

“TRADE IN SERVICES: OPPORTUNITIES AND CONSTRAINTS”

Project Study Sponsored by
Ministry of Commerce
Government of India

Executed by
Indian Council for Research on International Economic Relations
India Habitat Centre, New Delhi 110 003

Report on
TRADE IN LEGAL SERVICES

Co-ordinator: Dr. N. L. Mitra

Chief Co-ordinator: Mr. B.K. Zutshi

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Introduction

Legal services encompass a wide range of activities of economic and social consequences both in the developed as well as in the developing world. An important aspect regarding law is that it has a national character because it is part of local culture and life. This creates the main obstacle to cross-border trade in legal services. But amongst all national laws there are good deal of similarities specially in the basic principles abstracted from the observed practices.¹ Further, in the past decades international trade in legal services has increased rapidly as a result of internationalisation of the economy. Sectors such as corporate restructuring, privatisation, cross border mergers and acquisition, intellectual property rights, new financial instruments and competition law have generated an increasing demand for more and more sophisticated legal services. Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction.

Whereas international trade, commerce and industries are pooling the legal system closer, too much of traditionality in the qualification requirements in legal services on the knowledge of national law hinders internationalization of the profession.² With the integration of economies of the world, it would naturally require gradual globalisation of legal profession.³ A strong section of our legal profession has taken this process of globalization of the profession adversorially as if one can prevent any investor coming from outside to come alone without his legal advisor! The legal advisor comes as a part of the team of delegates and prepare the whole document of contract and asks a local lawyer to sign on the dotted line. One may note that lack of local expertise in certain fields of the law is, however, a factor that might gradually disappear as local practices develop skills in order to attract foreign client.⁴ We have to be reminded of the fact that on an affidavit, the Government of India, had to suggest to a New York trial court, that the country does not have a lawyer to deal with Bhopal tragedy and an able judge to try the case!⁵

¹ The background note of the Council of Trade in Services (S/C/W/43 dated 6 July 1998) observed, "There are of course important similarities between national laws, in particular within the 'great legal systems' or 'legal families', which are based on the same legal tradition and often share common bodies of law such as case law or legal codes. (Para 5)

² Ibid

³ Ibid, See para 4

⁴ Ibid

⁵ See Part I, Bhopal Gas Leak Disaster Case, NLSIU Publications, P.No.1, Assembled & Edited by Dr. N.R. Madhava Menon.

Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdiction mostly comes from their corporate clients, who do business across borders and choose to rely on the services of the professionals, who are already familiar with the firm's business and can guarantee high quality services. Recent regulatory and technological developments have increased the prospects for trade in legal services. With more and more countries introducing regulatory reforms and moving towards greater market orientation and with technological improvements enabling electronic transmission of certain legal services, trade in legal services is becoming increasingly important. In this context, the negotiations on legal services at the WTO negotiations on trade in services in 2000 assume great significance.

It may be pointed out that Indian legal community has a natural advantage and can take the advantage of entire Asian market both drawing inwards and supplying outwards the services of legal professionals. The Indian legal system provides several facilities for internationalization of legal services, such as:

- a) adversarial procedure ensuring procedural justice;
- b) legal code based on common practise;
- c) application of the principle of precedent; and
- d) advantage of English language.

Moreover, with the domination of legislation the only disadvantage of uncertainty in interpretative jurisprudence has also disappeared. There is a good deal of transfused hybridizing of all major legal families of the world. Whereas international trade, commerce and industries are pooling the legal system closer, too much of traditionality in the qualification requirements in legal services on the knowledge of national law hinders internationalization of the profession.⁶ With the integration of economics of the world, it would naturally require gradual globalisation of legal profession.⁷ With this background, it is important to take a close look at the possible benefits of India actively participating in the forthcoming negotiations on legal services under the auspices of GATS.

This paper begins with an explanation of the coverage of the term "legal services" as defined under the GATS, and then provides some background information on the structure, trends, and current as well as potential international trade in legal services (Section 1). Background information on the Indian legal service sector is provided in Section 2, and Section 3 specifies the different modes of supplying services under the GATS and mentions some of the GATS provisions that will be relevant in the context of the forthcoming negotiations. Section 4 summarizes the liberalization in legal services

⁶ Ibid

⁷ Ibid, See para 4

that has occurred as a result of the Uruguay Round. The Section provides both general information as well as the situation regarding India and its target export countries. A sub-section specifies the restrictions applicable in various countries to the activity of “Foreign Legal Consultants” because this will be an important activity as liberalization takes place in the coming years. Section 5 describes the Indian policy regime applicable to Indians and foreigners, and also describes the main features of the policy restraints faced by Indians when they go abroad to sell their legal services.

This provides a background for a discussion, in Section 6, of the Indian policies that are likely to be addressed by other WTO Members in the forthcoming negotiations. For any Indian negotiator, it is useful to know whether the policies addressed by others during negotiations are also the policies that should be reformed in any event in the course of improving the domestic policy environment for our own firms. Section 7 addressed the issue of which domestic policies should be reformed to improve Indian competitiveness in the legal services sector. This knowledge has to be combined with an assessment of the policies of other countries that should be addressed by Indian negotiators during the negotiations. Section 8 provides information on this issue. Section 9 specifies strategies to be followed during the negotiations, and Section 10 ends the paper with a consideration of which Indian laws will need changing if India makes concessions in the area of legal services during the forthcoming negotiations under GATS.

1. Overview of Legal Services in the World Economy

1.1. An overview of the activities covered by “legal services” category under the GATS

In the WTO’s “Services Sectoral Classification List” (document MTN.GNS/W/120), “legal services” are listed as a sub-sector of “business services” and “professional services”. This corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification. In the UN CPC the entry “legal services” is sub-divided in “legal advisory and representation services concerning criminal law” (86111), “legal advisory and representation services in judicial procedures concerning other fields of law” (86119), “legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.” (86120), “legal documentation and certification services” (86130) and “other legal and advisory information” (8619).⁸ The revision of

⁸ 861 Legal services

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

86111 Legal advisory and representation services concerning criminal law

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

the UN CPC approved by the UN statistical committee in February 1997 leaves the legal services classification substantially unchanged. However, it includes as a subclass of legal services "Arbitration and conciliation services," previously part of management consultancy services.⁹

It appears, however, that the UN CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was not as relevant to WTO Members scheduling commitments as the distinction between advice and representation in host country, home country and international law. As the UN CPC classification in this sector did not reflect the reality of trade in legal services, WTO Members preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services:

the preparation of a criminal case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to criminal law.

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

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

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

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

8613 86130 Legal documentation and certification services

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

8619 86190 Other Legal advisory and information services

Advisory services to clients related to their legal rights and obligations and providing information on legal matters not elsewhere classified. Services such as escrow services and estate settlement services are included.

⁹ See, "Detailed analysis of the modifications brought about by the revision of the central product classification," Note by the Secretariat – Addendum, S/CSC/W6/Add.10, 27 March 1998.

- (a) host country law (advisory/representation);
- (b) home country law and/or third country law (advisory/representation);
- (c) international law (advisory/representation);
- (d) legal documentation and certification services;
- (e) other advisory and information services.

Professionals practicing international, home and third country law are often referred to as Foreign Legal Consultants (FLCs). This definition has also been adopted in some GATS schedules.

1.2 Legal services in the world economy

Most of the demand for legal services comes from business and organisations. They often need a constant flow of legal assistance. In the field of business and international law most of the demand for legal services come from organisations that are involved in international transactions. These institutional actors will look for legal service providers who give them guarantees as to its knowledge of the firm's activities and of the place of business, as well as of the quality of the service it can deliver, regardless of its place of origin. A legal services supplier from the firm's country of origin (the firm's habitual lawyer) would have a comparative advantage with respect to the knowledge of the client's business, while a local service supplier would have a comparative advantage with respect to the knowledge of the local business and regulatory environment. Therefore business law and international law are the sectors most affected by international trade in legal services, although the possibility of entry of foreign service suppliers in more traditional sectors of domestic law should not be completely discounted as the sector becomes increasingly more integrated and competitive.

As a result of the massive growth in international trade and emergence of new fields of practice, in particular in the area of business law, the legal service sector has experienced a steady and continuous growth in the past decades. Unfortunately there are no comprehensive disaggregated data on the size of the sector, as legal services are often bundled together with other professional services or business services.¹⁰ It has been estimated that in the European Community 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 has tripled between 1973 and 1993.¹¹

The number of lawyers and law firms varies among countries according to the size of the economy, the level of economic development and the structure of the legal profession. In the mid 1990s the number of lawyers reached 800,000 in the United States (925,000, including non-professional staff), 500,000 in the European Community and 19,000 in Japan. The relatively low figure for Japan is explained by the fact that most of the counselling work is performed by non-qualified law graduates working as in-house lawyers for companies. It has been estimated that in 1992, together there

¹⁰ Disaggregated data on legal services are available from the OECD for Iceland and the United States.

