Sixth Services Experts Meeting
Domestic Regulation and Trade in Professional Services

Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services

by
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Session I: Legal Services
*The views expressed in this paper are the author's personal views

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EXECUTIVE SUMMARY

There is no agreed definition of the international market in legal services market because the tradability of legal services is to a large extent determined by regulation of the legal market and the degree of this regulation will vary significantly from country to country. It is however, clear that the international market in legal advisory and tradable dispute resolution services is growing rapidly. This growth is largely driven by the globalisation of law firms' client base.

Trade in legal services takes place in all four GATS modes. The volume of this trade is difficult to determine accurately but estimates suggest that global trade in legal services is around $400 billion. The main traders of legal services are the European Union (and in particular the UK) and the United States. Amongst other OECD economies Australia and Canada are growing exporters, whilst Japan and China are important importers of legal services. There are a number of other economies which should be importers of legal services but due to market access restrictions have become exporters of the demand for legal services.

The global legal market is becoming more diverse with the entry of new players from countries that are developing their service sectors from a position of regional strength, such as Hong Kong or Singapore. As a result, the overall international market for legal services is becoming more competitive through a combination of factors such as new entrants, outsourcing, greater specialisation and competition to move further up the value chain.

Domestic regulation of legal services throws up issues for foreign service suppliers, in both collective and individual practice. The key issues for collective service suppliers, or law firms, tend to revolve around issues relating to licensing, staffing, corporate structure and 'double deontology'[1]. Whilst for individual lawyers the main domestic regulatory issues affecting their ability to provide services across borders are rules relating to eligibility to register as a foreign lawyer and the rules governing requalification, which can in some instances nullify the market access that is offered on paper.

There is a strong correlation between the level of domestic regulation in any legal market and the extent to which the market is closed to foreign providers of legal services but all markets, however open or closed, contain some degree of domestic regulation. There are three types of regulation that can affect the legal services market: non-sector specific legislative and regulatory measures, sector specific regulatory measures that are often imposed through codes of conduct, and measures relating to education and training which can affect domestic and international access to the market. The most significant of these tend to be the way in which general measures, such as company law provisions, are applied within the legal sector, if anecdotal evidence collected from international firms is to be believed. Nonetheless, all of these measures can reinforce negative attitudes to foreign competition in the domestic legal sector and thus domestic regulatory reform has an important role to play in opening up legal markets. The introduction of reforms in education and training and the consequent changes that these can have in providing access to the legal market are particularly important because of the transformative effect they can have on the competitiveness of the domestic legal sector.

[1] Double deontology refers to the need for foreign legal service suppliers to comply with two, possibly conflicting, codes of conduct for lawyers.

There is already a widespread debate about the regulation of legal services in many jurisdictions around the world. This has taken a variety of different forms depending on the type of economy and level of regulation that exists. Where the debate has been most sophisticated it has attempted to define the rationale for regulation of the legal sector and has tended to summarise this as having the following three objectives:

- To tackle the asymmetry of information between customers and service providers.
- To take account of externalities, such as the impact that the provision of the service has on third parties as well as the purchaser of the service.
- To take account of the fact that legal services produce public goods that are of value for society in general, such as the proper administration of justice.

The debate on the regulation of legal services has touched in many countries on how these objectives can be met in a less restrictive way than at present. There are five ways suggested in this paper in which the burdens of regulation and the contradictions between regulation in different countries could be reduced. The first of these is the introduction of greater transparency requirements – this would not necessarily solve problems for domestic suppliers but would help foreign service suppliers to understand licensing requirements. The second is a wider application of GATS disciplines, to include not only transparency but also provisions on licensing requirements and qualifications. Such standards could assist in circumstances where requirements and procedures are onerous but would not deal with wider problems relating to company law or code of conduct provisions. There is perhaps more mileage in examining a wider role for mutual recognition agreements and model rules, which could deal with a much wider range of issues than those dealt with by GATS disciplines. There is also some merit in having sector specific tools rather than broad disciplines, since there are sector specific issues, such as the treatment of independence and the public interest role of the legal profession, which need to be factored in to regulatory developments.

