UK - London	805	15%	7
33	Pillsbury Winthrop	US - San Francisco	803	2%	5
34	Piper Rudnick	US - National	799	0%	1
35	Freehills	Australia - National	796	3%	3
36	Hogan & Hartson	US - Washington D.C.	793	12%	11
37	Greenberg Traurig	US - National	788	0%	1
38	O'Melveny & Myers	US - Los Angeles	776	4%	4
39	Simmons & Simmons	UK - London	769	38%	11
40	Hunton & Williams	US - Richmond	766	5%	5
41	Fulbright & Jaworski	US - Houston	762	1%	4
42	Squire, Sanders & Dempsey	US - National	760	22%	13
43	Clayton Utz	Australia - National	759	0%	1
44	Paul, Hastings, Janofsky & Walker	US - National	751	13%	4
45	Kirkland & Ellis	US - Chicago	747	4%	2
46	Dechert	US - National	744	28%	5
47	McCarthy Tetrault	Canada - National	740	2%	3
48	Gowlinig Lafleur Henderson	Canada - National	727	1%	2
49	LeBoeuf, Lamb, Greene & MacRae	US - National	722	15%	10
50	Blake Dawson Waldron	Australia - National	716	2%	4

Source: The American Lawyer / Legal Business

ANNEX TABLE 3

MFN EXEMPTIONS IN LEGAL AND PROFESSIONAL SERVICES

Member	MFN Exemption	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Bulgaria (1996)	Legal Services	Full national treatment on the establishment and operation of companies, as well as on the provision of services by foreign citizens, may be extended only to companies established in, and citizens of, the countries listed in column 4 of this table	Countries with which preferential arrangements are or will be concluded	Indefinite	Obligations under international agreements
Brunei Darussalam	Legal Services	All measures pertaining to the provision of legal services in Brunei Darussalam	All countries	Indefinite. Brunei Darussalam will keep the possibility of removing this exemption under review	The exemption is necessary as the establishment of foreign law firms in Brunei Darussalam is based on case-by-case approval
Costa Rica	Professional Services	A foreign professional may become a member of the corresponding professional college only if there is a reciprocal agreement in force with his or her country of origin and/or in certain cases if Costa Rican nationals may exercise the profession in similar circumstances in his or her country of origin	El Salvador, Guatemala, Honduras and Nicaragua	Indefinite	Need to ensure minimum standards of quality for professional services
Dominican Republic	Legal Services	Architects and engineers from the countries mentioned in column 4 of this table may exercise their profession on the basis of reciprocity	All countries	Indefinite	Reciprocity legislation in force
FYR Macedonia (2003)	Legal Services (excluding consultancy on home country, foreign and international law)	Legal services of foreign suppliers may be provided on the basis of reciprocity	All countries	Indefinite	Reciprocal coordination of the legal profession within the overall regional development of judicial and administrative institutions

Honduras	Professional Services	Authorization for the exercise of professional activities is granted on the basis of reciprocity	All countries	Indefinite	Lack of reciprocity
Lithuania (2001)	Legal Services	Attorneys from foreign countries can participate as advocates in court only in accordance with bilateral agreements on legal assistance	All countries with which agreements are or will be in force	Indefinite	Ability to control the legality and responsibility
Panama (1997)	Professional Services	Authorization to exercise a profession is granted on the basis of reciprocity	All countries	Indefinite	Lack of reciprocity
Singapore	Legal Services	All measures pertaining to the provision of legal services in Singapore	All countries	Indefinite. Singapore will keep the possibility of removing this exemption under review	The exemption is necessary as the establishment of foreign law firms in Singapore is based on case-by-case approval
Turkey	Professional Services	If any foreign country lays down legal and administrative conditions against Turkish citizens for performing arts and supplying services, the similar activities of the citizens of that country could be prohibited in Turkey	All countries	Indefinite	Desire to create favourable circumstances for Turkish citizens to perform their activities under equal conditions in the other countries

Note: The dates in brackets indicate the date of accession of Members which joined under Article XI of the Marrakech Agreement.
Source: WTO lists of MFN exemptions.

ANNEX TABLE 4

URUGUAY ROUND COMMITMENTS ON LEGAL SERVICES

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

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION		
Guyana	X	X	X	X	X	X		All*
Hungary					X			All*
Iceland			X		XF			All*
Israel	X	X	X	X	X	X		All*
Jamaica			X		X			All*
Japan	X	X	X	X	X	X	Services supplied by qualified patent attorneys and maritime procedure agents	All*
Lesotho	X	X	X		XF			3, 4*
Liechtenstein			X		X			1, 2,4*
Malaysia	(Domestic Offshore corporation laws)		X		X			1, 2, 4*; mode 3 limited to Federal territory of Labuan
Netherlands Antilles			X		X			All
New Zealand	X	X	X	X	X	X		All*
Norway					X			All*
Panama			X		X			All*
Papua New Guinea	X	X	X	X	X	X		All*
Poland	X	X	X	X	X	X		1, 2
Romania	X	X	X	X	X	X		1, 2
Rwanda	X	X	X	X	X	X		All
Sierra Leone	X	X	X	X	X	X		All*
Slovak Republic	X	X	X	X	X	X		All*
Slovenia	X	X	X	X	X	X		All*
Solomon Islands			X	X	X	X		All*
South Africa	X	X	X	X	X	X		3, 4*
Sweden			X		X			All*

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION	ADVISORY	REPRESENTATION		
Switzerland			X		X			All*
Thailand	X	X	X	X	X	X		2, 3
Trinidad and Tobago			X					All
Turkey			X		XF			All
United States	X	X	X	X	X	X		All*
Venezuela	X		X		X			2, 4*
TOTAL	**22**	**20**	**42**	**20**	**42**	**20**	**6**	

Source: WTO, 1998a

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

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

86130: legal documentation and certification services.

86190: other legal advisory and information services.

MA: Market Access

NT: National Treatment

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

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