¹¹ Commission of the European Communities, "Panorama of EU industry", 1997.

were 125,000 suppliers of legal services in Japan.¹² In the early 1990s the output of legal services represented 14% of all professional services and 1.1% of the economy in a “representative” industrialised country.¹³ In 1992 the output of legal services in the United States was \$95 billion, while in the European Community it reached \$52 billion.¹⁴

In the vast majority of countries the legal profession is practiced by individual professionals or by small firms, while the large law firms are still a phenomenon limited to a small number of Anglo-Saxon, Common Law countries. The largest firms in the world include:-

NAME OF THE LAW FIRM	COUNTRY
Baker & McKenzie	US
Jones Day	US
Sidley & Austin	US
Blake Cassels	Canada
Morgan Lewis	US
Mayer Brown	US
Mc Dermott	US
Clifford Chance	UK
Malleson Stephen	Australia
Francis Lefebvre	France
Kim & Chang	Korea, Rep. of
Loyens & Volkmaars	Netherlands
Deacons	Hong Kong
Boden Oppenhoff	Germany
Pinheiro Neto	Brazil

The constant growth of international trade and emergence of new fields of practice have ensured that trade in legal services grow at a rate even faster than the overall economic performance of the sector. In Italy, for example, exports of legal services have grown from US\$ 4 million in 1990 to US\$ 115 millions in 1997, while in Australia they have grown from US\$ 29 millions in 1991 to US\$ 118 millions in 1997. The two major exporters of legal services are the United States and the United Kingdom. The US and the UK had a combined net trade balance of almost US\$ 2 billion in the early 1990s, where the UK alone counted for US\$ 830 million, representing nearly 15% of the entire UK net trade balance from services. The figure for the UK is remarkable, considering that the size of the profession in the UK (72.000) is only about a tenth of that in the US (800.000). The US balance-of-payments data for private legal services,

¹² The Economist, 18 July 1992.

¹³ UNCTAD/ World Bank, “Liberalizing international transactions in services: a handbook,” United Nations, New York and Geneva, 1994. The data reflect averages for Canada, France and the United States.

¹⁴ OECD, “International Trade in Professional services: advancing liberalisation through regulatory reform,” OECD Proceedings, 1997.

which only capture cross-border trade and temporary establishment of natural persons, show that in 1990 the US had a surplus with respect to the whole EC of US\$ 188 million, but a deficit against the UK of US\$ 60 million.

Trade In Legal Services (1992-1997)

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

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

Figures expressed in millions of US dollars.

CR = Credit; DB = Debit

Legal Services: Gross Value Added (Current Prices)

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

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

Source: OECD, services statistics on value added and employment

Legal Services: Employment

1: thousands

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

Source: OECD, services statistics on value added and employment

United Kingdom and US suppliers of legal services enjoy a comparative advantage in international trade because of their domestic structure of the sector. In both these countries, the reliance is much more on large and medium sized law firms, rather than on individual professionals. Large and medium sized enterprises enjoy a competitive advantage in terms of human and financial resources with respect to individual professionals in dealing with complex business transactions which are often the object of international legal services. Individual professionals on the other hand tend to specialize in those traditional fields of domestic law, which are still the least exposed to international trade, due to the high barrier represented by qualification requirements and to the local nature of domestic law. This comparative advantage in legal services is also enhanced by the adoption of English law and New York law as the standards for international business transactions. To ensure legal certainty in international commercial transactions, especially major financial transactions, private parties often choose to subject their agreements to the laws of countries other than those in which they are resident, and sometimes to the laws of countries having nothing to do with the transaction itself.

2. Legal Services in the Indian Economy

India has the second largest legal profession with more than 600,000 lawyers. In spite of this we have a ratio of only 6 lawyers per ten thousand people, which is far less than what is available in any of the developed countries. There are about 500 law schools, where more than 2.5 lakh students are registered. Each year about 50,000 graduates come out of the National Law School of India University alone, of which nearly 40% join this profession.¹⁵

The Indian legal profession received the impact of GATT treaties in so far as corporate legal activities are concerned. Legal activities in project finance, intellectual property protection, environment regulation, competition law, corporate taxation, infra-structure contract, corporate governance, investment law, ----- all these were almost unknown before 1991-92. There were not more than 7-8 leading law firms in 1991-92 including Little and Company, Crawford Bailey, Khaitan & Co., Mulla & Mulla, Amarchand & Mangaldass, Gagrath & Company, Remfry Sagar and the like to deal with all conventional corporate legal activities. As a matter of fact, the system of practise through 'Law Firms' (Solicitors & Attorneys) was dispensed with specially after 1961 Act excepting in Bombay. Some old law firms like Fox & Mondal and Khaitan & Co., in Calcutta, however, continued. But during last ten years, not only the number of law firms providing services to corporate sector has increased by several hundred times,

¹⁵ See Indian Bar Review, Volume 25(2) 1998, Chairman's Speech, P. ix

The Chairman writes thus :- "During the year 1955, the number of Law Colleges were small, i.e. 30, lawyers were only 50,000, the number of lawyers now is more than 6 lakhs, the increase is more than 10 times. The number of Law colleges is now approximately 500 or more which have gone out of proportion multiplied i.e. more than 20 times.

but also the in-house business of every law firm has increased tremendously. Bombay and Delhi law firms experienced meteoric growth both horizontal and vertical.

Several distinctive tendencies have become evident in the process. Employment of senior and junior advocates in the law firms have increased by more than 800 times in the last six years. One or two examples from field experience may provide explanations. In 1991, a law firm like Amarchand & Mangaldas used to depend on not more than 10-12 senior and junior lawyers. At present it has several offices throughout the country employing nearly 100 lawyers, senior and junior. The firm recruited 7 to 10 junior lawyers every year from National Law School alone during the last 5 years. About a hundred new law firms have come into existence in Calcutta, Delhi, Bombay, Madras, Bangalore and Hyderabad. It naturally means that the need for professional services in the corporate sector have tremendously increased ever since 1991. Campus recruitment in the legal profession was unknown in India before 1995. Indian Law firms (mostly engaged in corporate lawyering) take 30 to 40 juniors every year from National Law School through the Campus recruitment. Most of these law firms have expertise in designing equity and loan instruments, writing infra-structure contract, power contract and in drafting of project finance contracts. They are engaged in finalising transnational investment, joint venture and technology transfer contract. Many of these firms are now engaged in the job of intellectual property protection representing many foreign law firms and foreign inventor.

It is expected that a foreign investor will always require the legal services in order to protect his interest. Therefore, it necessarily means that all foreign investors try to acquire the legal services of their own law firms in all matters of corporate governance whether they need the same in India or outside. Another feature is also to be noted. There was practically no market demand for junior and senior lawyers for any assignment coming from outside the country before 1991-92. But at present, market has been created for both senior and junior lawyers of India at a very consistent level. Indian law firms bill about 50-75 dollars per hour for juniors and 150-200 dollars per hour for seniors for every work done on behalf of foreign client. There is sufficient growing work for the legal professionals coming from foreign sources. Globalisation has necessarily expanded the internal and external demand for professional services.¹⁶ If it is economic to provide services to clients of foreign firm through the present system, the arrangement shall continue. But foreign law firms shall like to open their counter.

2.1 The Indian Legal System

The Indian legal system is a transplant of the British common law system. including substantive legal principles; common law procedures referred to as adversarial procedure; legal profession and legal education. During the British rule, the legal profession comprised of Solicitors, Attorneys and Barristers in the line of British Legal

¹⁶ See, Pistor & Wellons (Ed.) The Role of Law and the Legal Institutions, Oxford, 1998, Pp. 82-84.

profession as well as some local classes of lawyers called pleaders, mukhtars and vakils. The Advocates' Act 1961 brought all these professions under one umbrella under the Bar Council of India. The Act formalised all the recommendations of the All India Bar Committee, which submitted its report in 1953 after taking into account the recommendations of the Law Commission, such as:-

- (a) Established the Professional body, namely Bar Council of India
- (b) Established a common Roll having a right to practice in any part of the country including Supreme Court of India¹⁷.
- (c) Integrated the Bar into a single class of legal practitioners, known as Advocates, and
- (d) Prescribed uniform qualification for admission into the profession.

2.1.a Bar Council of India and Its Functions

The 1961 Act established a Bar Council of India as the central body¹⁸. Some of the important functions of the Council were:-

- (i) To Promote legal education and to lay down standard of such education
- (ii) To recognise Universities whose degree of law shall be a qualification for enrolment as an advocate.
- (iii) To lay down the standard of professional conduct etc¹⁹.

Each State has to have its own Bar Council. The State Bar Council is empowered to admit persons as advocates on rolls.

According to Section 47 of the Advocates' Act subjects of any foreign country which discriminates against the citizen of India in the matter of legal practice shall not be entitled to practise in India. It also empowers the Bar Council of India to lay down conditions subject to which foreign subjects may be recognised for being enrolled as an advocate.

2.2 What Constitutes Legal Service in India

No Indian law has defined or identified the contours of legal services. The background note prepared by the WTO Secretariat on Legal Services identified three different functional types of legal services, namely, counseling, pleading and notarial. Lawyering service in a Common Law tradition distinguishes these three different types of lawyering services through functional classification of the professionals, viz.,

¹⁷Sec. 30 of the Advocates Act which is not yet enforced.

¹⁸Constitution of Bar Council of India is given in Sec.4 of the Act.

¹⁹ Sec. 7 of the Act lays down functions of the Bar Council of India including the management of funds.

solicitors doing counseling; barristers representing the client in the court through pleadings and public notaries carrying notarial activities.

Following the common law traditions, India transplanted these professional divisions in the legal service before the Advocates Act 1961 was introduced. The Advocates' Act 1961 uniformed the entire profession though still retaining the theoretical frame of classificatory distinction. The legal service providers are called "Advocates"²⁰. All functions connected with counselling, drafting and pleading are activities reserved for advocates.

2.2.a Advocates

The Advocates' Act includes various words like legal practitioners²¹, Advocate²²; legal practise²³; and legal profession²⁴. One has to distinguish "practise in the Court or before any Authority"²⁵ and "practising the profession of law"²⁶. The term Legal Practitioners has been defined as "an advocate (or vakil) of any High Court, a pleader, mukhtiar revenue agent". After June 1, 1969 however, no person was entitled to practise in any Court or before any Authority or person unless he was enrolled as an

²⁰ The State Bar Councils are empowered to admit persons as advocates on its rolls (See 6(1)(a) of the Advocates Act : "to admit persons as advocates on its roll").