One of the major recommendations of this paper is that governments should encourage domestic reform in legal regulation to be profession led. An external impetus or encouragement makes it more likely that reform will happen but it will be more likely to succeed if it is driven from within the sector itself. The paper makes three other, linked, recommendations. These are: the value of developing a library of materials on how legal regulatory reform has been carried out in other jurisdictions; the elaboration of best practice guidelines, based on experience, of the most appropriate way in which to stage reforms in order to obtain a particular policy outcome; and encouragement to look at non-legal sector specific regulation and how that can impact on the legal sector.

I. THE SIZE AND POTENTIAL OF GLOBAL TRADE IN LEGAL SERVICES

1. Definition

1. There is no universally accepted definition of the international market in legal services. In part this is because there has been no explicit distinction made in international statistical classifications between traded and non-traded legal services[2]. This distinction is important because it lies at the root of a misunderstanding about what lawyers wish to do abroad and hence to a resistance to the liberalisation of trade in legal services. The UN CPC [3]definition used for gathering trade statistics in legal services, for example, puts great emphasis on litigation and in particular criminal litigation, which is one of the most specifically domestic and therefore least easily traded parts of the legal sector. It also fails to capture the vast majority of traded services, which are non-litigation related legal advisory services.

2. The definitions used at multilateral level sit in sharp contrast to the definitions of the international legal market used by organisations involved in the analysis of the legal sector from a business perspective[4]. These organisations tend to regard the international legal market as synonymous with the kind of transactional business carried out by the world's top commercial law firms. However, whilst this may be a better proxy of the output of the tradable sector, it is still likely to produce an underestimate of the size of the international sector, as it focuses on only one segment of the legal market, albeit a particularly important one. Such a definition for example, captures some, but not all, cross-border trade and trade[5] carried out through establishment in another jurisdiction. It does not however, capture trade in legal services generated by clients purchasing legal services in other jurisdictions, which is particularly significant in closed legal markets.

3. The best definition of the international market in legal services is therefore one that takes into account any legal services that are sold through one of the four GATS modes of supply. Although gathering statistics on the basis of such a definition is not an easy task, a reasonable working definition of the international legal services market might be: 'What lawyers, law firms and notaries do internationally or for international clients'. This definition might be regarded as too all encompassing and too synonymous with the supplier rather than the service he or she is providing, but as long as lawyers are not allowed to enter multi disciplinary practices (MDPs) and as long as there are areas of activity that are reserved to

2 The boundaries of traded and non-traded legal services are hard to define. Regulation affects the extent to which some tradable legal services can be exported to certain markets but there are nonetheless some services which are by definition non-tradable in that they can only be dealt with by a locally qualified practitioner in a local court.

3 UN CPC version 1.1, UN Statistics Division Classification Registry

4 For example, legal business publications such as 'the American Lawyer', 'the Lawyer' and market intelligence providers like Datamonitor

5 This point is made forcibly in Silver - Regulatory Mismatch in the International Market for Legal Services, Northwestern University School of Law, Public Law and Legal Theory Research Paper Series, Research Paper No. 03-07

lawyers and related legal professionals, there will be a significant overlap between the role of the individual and the service they are supplying.

4. The debate on domestic regulation is therefore particularly significant because regulation defines the boundaries and the players in any legal market segment.

2. Size of global market for legal services

5. Unfortunately, there are no statistical sources that are compiled for legal services on the basis of the four GATS modes of supply, although the UN manual on services statistics[6] which is under development gives some indication of how such statistics might be gathered in future, including, for example, FATS statistics. Moreover, because there are very few countries that gather balance of payments statistics on services at a sufficiently detailed level, we cannot yet even construct estimates of what GATS mode based trade might look like. We therefore must rely to a large extent on the limited evidence that exists from exporting countries, proxy measures and anecdotal evidence.