²¹ Sec. 2(1)(i) : "in the case of a Bar Council constituted for a State or for a State and one or more Union Territories, the High Court for the State.

²² Sec.2(1)(a) : "advocate means an advocate entered in any roll under the provisions of this Act".

²³ (Sec.33) : **Advocates alone entitled to practise** : "Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.

²⁴ (Sec.47) : **Reciprocity** : (1) Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practising the profession of law or subjects them to unfair discrimination in that country ; no subject of any such country shall be entitled to practise the profession of law in India.

(2) Subject to the provisions of sub-section (1), the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an advocate under this Act.

²⁵ (Sec.33) : Ibid

²⁶ (Sec.47) : Ibid

Advocate under this Act²⁷. Any Vakil practising under the Legal Practitioner's Act 1879 (repealed in 1969) or under Bombay Pleader's Act 1920 (repealed), a Mukhtar practising under the Legal Practitioners Act and a revenue agent practising under the said Act, was to continue to practise as if these Acts had not been repealed.²⁸

Section 55 protects the interest of the legal practitioners already practising earlier and who did not possess the qualification to become an Advocate. A person holding the power of attorney after passing the Articled Clerk's Examination specified by the High Court of Calcutta and Bombay (presently only Law Society of Bombay holds the examination) can only sign the pleadings but cannot argue the case except with the permission of the court²⁹. Labour Advisors have no blanket right to appear before the Courts or Tribunals.³⁰

In a recent contest over the role of foreign law firms providing legal advice to their clients and contesting that they were not 'acting and pleading' for their clients as advocates (since these functions are confined to advocates registered in the rolls), the Bombay High Court in an interim order held that counselling and providing legal advice to the clients is an 'act' of advocacy, because there is presently no distinction between solicitors and advocates in India. A professional cannot be a solicitor simpliciter without being an Advocate. Similarly, notarial functions are also done by Advocates specially appointed as notary public by governmental order. However, taxation laws allow the Chartered Accountants and Commerce graduates to practice taxation laws, give advice to clients and represent the client's case in taxation tribunals.³¹

2.2.b Counselling and Other Legal Advisory Services

It must be carefully noted that the Advocates Act, 1961, imposing restrictions on enrollment as Advocates, is only concerned with those who desire to be entitled "to practise in any Court or before any Authority" and to act and to plead in such Court or before such Authority. The Act cannot and does not reach those persons who neither intend to act or plead before any judicial authority and that is apparent from the provisions of Section 33 of the Advocates Act which specifically refers "only to practise

²⁷(Sec.33)

²⁸(Sec.55) : Rights of existing legal practitioners not affected

²⁹Hari Om Rajendra Kumar v. Chief Rationing Officer (1990) 1 An.L.T. 645

³⁰ M/s.Perfect Paper and Steel Contractors (P) Limited v. B.M.G.W.U. 1985 Lab.L.J.82 (Bom.).

³¹Supra, note 13

in any Court or before any Authority or Person”.³² Advocates obviously do render legal advice and carrying on the profession of rendering legal advice is also practising the Profession of Law. But unless one acts or pleads in or before any court or other adjudicatory Authority and is not also entitled to do so because of not being enrolled as an Advocate, cannot be said to be practising the profession of advocacy in a manner to come within the mischief of Section 33. Such a person may legally continue to do so without being enrolled as an Advocate, if, however, he does not appear before any Court or Authority and does not act or plead therein. He cannot however be held responsible as an Advocate (professional) for his advise.

If one reads Sec.33 with Sec.45 of the Advocates Act “practising in any Court or before any authority” is only confined as the professional right to the advocates. But “counselling” or “advise” as a professional activity has not been made the monopoly of the professional right kept with only advocates. Besides the above two exceptions, Sec.33 itself allows ‘any other law’ to authorise such practise. As for example, accounting professionals have been authorised to practise in any court or before any authority (as for example, Tribunals) as prescribed in Revenue Statutes.³³

The provisions of Section 45 of the Advocates Act also make it clear that the Act aims at prohibiting “practising in any Court or before other Authority” and has nothing to do with rendering legal advise outside the Courts, etc.³⁴ The word Advocate generally means a Person “who pleads the cause of another in a Judicial Tribunal”, as will appear from Osborn’s Concise Law Dictionary. In Black’s Law Dictionary also, the word “Advocate” has been defined as “one who renders legal advice and aid and pleads the cause of another before a Court or Tribunal”, “a person learned in Law and duly entitled to practice, who assists his client with advice, and pleads for him in open court”. If one reads Sec.33 with Sec.45 of the Advocates Act ‘practising in any Court or before any authority’ is only confined as the professional right to the advocates. But ‘counselling’ or ‘advise’ as a professional activity has not been made the monopoly of the professional right kept with only advocates. Besides the above two exceptions, Sec.33 itself allows ‘any other law’ to authorise such practise. As for example,

³² Sec. 33 of the Advocates Act : “**Advocates alone entitled to practise** - Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an Advocate under this Act.

³³ Such as, taxation laws like I.T. Act, Customs Act, Excise Act, etc. See, Sec. 288 of the IT Act in which an Accountant is empowered to represent in a tax Tribunal, the case of his/her client.

³⁴ **Sec. 45 Penalty for persons illegally practising in courts and before other authorities** - Any person who practises in any court or before any authority or person, in or before whom he is not entitled to practise under the provisions of this Act, shall be punishable with imprisonment for a term which may extend to six months.

accounting professionals have been authorised to practise in any court or before any authority³⁵.

2.2.c Notarial Activities

The following are the notarial activities³⁶ :

- (a) Verify, authenticate, certify or attest the execution of any instrument;
- (b) Present any negotiable instrument for acceptance or payment;
- (c) Note or protest the dishonour of any negotiable instrument under Negotiable Instruments Act;
- (d) Note and draw up ship's protest, boat's protest or protest relating to demurrage and other commercial matters;
- (e) Administer Oath to, or take affidavit;
- (f) Prepare bottomoy and respondentia bonds, charter parties and other merchantile documents;
- (g) Prepare, attest and authenticate documents;
- (h) Translate and verify translation of any document; and
- (i) any other Act which may be prescribed.

The Central Government for the whole or any part of India and any State Government for the whole or part of any State, may appoint as notaries any legal practitioners or other persons who possess such qualifications as may be prescribed³⁷. By and large, notaries are legal practitioners.

Another way in which one can divide the legal services in India is between adversarial practice, which focuses on the more "traditional" aspects of the legal profession such as litigation and dispute resolution, and transactional practise, which focuses on transaction-related activities, such as documentation, general advise, negotiation, etc. Competition between Indian and foreign law firms is likely to initially arise in the area of transactional practise rather than adversarial work.

Transactional work involves a new paradigm, wherein a lawyer's role before a dispute arises is as important as a lawyer's role as his client's attorney-at-law during the dispute-resolution process. Legal professionals therefore have to equally focus on advising clients and drafting contracts with a view to avoiding complications and setting out the intent clearly, while best protecting their clients. The Advocates Act, however, is primarily framed to deal with adversarial, and not with transactional work (Chamber work). The Standards of Professional Conduct are also centred largely around the

³⁵ See Sec. 288 of the I.T. Act as mentioned earlier

³⁶ Sec.8 of the Notaries Act, 1952

³⁷ Sec.3 of the Notaries Act, Rule 3 of the Notaries Rules 1956 provides other qualifications

litigative process and with a view to regulating a profession focused on litigation and adversarial work. The Bar Council of India also by and large consists of advocates from a background of litigation and does not represent the non-litigating section of the profession focusing on transactional work.

The effect of this approach is that the Advocates Act and the Rules of Professional Conduct do not appropriately or effectively regulate non-litigating lawyers, or set out a code of conduct appropriate and applicable to non-litigating lawyers and to transactional work. The needs of the non-litigating segment of the legal community are therefore not appropriately recognised. Given that competition between foreign lawyers and domestic lawyers is most likely to arise in this aspect of legal practise in India, this is of critical importance.

Another fallout of the failure of the current legal framework to focus on the non-litigative aspect of the Indian legal profession is that law remains regarded as a profession, and not a service industry. By contrast, many foreign law firms operate on the basis that the aim of the firm is to render service to the client in as efficient a manner as possible. This leads to foreign law firms being able to act more efficiently in transactional matters. The following issues could arise in this context :

- ❖ Advertising / publicity
- ❖ The ability to provide multi-disciplinary services
- ❖ The need to expand beyond 20 partners
- ❖ The need to be able to limit liability

These issues are potentially controversial, since they are more in accordance with recognising law as a service industry rather than as a profession.

3. Trade in Legal Services And Relevant Provisions of GATS

3.1. Different modes of supply for trade in legal services

Article I of the GATS specifies four different modes for supplying traded services: cross border, foreign direct investment in another territory to sell a specified service (i.e. “commercial presence” mode of supply), customer travelling to the territory of the seller of the service (i.e. “consumption abroad” mode), and movement of natural persons.

Legal Services play a significant role in global movement of investment, goods and services. Economic activities have a close nexus with the capacity of the legal regime. As for example, a free movement of equity and loan instrument necessarily has to be covered with a strong competition law; capital market regulation and corporate governance. Free movement of goods require, for example, a legal regime to check dumping. A strong contract law regime is to be built up facilitating growth of infrastructure, so on and so forth. Naturally, trade in legal services is going to be exceptionally important.