6. What we can say about the international legal services market is that it has grown rapidly over the past few decades. This has happened because legal services are principally a business input[7] and so the international legal services market has expanded on the back of the growth in world trade and capital flows. The liberalisation of the financial services sector has also been an important factor, as illustrated by the example of the United Kingdom since the liberalisation of its financial service market, where the legal services sector has been the eleventh fastest growing sector[8] in the economy over the decade 1992-2003 and is now the 22nd largest sector in the economy, contributing 1.39% to UK GVA or £13.6 billion. The importance of traded legal services to the growth of the sector as a whole is evident from the fact that the turnover of the UK's top 38 law firms, who earn most of their fee income abroad, accounted for £4bn alone or 0.5% of UK GVA in 2003.

7. The expansion of legal services in the United Kingdom is a reflection of a global expansion in legal services trade. As a result of the growth of demand for legal services by international clients, a multinational tier of law firms has grown up to serve the MNE market. This tier of law firms has been the main driver in the internationalisation of legal services and they have significantly expanded their overseas operations over the last twenty years. The first US law firm opened an office in London in the late 1960s but by 2005 there were more than 70 US law firm offices established there.

8. However it is interesting to note that although the international legal sector is still very much dominated by US law firms, it is gradually becoming more diverse. In 1980, the world's top law firms were all from the United States but by 2006 there were law firms from five other countries represented in the league table of top 100 global law firms[9]. To some extent, the history of globalisation itself can be traced through the development of the international legal market and as global businesses emerge from a wider range of countries, one might expect to see a similar development in the legal market.

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6 UN Manual of Statistics, ST/ESA/STAT/SER.M/86

7 Dispute resolution services can be regarded as an end-user purchase in their own right but most legal services purchases are inputs into other transactions.

8 The UK economy - Analyses at a glance, 1992-2003, Extract taken from United Kingdom Input-Output Analyses, 2005 Edition, UK Office of National Statistics

9 United Kingdom, Canada, Australia, Netherlands and France – source: The Lawyer Annual Survey of the Global Top 100: www.thelawyer.com

i) Estimate of size of market in international legal services

9. In 2004, Datamonitor estimated that the global legal services market amounted to $394 billion[10]. This estimate, however, covers the entire output of the legal services sector and not only the part of it that might be considered tradable. The United States for example, has a legal market worth an estimated $192 billion[11] or around 40% of the estimated global legal market but it has a large domestic market in dispute resolution that lies outside the tradable sector. The turnover of the top 100 US law firms amounts to around $44 billion, suggesting that roughly a quarter of the US legal sector is traded. This contrasts with the United Kingdom which has a smaller domestic legal market but a higher proportion of traded legal services.

10. Not surprisingly, the United States and the United Kingdom publish the most complete statistics on legal services trade, but even these are very partial. Table 1 below, compares available figures in different GATS modes for these two major exporters of legal services.

11. It is worth noting that these statistics only capture legal services trade in modes 1, 3 and 4. Anecdotal evidence suggests that in some jurisdictions, which have become known as important international legal centres, mode 2 earnings could also be significant. According to a survey of law firms carried out by the Law Society of England and Wales in 2003[12], 2,150 of the 9,198 registered law firms in the jurisdiction were earning fee income from international clients. Since only 38 of these law firms had offices in other jurisdictions and much of the overseas earnings reported under mode 1 is accounted for by the top 100 law firms, this would appear to support the argument that mode 2 is more important than might at first be thought.

Table 1. International Trade in Legal Services

Form of trade	United States	United Kingdom
Mode 1	$3.4 billion (2003)	$3.2 billion (2003)
Mode 3	$958 million (2002) Top 71 law firms have 343 offices abroad (2000)	484 branches of solicitors firms established abroad (2003) no published data on earnings from offices
Mode 4	775 work permits issued to lawyers (2000)	881 work permit requests to US lawyers alone (2000)

Sources: US: Statistics from Bureau of Economic Affairs; UK: Mode 1 statistics from UK Pink Book, Office of National Statistics 2005; Mode 3 statistics from Law Society of England and Wales (unpublished data); Mode 4 statistics from Home Office/Work Permits UK)