Cross Border trade and Movement of Natural Persons are the two most important modes of supply of legal services. Affiliate trade of legal services is still limited as suppliers often find the costs and the difficulties associated with establishing a commercial presence too high, especially if compared to the relatively lower barriers to cross-border transactions. It has been estimated that the number of lawyers who move abroad on a permanent basis (modes three and four) is very small, a few thousand, if compared to a total of over 300,000 lawyers travelling abroad occasionally. Due to the high costs and risks involved, affiliate trade is still limited to the large law firms and is mostly directed towards the world major financial and business centres (Brussels, Frankfurt, Hong Kong, London, New York, Paris, Singapore, Tokyo) where the demand for legal work in the fields of business law and international law is highest.

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

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

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

Trade, Commerce and industries always favour 'one stop shop' or 'one window service' in matters of legal services. Confidence, confidentiality and reassurance of the investment community need mobility of the service providers. Foreign investors would prefer their legal service providers to enter into the regime of the territory of investment. Similarly Indian investors outside the country shall require their law firm to move with them. Legal service providers, in fact, receive the first impact of globalization.

It may be pointed out at this juncture that law is a cultural process and with further integration of economy with rest of the world, one can easily anticipate certain developments:

- (a) more and more Indian lawyers, both junior and senior, shall be required by foreign firms to work in India;
- (b) more and more Indian lawyers will join foreign law firms as Associate and partners to work from the location of the Law firm which will require temporary and even semi-permanent migration of service providers; and
- (c) more and more foreign law firms shall open their Indian office where more and more Indian lawyers shall be required to work. Similarly, Indian law firms shall also have similar need to appoint legal associate and partners from foreign country.

Trans-jurisdictional issues are bound to increase for India as globalization and integration activities intensify requiring :

- (1) servicing the clients' need in another jurisdiction from the site of the service providers, as for example, a New York Law firm may serve its US Investor investing in India and vice versa ;
- (2) sending lawyers under temporary migration, as for example, a British law firm sending its one of the partner to serve its clients in India for, say, a period of two years and vice versa;
- (3) recruiting of lawyers in India either as Associate or as Partner by a foreign firm and having Indian office or vice versa.

It would be naive to think that foreign law firms have not moved in India to extend service to their clients. As for example, in any joint venture the foreign firm bring their lawyers inside as a member of the team to dialogue and provide legal advise instantly, draft contracts and prepare legal papers. The associated local law firm is only required to sign on the dotted lines.

3.2 Some Other Relevant Provisions of GATS

A major discipline under the GATS is specified by Article II which provides for most favoured nation (MFN) treatment to all member-nations, i.e. ensuring no discrimination between service suppliers of one Member from that of another, of course excepting conferring advantage to adjacent countries facilitating contiguous frontier Zones of services (such as, additional advantages can be given to professionals of SAARC countries in India)³⁸. This aspect becomes particularly relevant in the context of various

³⁸ Art. II (3) of GATS reads as follows : “The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both legally produced and consumed.

reciprocal arrangements that we have at present with certain countries for allowing their nationals to provide legal services in India.

Similarly, there is a national treatment provision (Article XVII) under which service providers of another Member cannot be treated less favourably than the treatment accorded to own service providers, subject to the terms, limitations and conditions agreed and specified in the individual WTO Members's schedules of concessions under the GATS.³⁹ Similar to national treatment commitments, restrictions on market access to suppliers of services are specified in the various schedules of concessions in terms of market access commitments under Article XVI of the GATS.

Certain minimum qualification requirements for lawyers are normally specified by authorities because lawyers need specified type (and quality) of expertise to adequately perform their task, and because there are legal liabilities attached to those providing legal services. Likewise, policy makers also specify residency requirements for lawyers in view of the fact that proximity to lawyers is often necessary for the customer to obtain proper service. Therefore, residency requirement and qualification (or experience) requirement should not per se be considered barriers to trade in legal services. Under Articles VI and VII, GATS provides certain mechanisms to address problems arising due to these requirements.

Under these provisions, a WTO Member may recognize the education or experience obtained, agree to criteria for meeting the education and experience requirements, or licenses or certification granted in a particular country achieved through harmonization or otherwise (including based on bi-partite agreement) may be recognized autonomously. The WTO Member has to accord adequate opportunity to other Members to demonstrate that education, experience, license or certification as comparable and the recognition must be extended to the service provider of such WTO Member as well. The basic question for the policy maker/negotiator is how to utilize or enhance these mechanisms, and in the process of forthcoming negotiations, whether to rely on bilateral initiatives to deal with these issues, and/or to aim at developing some multilateral disciplines to address problems arising on account of requirements regarding qualification/experience.

Some GATS provisions have implications for the institutions and administrative arrangements that India would have to establish if we make greater substantive commitments under the GATS. These include, for example under Article III of GATS, disciplines relating to transparency, publication of all relevant measures of general application which affects the operation of the Agreement (as for instance, all conditions to enroll as lawyer in the country which stands in the way of applications of the

³⁹ Art. XVII(1) reads as follows : "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Agreement must be published), and enquiry points to be provided on request to supply specific information to WTO Members.

The negotiator will also have to bear in mind any developments in the area of rules regarding government procurement, subsidies, and emergency safeguards measures under Articles X, XIII, and XV).

4. Liberalization in Legal Services Under the Uruguay Round

4.1 A general overview

In the Uruguay round 45 WTO Members (counting 12 Members States of EC as one) have made some type of commitments in the legal services.⁴⁰ Two acceding Members, Panama and Bulgaria also included legal services in their schedules. Of these 47 Members 22 made commitments in advisory host country law (19 in representation), 41 in advisory international law (20 in representation), 40 in advisory home country law (20 in representation), 4 in advisory third country law and 6 in other legal services (including legal legal documentation and certification services and other advisory and information services).

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

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

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

⁴⁰ Antigua and Barbuda, Argentina, Aruba, Australia, Austria, Barbados, Canada, Chile, Colombia, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, European Communities, Finland, Gambia, Guyana, Hungary, Iceland, Israel, Jamaica, Japan, Lesotho, Liechtenstein, Malaysia, Netherlands Antilles, New Zealand, Norway, Papua New Guinea, Poland, Romania, Rwanda, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, South Africa, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, United States, Venezuela.

Types of measures scheduled in legal services

(Taking account of horizontal measures applicable to all sectors)

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

National Treatment	Mode 1	Mode 2	Mode 3	Mode 4
Financial measures			1	
Nationality and residency requirements	6	2	16	11
Licensing, standards, qualifications	7	2	12	11
Registration requirements	4	1	7	4
Authorization requirements			1	1
Local content, training requirements				1
Other national treatment measure	2	1	6	5
Total	19	6	43	33

A consideration of the Schedule of commitments of the WTO Members brings out the fact that in Market access, nationality requirements are still quite common in legal services. As many as 11 OECD countries still maintain nationality requirements although often such requirements only affect some sectors of the legal profession. The most common sectors subject to nationality requirements are notarial services, representation services (in all fields of the law) and less frequently the practice of

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

Many of the Member countries have also resorted to the restrictions on movement of professionals, managerial and technical personnel, which often constitute an integral part of the country's immigration policy. Such restrictions apply to natural persons seeking long term or permanent establishment or to individuals travelling for business purposes for short period. Moreover, countries that have referred to their horizontal commitments for Mode 4 have limited entry to a selected number of people and have made it conditional to a series of criteria.

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN		
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*

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN		
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*
E. C.	(France, Luxemb)	(France, Luxembg)	X		X			All*
Finland			X		X			All*
Gambia	X	X	X	X	X	X		All*
Guyana	X	X	X	X	X	X		All*
Hungary					X			All*
Iceland			X		XF			All*
Israel	X	X	X	X	X	X		All*
Jamaica			X		X			All*
Japan	X	X	X	X	X	X	Servic es supplie d by qualifie d patent attorne ys and mariti me proced ure agents	All*
Liechten- Stein			X		X			1, 2,4*
Malaysia	(Domes- tic Offshore corpora- tion laws)		X		X			1, 2, 4*; mode 3 limited to Federal territory of Labuan

COUNTRY	HOST COUNTRY LAW		INTERNATIONAL LAW		HOME COUNTRY LAW		OTHER	MODES
	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN	ADVISORY	REPRESENTN		
Nether-lands 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*
Switzer-land			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	

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

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

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

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

Other scheduled national treatment restrictions include:

- (a) language requirements;
- (b) recognition of foreign degrees only for nationals who have studied abroad;
- (c) the requirement that foreign ventures be competitive institutions in their country of origin; and
- (d) the requirement for foreign lawyers to take active part in the business in order to be able to maintain an interest in a local law firm.

All these above measures have been scheduled as national treatment restrictions as they discriminate de jure or de facto against foreign service suppliers.

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

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

Out of the 45 WTO Members who have made some sort of commitment for the Legal Services, Brunei Darussalam, Bulgaria, Dominican Republic and Singapore have taken MFN exemptions. Other countries like Costa Rica, Honduras, Panama and Turkey have MFN exemptions in professional services. Three of the legal services sector specific exemptions cover all measures pertaining to the provision of legal services and apply to all countries on the basis of reciprocity. The fourth exemption extends full national treatment for mode three and four only to companies and citizens of countries with which preferential arrangements exist. All the professional services exemptions maintain reciprocity as a condition for authorizations to exercise professional activities, including legal services.

On the face of it appears that some countries, which have undertaken specific commitments the actual legal services regime is more liberal than the regime bound in the schedules and that some countries who have not scheduled specific commitments and have listed MFN exemptions maintain rather liberal legal services regimes

4.2 Foreign Legal Consultants

With increasing globalization, there is likely to be enhanced demand particularly for foreign legal consultants (FLC), particularly on account of higher foreign direct investment and other increased interaction with other countries. FLCs face more qualification barriers in the field of host country law. There are fewer barriers in the field of international law and home/third country law since FLCs seek access in fields of law where they possess the right qualification. FLCs face important regulatory barriers in the form of licensing requirements.

Foreign legal consultants encounter few barriers when providing services cross-border. However, their establishment is regulated by most Members. While policy regimes

applicable to foreign legal consultants vary across countries, some of the most common features of domestic regulatory regimes are:

- Foreign legal consultants are normally not required to qualify in the host country, but they are often required to observe the host country rules of professional conduct and not to provide services in fields of the law for which they do not possess a qualification, such as host country and third country law.
- Some countries regard foreign legal consultants as lawyers, while others do not.
- More liberal regulatory regimes allow foreign legal consultants to provide advisory services on host and third country law, as long as such advice is based on the advice of a fully qualified local or third country lawyer. A further extension of the scope of practice consists in allowing foreign legal consultants to appear before arbitral tribunals in the host country. Some countries do not regulate the provision of legal advice, making it particularly easy for foreign legal consultants to establish and supply advisory services.
- Most countries require foreign legal consultants not to present themselves as members of the local profession, but to use a specific different title (in the local language) or in some instances their home professional title.
- Some countries require foreign legal consultants to register with the local bar and/or to pass a professional examination. The professional examination is normally different in scope than the full local professional examination, reflecting the difference in scope of practice between foreign legal consultants and domestic lawyers. However, this might constitute an important obstacle to trade especially if it is held in the local language.
- Some countries require foreign legal consultants to have practiced for a certain number of years in their home country following their qualification in order to be licensed as FLCs in the host country. This requirement may be relaxed by taking account of years of practice in other jurisdictions including the host country jurisdiction.
- Some countries regulate advice and have no foreign legal consultant regimes. In such cases access to legal services market is conditional on qualification as host country lawyer. The harshness of similar regimes is often countered by more relaxed access for foreign qualified professionals to the local profession, falling short of a full re-qualification requirement.⁴¹

⁴¹ France and Denmark require foreign legal consultants to pass the local bar examination prior to drafting legal documents or providing legal advice. However, this allows foreign lawyers to become full members of the local profession with no limitations on their scope of practice.

4.3 Liberalization under GATS in the target markets for India's exports of legal services

In the area of legal services, the target markets for India could include United Kingdom, the United States, Australia, New Zealand, Malaysia, Singapore and Thailand.

Annex 1 of this paper shows the schedule of commitments under the GATS on legal services by the European Union. The main focus of our attention in the European Union has been the United Kingdom, which has specified particular restrictions in this sector. As mentioned below, India has a "reciprocity arrangement" with United Kingdom, which helps Indian national to obtain access to that market.

A noteworthy feature of the commitments shown in Annex 1 is that the supply of advisory services through movement of natural persons is "unbound except as indicated in the horizontal section and subject to the limitations specified by certain EU Member States". The horizontal commitments of EU (Annex 1) show that for movement of natural persons is "unbound" except for measures concerning temporary stay in EU Member States.

Annex 2 shows the schedule of commitments in legal services by the United States. The schedule shows that for movement of natural persons, there is no commitment in general. In case of certain states, there is no commitment made even for the commercial presence mode of supply of legal consultancy. For legal practice (commercial presence mode of supply) partnership in law firm is limited to persons licensed as lawyers. As shown below, this is a commonly applied restriction to ensure the quality of services that is provided. In a number of instances, another commonly applied requirement i.e. residency requirement is also imposed, mainly for provision of legal services through the commercial presence mode. However, as shown below, a large number of Indian nationals do have access for providing legal services in United States.

Annex 3 shows the schedules of commitments in legal services by Australia, New Zealand, Malaysia and Thailand. For these countries too, the movement of natural persons mode of supply in general has no commitment (i.e. the schedule shows "unbound"). In the case of Australia, the scheduled commitment is that foreigners can not enter into partnership with local lawyers and can only join a local firm as an employee. In the case of Singapore and Indonesia, we see that these countries have made no commitments for legal services under the GATS. Thus, these countries could be a special group of target countries for us to obtain some commitments from them in the forthcoming negotiations.

4.4 Liberalization under GATS by India in the area of legal services

A noteworthy point is that similar to Singapore and Indonesia, India has not made any commitments in the legal services sector. To the extent we want commitments from

other countries under the forthcoming negotiations, we will have to make commitments of our own. The points to focus on in this regard are addressed in more detail below.

5. Policy Regime Affecting India's Exports of Legal Services

Any assessment of the issues relevant to India's participation in the GATS negotiations has to begin with an examination of India's domestic policy regime. This regime will not only be the focus of attention of other countries seeking concessions from India, we also need to consider whether any of the existing policies constrains the export performance of our legal services sector.

5.1 Indian policy regime applicable to Indian nationals

According to the Constitution of India, freedom of profession is provided only to a citizen.⁴² The policy regime applicable to legal services in India can be summarized as follows:

- (a) Services must be supplied by natural persons who are citizens of India. (However a foreign national may also be allowed provided an Indian national have similar opportunity in that foreign national's country (rule of reciprocity));
- (b) the service provider is required to be commercially present in the place where service is required in the country's jurisdiction. The service provider is required to be in rolls of advocate in the State where he is required to provide service;
- (c) the service provider can be of his own (sole proprietor) or may be a partner of a firm (partnership) with natural persons similarly qualified to practise law only. But services must be provided by natural persons only in individual capacity.

There are three requirements to be fulfilled before a person can apply for enrolment as an Advocate⁴³. These are:

- (a) Nationality -- In order to be an Advocate, a natural person has to be a citizen of India. (A national of any other country may be admitted as an Advocate, if citizens of India, duly qualified are permitted to practise law in that other country);
- (b) Age -- In order to be an Advocate, a natural person has to be of twenty-one years of age;
- (c) Qualification -- In order to be an Advocate, a natural person has to obtain a degree in Law.

⁴²Art. 19(1)(g) of the Constitution of India

⁴³Sec. 24 of the Advocates Act

Other policy conditions (or restrictions) in India include:

- (a) No advocate in India can enter into a partnership or any other arrangement with a non-advocate.⁴⁴ As such, 'a One Stop Shop' or 'One Window Service Centre' cannot be organised here. A corporate client always prefer a Law firm adequate enough to provide all professional services in every requirement both in national and in foreign jurisdiction. That requires law firms to have partners from multi-discipline like accounting, economics, taxation and other profession. That being not possible legal profession itself is unable to adequately cover all professional requirements.
- (b) Though the Partnership Act, 1932 does not provide any restriction on the number of partners in a partnership firm, Sec.11 of the Companies Act provides that a partnership or any other form of association with more than 20 partners if not registered as a company, shall be an unlawful assembly. Thus Indian law firms cannot have more than 20 partners. World over, law firms can have any number of partners. As such, such big law firms have wide controlling, regulating and functioning power both nationally and in foreign countries whereas Indian firms are small, mainly closed within a family; incapable of associating legal experts of more than one country and work trans-nationally.
- (c) In India, the liability of partners is unlimited. This is another organisational inability. This has resulted in the Indian firms being handicapped and not being able to operate on a level playing field with international firms. Big law firms of US or EC provide limited liability to the member partners. For Indian firms, there is provision for limited liability partnership. Indian law firms do not have limited liability requiring only one or more equity-holder to be bearing unlimited liability whereas others liability may be limited. Indian law firms are predominantly family firm and the partners, by and large, belong to family relations. Of course, recently, there is a strong external force to break through this 'closeness'.
- (d) Foreign lawyers (natural persons) may be engaged as an employee or consultant of a local law firm but cannot be appointed as a partner subject to restriction imposed by foreign exchange regulation. Thus, an Indian lawyer (an Advocate) cannot enter into a partnership with any other person (including a foreign lawyer) who is not an accredited lawyer (Advocate) himself or herself in India. However, an Indian firm may appoint a foreign lawyer as an employee or a consultant but he/she cannot sign any legal document or represent a client. His/her liability is strictly restricted within the terms of

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Rule 2 of Chapter III under Sec.49(1)(ah) of the Act reads as : "An Advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal Practitioner who is not an Advocate.

employment between the owner of the law firm and he/she as an employee only;

- (e) Joint ventures involving revenue sharing between foreign law firms and local law firms is still unknown because no Joint Venture is possible with a foreign lawyer who is not an Advocate under the Advocates Act, 1961. But Indian law firms operating in such revenue sharing with a foreign law firm in the foreign country depends on the law of that foreign country. A few Indian law firms have this type of tie up for their cross-border operation.
- (f) A firm or a company cannot be appointed as a lawyer. The right to practise law is given to only a natural person. No artificial body including a body corporate can undertake this responsibility inspite of the fact that lawyers may among themselves form organisations to create a facility of 'one stop shop'.

5.2 Indian policy restraints applicable to foreign nationals providing legal services in India

In addition to the above-mentioned policies generally applicable to legal profession in India, some additional restraints are in place for foreign nationals providing legal services in India.

No foreign lawyer has the of practise in a court of law in India unless:

- (a) there is reciprocal right of the same kind to an Indian lawyer in the country of that lawyer's origin;⁴⁵
- (b) he has obtained the degree from a University recognised by the Bar Council of India provided the law degree is at least a two years full time course to be taken after graduation.⁴⁶

⁴⁵ Rule 5 of Res. No. 6/1997 of Bar Council of India Rules reads as : "No foreign lawyer shall have right of audience in a court of law in India unless there is a reciprocal right of the same kind to an Indian lawyer in the country of that lawyer's origin.

⁴⁶ Rule 3 of Res. No. 6/1997 of Bar Council of India Rules reads as : "Subject to the Provisions of the Advocates Act, 1961, a foreign national who has obtained a degree in law from any Institution / University recognised by the Bar Council of India and who is otherwise duly qualified to practice law in his own country would be allowed to be enrolled and /or allowed to practice law in India provided that a citizen of India, duly qualified, is permitted to practise law in that country.

Furthermore, a foreign national is allowed to practise law in India subject to the following additional conditions:

He will be subject to the disciplinary jurisdiction of the concerned State Bar Council;
A separate register of the foreign nationals enrolled and allowed to practice in India would be maintained by the respective State Bar Councils and information in respect of every such registration shall be given to the Bar Council of India which also shall maintain a separate register for the same.

A person of Indian origin with foreign nationality who is so otherwise qualified to practise law in India and who wants to permanently settle down in India would be allowed to be enrolled and/or practise law subject to the rules of registration with the State Bar Council. In case it is found that such a person is not ordinarily residing in India, his name would be removed from the roll of Advocates maintained by the State Bar Council.⁴⁷ Thus a residential requirement is prescribed for a non-resident Indian professional.

In addition to these restrictions on entry of foreign lawyers into India, there are certain restrictions on remittances and setting up of offices by foreign lawyers. According to Sec.30 of the FERA, no national of a foreign state shall, without previous permission of the RBI, practice any profession or carry on any occupation, trade or business in India in a case where such national desire to acquire any foreign exchange (such foreign exchange being intended for remittance outside India) out of any moneys received by him in India by reason of the practising of such profession or the carrying on of such occupation, trade or business, as the case may be. Thus even if a foreigner is allowed certificate of practice law in India, he has to secure permission from RBI if he desires to acquire foreign exchange and remit the same outside India. Sec.29 of FERA requires that a foreign resident and a foreign national (such as a foreign law firm) shall not carry on in India or establish in India a branch office or other place of business for carrying on any activity without the general or special permission of the RBI. Thus a foreign law firm cannot establish its office without any permission from RBI. Again according to Art.47 of the Advocates Act, if a country practices discrimination against Indian citizens to practise law in that country, no citizen of that country is allowed to practise law in India.

Foreign legal professionals who are not qualified to advise on Indian law could be permitted to be registered as Foreign Legal Consultants, to only advise on foreign law. Legal professionals entitled to practise abroad could be registered as Foreign legal

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Rule 4 of Res.No. 6/1997 of Bar Council of India Rules reads as : “A person of Indian origin with foreign nationality who is so otherwise qualified to practise law in India and who wants to permanently settle down in India would be allowed to be enrolled and/or practise law subject to the rules of apprenticeship framed by the Bar Council of India. In case it is found that such a person is not ordinarily residing in India, his name would be removed from the roll of Advocates maintained by the State Bar Council.

consultants in relation to jurisdictions whose law they are qualified to practise, subject to submission to the disciplinary jurisdiction of the Bar Council and to background checks. Foreign legal professionals who are qualified to advise on Indian law will ultimately also have to be permitted to practise Indian law in India under the national treatment principle. Appropriate entry level qualifications will have to be set at this stage. The existing rules provide for such registration only on the principle of reciprocity, which cannot continue after GATS.

The situation as regards foreign law firms (who can employ Indian lawyers) is different. Under GATS, foreign law firms will ultimately have to be permitted to render legal services in India. An Indian law firm cannot currently affiliate itself to a foreign law firm, and a foreign law firm cannot set up a practise in India because of Exchange Control issues and Rule 2 of the Bar Council Rules, which prevents Indian advocates from entering into profit sharing arrangements with persons who are not Indian advocates. Both of these may have to change under GATS.

Foreign law firms can under GATS be permitted to establish linkages to Indian law firms / set up Indian offices to render advise on local law using local lawyers, since GATS does not require free flow of personnel. The practical problem with this would be that once mixed firms are permitted, it would be difficult to ensure that foreign lawyers do not advise on Indian law, since it may not be possible to distinguish which lawyer does which work within the same firm. One option would be to require separate entities with separate offices to be established to practise foreign law and Indian law.

It is important that all foreign lawyers, including foreign law consultants, who intend to practise in India submit to the disciplinary jurisdiction of the Bar Council of India. The Bar Council's jurisdiction over foreign lawyers should be no less than its jurisdiction over Indian lawyers. This will, however, require significant amendments to the existing regulations.

All work directly linked to Indian law, whether adversarial or transactional, should be restricted to persons qualified to practise Indian law. This would include advising on Indian law and drafting documents governed by Indian law. Registered Foreign Law Consultants may be permitted to draft documents governed by laws which they are qualified to practise.

5.3 External policy regime affecting the possibility of an Indian lawyer exporting legal services

Free flow of investment, goods and services require lawyers of various countries to work in harmony, and professional markets might expand in two ways:

(a) National law firms to employ foreign lawyers as employees, consultants and partners; and

(b) Development of multinational law firms with partners from various legal systems.

Though Indian firms cannot take foreign partners, the first situation above is increasingly evident. With time, the second situation is also likely to become a reality. As a matter of fact most of the Indian law firms developed in the last five years such working relations both for serving Indian client as well as to support the clients of foreign law firms relating to their Indian business affairs.

Indian lawyers possess an advantage in the liberalised market over the lawyers of many Asian countries including China, Japan, and middle Eastern countries because India follows a British legal culture, Indian lawyers have command over English and the Indian Bar and the Bench follow an adversarial legal procedure. Naturally, Indian lawyers have wider market accessibility to facilitate economic integration and mobility of Corporate identities.

There was practically no market demand for junior and senior lawyers for any assignment coming from outside India before 1991-92. But at present, market has been created for both senior and junior lawyers of India at a very consistent level. Indian law firms bill about 50-75 dollars per hour for juniors and 150-200 dollars per hour for seniors for every work done on behalf of foreign client. There is sufficient growing work for the legal professionals coming from foreign sources. More and more Indian lawyers will be needed by Asian countries to assist economic transition, and multinational law firms will need Indian lawyers in larger number. Though there is no detailed statistics available, the balance of payment on the legal service export and import is certainly likely to be favourable for India. In the context of GATS negotiations, it would be useful to assess the various restraints to exports of legal services by India.

5.3.a An overview of the various types of restraints to exports of legal services

In each country, the Professional Body regulates the entry-level professional qualification. Moreover, permanent residency is normally required for representation services, as court lawyers must reside within the jurisdiction of the court in order to be accessible to clients, other members of the profession and the same court. A number of countries prohibit or restrict incorporation of foreign firms, justifying them on public policy grounds, namely as a means of ensuring that professionals do not limit their professional liabilities and responsibility. In several cases, there are restrictions on partnership with local professionals, and policies include provisions that promote the hiring of local professionals. The latter two restrictions are aimed at the practise of international and foreign law. Restrictions on foreign legal consultancy are normally imposed for practise of host country law.

Another regulatory issue is the treatment of multidisciplinary practices. Many countries prohibit them on public policy grounds, while others do not regulate the association between lawyers and non-lawyers. The view in several countries is that the independence of the lawyer could be compromised in associations bringing together professionals subject to different ethical standards. For example, accountants and

consultants are not subject to the same rules on conflicts of interest as lawyers.⁴⁸ However, it appears that multidisciplinary practices sometimes exist de facto in countries where they are prohibited or not regulated. This could create even greater public policy concerns as the lack of regulation or its circumvention might lead more easily to the unauthorised practice of law by non-qualified professionals or to the violation of ethical standards specific to the legal profession.

The following types of restrictions are used in OECD countries:

- Prohibition on partnership with local professionals (14 OECD countries);
- Policy restrictions aimed at hiring of local professionals (7 OECD countries);
- Restrictions on the use of international and foreign firm names (8 OECD countries);
- Residency requirements (prior residency, permanent residency or domicile requirements, which are normally applied in a similar manner to both nationals and foreigners: (seven OECD Members impose prior residency requirements as a condition for obtaining a license; eleven OECD countries impose residency or establishment requirements on suppliers of legal services).

Several countries facilitate access to their legal profession for lawyers coming from jurisdictions within the same legal family, either by fully recognising their qualifications or by providing for a short route to host country qualification, which takes account of their home qualifications (aptitude test, adaptation period, integrative education). A good degree of recognition exists between Commonwealth countries, which partly share the same case-law, and to a lesser extent between all Common Law countries. Less recognition exists between Civil Law countries, who share common legal principles, but whose national codes and legislation constitute separate bodies of law.

Amongst Commonwealth countries, a rule called 'Rule of equivalence' is followed. Under the Rule, law degrees received from the Universities of Commonwealth countries is considered as equivalent to obtain admission to take internship training in British Institutes and Inns to appear Bar Examination. Citizenship is no criteria for granting Certificate of practise in UK. After passing the examination, one can practise in UK and can also have the opportunity to join Law firms as Associate or Partner subject to other migration provisions.

Employment of Indian lawyers in UK firms has increased by almost 100% in the last five years. UK law firms are now even recruiting Indian lawyers without having regard to the rule of equivalence in order to run the Indian desk in their office in England. Such type of temporary migration is now allowed in UK.

There are different systems and structures of Bar in the United States of America. Indian lawyers have to study JD or LLM in USA and then can appear the Bar Examination. If they pass the Bar examination of a State, they can practise. Law firms

⁴⁸ In Germany partnerships between court attorneys, patent attorneys, tax consultants/auditors and notaries have been allowed in some regions, in presence of a common code of ethics protecting the secrets of clients with their lawyers and accountants. Commission of the European Communities, "Panorama of EU industry", 1997.

in USA recruit Indian students completing LLM or JD from US Universities. Law firms are now recruiting Indian lawyers to manage Indian desk even if they have not taken any Law course in USA. The recruitment of Indian lawyers in the United States is also subject to usual migration law. These employee - lawyers cannot represent clients in the US court, though they can give advise.

In the last three years about hundred Indian lawyers moved from Bombay, Bangalore and Delhi to foreign law firms, mostly to USA and UK. A few have also shifted to Australia. At least about thirty former graduates of Bangalore's National Law School of India joined USA or UK based law firms in the last 5 years. Most of them have taken a Master degree in Law in any USA or UK University and joined as assistants. Some have passed New York Bar Examination and some did not take any further qualification.

6. Indian Policies Likely To Be Addressed By Others During GATS Negotiations

There is no comprehensive data on the flow of professional legal service providers into India. A sample survey indicates that the only route of foreign lawyers coming into India is through Bombay Solicitors firms. About a dozen entries were found in the sample where a foreign lawyer undertook apprenticeship with a solicitor firm in Bombay, and after a year passed the examination conducted by the law Society and became associate in the firm. Most of these persons are NRIs and have lawyering qualification from USA or UK.

It is to be expected that a foreign investor will always require legal services in order to protect his interest. In general, foreign investors try to acquire the legal services of their own law firms in all matters of corporate governance whether they need the service in India or outside. Another feature should also be noted. Globalisation has necessarily expanded the internal and external demand for professional services,⁴⁹ and if it is economic to provide services to clients of foreign firm through the use of Indian legal service providers, foreign law firms would like to open their counter.

With the inflow of foreign investment and multinational companies, foreign law firms shall either require Indian lawyer in their office to advise on Indian law or open Indian office (if permitted) and employ or engage Indian lawyers to provide legal services. Both these options imply export of professional (legal) services by India. It is quite unlikely, other than in exceptional circumstances, that a foreign law firm will bring professional lawyers to contest litigations. It was mentioned earlier that in the last five to six years, the employment of Indian lawyers in foreign law firms has tremendously

⁴⁹ See, Pistor & Wellons (Ed.) *The Role of Law and the Legal Institutions*, Oxford, 1998, Pp. 82-84.

increased. Almost all UK and US law firms have many Indian lawyers including some as partners. Similarly three foreign law firms have their Indian liaison office (since such a law firm cannot provide legal services in India). This is one of the Indian policies likely to be addressed by foreigners in the GATS negotiations.

Establishment of an office in India is prevented for foreign law firms compelling them to have linkages with Indian law firms. Litigational lawyers are appointed from only senior Indian practitioners through Indian law firms. It is feared that Indian law firms will lose their jobs if foreign firms are allowed to establish their Indian office. Besides, there is a fear that big multinational law firms shall take over Indian firms easily. As a matter of fact, this is happening in the accounting profession. Big firms are taking over the small Indian accounting firms, e.g. Deloitte & Touche has taken over Chokshi & Chokshi of Bombay. This fear may not be completely unfounded. But if allowed, big law firms moving into India will require Indian lawyers in bigger number. Such a free access shall also increase the quality of legal services. Thus, another Indian policy to be addressed by others might be the limitation on size of the Indian legal firm.

One of the avenues used by a foreign lawyer is that he/she takes the examination conducted by the Law Incorporated Society of Bombay which is a good entry level qualification to become an Advocate in India. Bar Council of India has enlisted almost all UK Universities, leading law schools of USA, Australia, New Zealand and other countries. The law degree of all these enlisted Universities is recognised and the degree holders are allowed to register as Advocate subject to the requirement of reciprocity in treatment to Indians in the aforesaid country.

Under this Rule of reciprocity a British, or an Australian or New Zealander or a citizen of U.S. can practise law in India having fulfilled the qualification prescribed by Bar Council of India - because an Indian lawyer can practise thereafter fulfilling the prescribed condition for professional qualification. Of course, in India the State Bar Council (SBC) has to register the name on an application for registration. SBC may register on the ground of reciprocity having extended to Indian lawyers in the country in question. There may, however, be other countries with foreign investment interest in India but without reciprocal arrangements with India regarding legal practise (e.g. Germany??). Such a country may seek policy relaxation in India with respect to the reciprocity requirement. Moreover, if a commitment is given under the GATS (without any most-favoured-nation exception) that India would allow others to practise in the country subject to specified conditions, that commitment would imply the removal of any reciprocity clause that is at present a hallmark of our policy regime in this regard.

Two other policies that might be addressed by other countries during negotiations could be the present policy of not allowing limited liability, and the RBI restrictions on foreign firms.

There may also be an interest in seeking:

- (a) A global (or multilateral) standard for educational requirements for enrolment;
- (b) Criteria for determining the grounds of reciprocity, or for mutual agreement;

- (c) Establishing an international professional body to keep a list of enrolled lawyers available for international consultancy on international or foreign laws.

These efforts would link up with the overall move that India should make to develop multilaterally agreed standards for movement of natural persons.

A strong section of our legal profession has taken the process of globalization of the profession adversorially as if one can prevent any investor coming from outside to come alone without his legal advisor! It is noteworthy that the legal advisor comes as a part of the team of delegates and prepares the whole document of contract and asks a local lawyer to sign on the dotted line. This partly due to lack of local expertise. One may note that lack of local expertise in certain fields of the law is, however, a factor that might gradually disappear as local practices develop skills in order to attract foreign client.⁵⁰ We have to be reminded of the fact that on an affidavit, the Government of India, had to suggest to a New York trial court, that the country does not have a lawyer to deal with Bhopal tragedy and an able judge to try the case!⁵¹

The Bombay case⁵² brought out in detail the philosophy, arguments for protective cover by a national body and arguments against. Let us examine the comparative position of GATS and our professional regulatory system. The concept of MFN is based on non-discrimination. Nationality barrier is itself a geographical discrimination which is unrelated to the professional expertise. As such the citizenship requirement under Sec.24 of the Advocates Act is against the spirit of GATS. In case of other service sector like accounting profession such a discrimination on ground of nationality is not there. Any person qualifying by passing Chartered Accountancy examination in India, can become a C.A. similar is the provision in EC and USA. Of course for appearing in the examination of chartered accountancy a person is required to undergo a standard apprenticeship training.

Another noteworthy point is that in the process of our domestic reform, we should in any event address (and possibly relax) several of the Indian policies that are likely to be addressed by others during the GATS negotiations.

In view of the above, it would be worthwhile to pursue negotiations on legal services under the auspices of the GATS, in particularly if it requires releasing certain policy constraints that would improve our competitiveness in legal services. This conclusion is strengthened by the fact that while India has edge in providing legal services in other developing parts of the world, India itself is a good market for US and EC law firms

⁵⁰ Ibid

⁵¹ See Part I, Bhopal Gas Leak Disaster Case, NLSIU Publications, P.No.1, Assembled & Edited by Dr. N.R. Madhava Menon.

⁵² SLP No. 2055 of 1996 filed by

because it has a big market and a wide scope of foreign investment. Therefore some meaningful negotiations might be possible in the area of legal services.

However, a part of the industry is of the view that it is unlikely that Indian lawyers will get big firms like General Motors and General Electric as their international clients and also that the Tatas and Birlas will grow up in near future to match the strength of these international giants. As a result we do not have much to gain from opening up this sector. It is optimistic to think that with the opening up of this sector, since we can go to any part of the world so we must allow everyone to come into India.

7. Which Domestic Policies Should Be Reformed To Improve Competitiveness of Indian Firms

Domestic policy reform can be considered under two different categories. One is a narrow consideration of certain direct benefits to the domestic legal service industry. Another is a consideration of direct and indirect benefits, including those encompassed in the view expressed in the previous section that increased participation of foreign legal firms in the Indian economy is likely to imply greater use of the legal of Indian lawyers.

First, take the narrower perspective. It appears that a number of Indian policies likely to be addressed by others during GATS negotiations are also those which should be altered (relaxed) to improve Indian performance in legal services sector. Take for instance the Indian law which prohibits formation of partnership with enrolled professionals of foreign countries. This limits the scope for an Indian firm to build its capacity to advice on foreign law or international law or in a newly developed area. Relaxing this restraint would be useful for the domestic industry.

Another policy which restricts the capacity of domestic firms is the prohibition on formation of partnership with multi-disciplinary knowledge. This prevents capacity building in areas where technology progresses beyond the comprehension of a lawyer. As for example, it is justified to restrict that a Chartered Accountant cannot certify legal documents. But it is an absurd logic that a lawyer is competent to know the complexity in the accounting documents that he is required to work upon as an advocate.

At present, attempts are made to circumvent the above two restrictions with a Memorandum of Understanding or joint venture through which Indian firm obtains advice from its foreign counterpart and works upon the same and vice versa. Also, lawyers are now forming companies to get away with the restrictions on partnership created by professional laws like, Advocates Act, Institute of Chartered Accountants Act, so on and so forth.

Limitation on size of the firm, and on limited liability, also qualify among the type of policies mentioned above, i.e. policy restrictions which need to be relaxed to improve the flexibility and quality of response by Indian legal service providers.

If we consider the wider perspective on domestic reform, then restrictions on joint ventures or establishment of firms in India by foreigners should also be relaxed. However, this would be major reform and it might be strategically better to delay it (or not include it in the schedule) if it links up with market access that others are likely to provide us during the negotiations. This is particularly if certain target countries currently impose strict restrictions with respect to educational and experience qualifications of Indian lawyers, and these conditions have to be negotiated on the basis offering major concessions under the GATS. We must also look into the fact that most of the major contracts signed are subject to a concept of law that is not Indian as a result Indian lawyers will have to be trained to understand these laws. One can introduce a refresher course for judges and advocates and also overhaul our existing education system so that Indian lawyers can operate under the concept of law that is internationally acceptable. We may also invite foreign experts to teach at Indian law institutes.

These efforts have to bear in mind that there is automatic right of entry to a market (whether India or any other country) by foreigners as qualification requirement and their mutual recognition would still need to be kept in place. The professional body has to consider the standard of legal education and certification needed to apply for license. It has also to determine the equivalence to recognise the educational standard of another nation-state. Any profession is different from business and trade in the sense that profession is based on distinct knowledge and skill that are required to be obtained from the educational institution. Profession has an epistemological basis. Naturally, the professional body is concerned about the standard, ethics and professional service.

8. Policies Of Other WTO Members That India Should Consider During GATS Negotiations

Indian law firms are competent to open up foreign branches and take advantage of more and more Indian lawyers to serve foreign branches. Though comparatively new, the East Asian market calls for more Indian lawyers to serve. There is reason to believe that most of the law students⁵³ going every year to developed countries especially to USA and UK for higher studies, take employment in foreign law firms. The service market for foreign law graduates is gradually in the increase in every country. Presently only a few Indian law firms have foreign offices.⁵⁴

One of the most important consideration in addressing policies of other countries is to assess which of our target countries do not have a “reciprocity arrangement” with us in the practise of legal services. A related concern would be to obtain certain standards

⁵³ From National Law School alone at least 12 to 15 passing out graduates leave for higher studies in USA and UK and most of them did not return.

⁵⁴ Like D.C. Singhanian & Co., has it London and New York office. D.C. Singhanian & Co. is a leading firm in commercial arbitration.

or understanding from others regarding the acceptance of certain educational standards and experience that our lawyers normally fulfil. As mentioned above, a decision has to be made in this regard on the extent to which this initiative should be taken through the multilateral negotiations.

A comparison of the restrictions imposed in India and in other countries shows that in general these restrictions are of a similar nature. This implies that our focus is also going to be on the same kind of policies that are likely to be emphasised by others when they seek concessions from India during the GATS negotiations.

In specific, the policies of other countries that should be addressed by Indian negotiators include:

- (a) "reciprocity arrangement" with certain countries for the possibility of our lawyers to practice in the other country (e.g., Singapore, Malaysia, Thailand, etc.);
- (b) relaxing the restrictions on foreign legal consultancy (e.g., Malaysia, Thailand, Australia, New Zealand, etc.);
- (c) possibility to establish a joint venture or a partnership (e.g., Australia, Thailand, Malaysia, etc.);
- (d) possibility of establishing multi-disciplinary companies

One important point to consider is the extent of emphasis that India should give to seeking liberalization in the legal services regime of East Asian economies. A small-sample survey suggests that there is a need to focus on opening up the regime applicable in these economies.

The similarity between our demands and those likely to be made on us by others shows that there will likely be a strong link between the extent to which we ourselves wish to liberalize and the extent to which we could seek similar liberalization from other countries. In this context, it is noteworthy that any such liberalization (or scheduling of concessions) under GATS will take place after a period of about five years, and even then we could phase-in the easing of certain restrictions over an extended period of time.

9. Strategy for the Forthcoming Negotiations

Right at the beginning we must ensure that no strategy should be taken that will compromise the growth of the domestic sector. Legal services can be dis-aggregated into components like:

- (i) Representing the client before a Court or any other authority;
- (ii) Drafting of documents and conveyances;
- (iii) Notarial function;
- (iv) Legal Advice and Consultancy

It is not possible to prevent somebody from advising legally. The only thing that one can restrict is its admissibility before a Court or an Authority. Logistically, this should be the first step of negotiations. Law firms from countries enjoying MFN status may be allowed to register their names with the Bar Council of India or similar professional bodies of the other countries submitting details of the professionals as its members, partners, consultants and associates and paying annual fees. One of the conditions for such registration could be that one member, partner, consultant or an associate of the firm must have legal education, training and certification in India or in the country in which the firm wants to register itself. Legal advice or consultancy provided by such a registered firm may be admitted in a court or in any other Authority. This will enable a law firm of any country serve in another country from the original office situated in another country.

It would be unwise for the legal profession in India not to agree to it because the legal profession has already lost most of its ground in matters relating to taxation and tariffs to Chartered accountant firms. It would be better for the Bar Council of India to argue and save its professional interest against the accounting firms in taxation matters. As for example, a Chartered Accountant in representing his/her client's case may be allowed to present before a Court or an Authority only the accounting part of it, the legal matters must require an Advocate as stipulated in the Advocates' Act. Taxation Statutes in this respect must not override Advocates' Act.

In the negotiation, our gain shall be that legal professionals shall be required by all leading law firms of the member countries. Of course, USA or UK lawyers shall have an edge because most of the Universities of these countries are having the seal of approval and equivalence to claim license for practice in India. This step shall certainly increase the market potential for Indian lawyers. It will also increase the ability of a foreign law firm to provide service for its client in another nation.

The second step of negotiation strategy may be that a registered foreign firm of the above variety for 4/5 years may be allowed to have a Branch in the country or to have a joint venture with a local firm. Since such a condition is essentially a qualification and licensing condition that is not against the spirit of GATS.

In India, Client-Advocate is a direct relation in most of the civil and criminal matters excepting those, which relate to companies. In corporate matters and international trade and taxation issues clients come to law firms for one window service. One does not envisage foreign law firms to even touch the fringe of our needs in litigational lawyering. GATS will have its implication mostly in corporate affairs including corporate governance. A firm having a joint venture in India or having an Indian branch may be allowed to:

- (a) Draft legal documents and conveyancing;
- (b) Represent the Client before a Court or an Authority through an Advocate registered in Rolls

The problem is that Indian firms are mostly family firms and are quite small. Their capacity is also severely limited. Therefore sufficient time and facility must be allowed to the Indian firms so that they can build the capacity. Otherwise, an international law firm shall take Indian firms out of the market on the basis of its sheer organisational and financial strength. The point that the forthcoming negotiations would involve a transition period has been mentioned above.

The most important task is to initiate a World body with the Professional bodies of an MFN countries to standardize the legal education in the member States the standard conditions shall also include the grounds on which recognition is given for certification. Indian Advocates' Act requires to be amended to empower the BCI to not only standardise the University curriculum for the profession but also to take an admission test for certifying admission into the Bar including prescribing rules of apprenticeship. Each member-State can insist on the passing of an entry level Bar examination before certification because legal adjudication depends on national legal regime.

Suggested chart for Foreign lawyers and foreign law firms

Area of law	Permitted	Specific registration required	Indian offices of Foreign law firms
Advising			
(a) On Indian law	No	-	Barred / only through Indian associates
(b) On foreign law	Yes	Foreign Law Consultant	Subject to registration
Drafting			
(a) Documents governed by Indian law	No	-	Barred / only through Indian associates
(b) Documents governed by foreign law	Yes	Foreign Law Consultant	Indian / Foreign associates
Alternate Dispute Resolution			
(a) Governed by Indian law	No, unless permitted specifically by the Bar Council	-	Indian associates, or foreign associates who are specifically permitted to do so by the Bar Council
(b) Governed by foreign	Yea	Yes	Yes

Area of law	Permitted	Specific registration required	Indian offices of Foreign law firms
law [This is currently open to all persons, whether qualified or not]			
Adversarial			
(a) Litigation			
(i) Based on Indian law	No, unless permitted specifically by the Bar Council		Indian associates, or foreign associates who are specifically permitted to do so by the Bar Council
(ii) Based on foreign law	No, unless permitted specifically by the Bar Council		Indian associates, or foreign associates who are specifically permitted to do so by the Bar Council
(b) Tribunals			
(i) Reserved for advocates	No, unless permitted specifically by the Bar Council		Indian associates, or foreign associates who are specifically permitted to do so by the Bar Council
(ii) Others	No, unless permitted specifically by the Bar Council		Indian associates, or foreign associates who are specifically permitted to do so by the Bar Council

10. Legal Provisions That Will Need Changing If India Makes Commitments in the Forthcoming Negotiations

As such, with GATS coming into operation specially in the movement of professionals seeking entry, temporary stay and provide service to the clients, those questions shall come into limelight. Professional Regulations like the Advocates Act does not favour such mobility of professionals in an ordinary sense. But in fact, for long that did happen in India. Legal professionals used to come in at the call of their clients, clients being Governments, public sector and private sector enterprises. They mainly provided legal advice to their clients including Indian Law firms. As soon as these

foreign law firms moved in an organised manner and attempted to widen the activity extending to preparation of legal documents, problem started. If advice given by foreign lawyers are treated as legal professional activity, Supreme Court has to determine whether there is a gap in Secs. 24, 30, 33 and 35 of the Advocates Act to allow foreign lawyers to come and advise their clients in India.

The discussion in the previous section shows that the negotiations are likely to result in pressure for amendments of some of the provisions of the Advocates' Act, especially Articles 24, 30, 33 and 45. The Professional body of the Bar Council of India will have to negotiate with its sister concern in other Member-states. The procedure of standardisation also needs to be strengthened in all its phases such as at the stage of input education level, training level, authorisation level and certification level. The organisational laws will also have to be changed so as to allow:

- (a) Big partnership firms so that the fear of foreign firms taking over Indian firm is diminished;
- (b) Partners of various discipline and knowledge can develop one stop shop facility;
- (c) Professionals of more than one countries may work in a partnership team so that legal systems of various nations can get a comparative advantage.

A change in the Advocates Act would be needed also if because the concessions given under the GATS negotiations would have to be applied on a most-favoured nation basis (and thus not on the bilateral/plurilateral reciprocal basis that is presently in place). This would also apply if a multilateral standard setting is adopted which does not allow for the present system of reciprocity.

In addition, there will need to be a structured organizational approach to publication of the relevant laws and regulations of India, and develop enquiry points for answering queries in their regard.