12. Mode 2 trade would appear to be particularly significant in jurisdictions which are promoting themselves as dispute resolution centres for parties from abroad in civil and commercial matters as well as for arbitrations and mediations. The commercial court in London publishes annual statistics which show that roughly 60% of its cases emanate from business based abroad. It is also the case that wealthy individuals do shop around for their legal services when forum shopping is possible and may buy from other jurisdictions where they expect the outcome in the local courts to be more favourable to them. For the most common torts, for example, the choice of forum may change depending on which courts are offering

10 Datamonitor – US Legal Services Sector Study, 2004

11 Ibid.

12 Law Society of England and Wales Business survey, 2003

the most beneficial settlements from the petitioner's point of view at the time. In the case of divorce, for example, the recent judgement in the House of Lords in the case of Miller v. Miller (2006) has made London an attractive destination for spouses suing for divorce from a wealthy partner following a short marriage.

13. Arbitration is another example of potential mode 2 earnings. The following table illustrates how fast trade in international arbitration services has grown over the past decade. Trade in this area is growing rapidly and is not confined to the traditional exporters of legal services.

Table 2. Growth in trade in international arbitration services - Number of cases in major arbitration centres, 1995-2005

	1995	2000	2005	Percentage growth
AAA	180	510	580	222%
CIETAC	902	543	979	8.5%
HKIAC	184	298	281	52.7%
ICC	427	541	521	22%
JCAA	7	10	11	57%
KCAB	18	40	53	194%
KLRCA	7	11	6	-14%
LCIA*	49	81	118	141%
SIAC	37	55	58	57%
STOCKHOLM	70	73	56	-20%
VANCOUVER*	40	88	77	92.5%
VIENNA	100	100	55	-45%

Note: AAA - American Arbitration Association; CIETAC - China International Economic and Trade Arbitration Commission; HKIAC - Hong Kong International Arbitration Centre; ICC - International Chamber of Commerce; JCAA - Japan Commercial Arbitration Association ; KCAB - The Korean Commercial Arbitration Board; KLRCA - Kuala Lumpur Regional Centre for Arbitration

LCIA* - London Court of International Arbitration; SIAC - Singapore International Arbitration centre; STOCKHOLM - Arbitration Institute of the Stockholm Chamber of Commerce; VANCOUVER* - British Columbia International Commercial Arbitration Centre; VIENNA - International Arbitral Centre of the Austrian Federal Economic Chamber

Source: HK International Arbitration Centre (nb: figures for LCIA and Vancouver include some domestic cases.

14. Finally it is also worth noting that where a country imposes restrictions on foreign legal practice it may simply displace its own potential earnings through mode 3 investment by foreign law firms into mode 2 earnings for other jurisdictions, as its own citizens and businesses are required to go offshore to source the legal advice they need. There are, for example, 31 international law firms recorded in international directories[13] as significant suppliers of legal advice to Indian clients. Indian clients must travel to meet their international legal advisers abroad because foreign lawyers are not allowed to practise in any form in India. In recent years, foreign lawyers have given offshore advice to major Indian clients on recorded deals worth more than $18.5 billion[14], from which the legal services earnings were likely to have been substantial.

13 Legal 500 www.legal500.com

14 Legal 500 www.legal500.com

3. Who are the main importers and exporters of legal services?

15. Although the United States and the European Union have the two biggest legal markets in the world and are the largest traders of legal services, there are a growing number of other countries with export interests in this sector. Canada, for example, experienced growth of 30% in its exports of legal services between 2001 and 2005 and now exports more than CAN$0.5 billion worth of legal services a year.

16. Unlike Canada, however, most countries do not produce statistics at a sufficiently detailed level to identify legal services exports. A useful proxy however can be found in the US import statistics which give an insight into the range of countries that are exporting some volume of legal services to the largest market in the world. Table 3 illustrates the range of countries now engaging in the export of mode 1 legal services.

Table 3. Imports of legal services from other countries to the United States, 2003, US$ million

Canada	**60**	**Latin America**	**89**
Europe	**499**	Argentina	10
Belgium-Luxembourg	16	Brazil	18
France	34	Chile	3
Germany	69	Mexico	24
Italy	11	Venezuela	6
Netherlands	11	Other South America	17
Norway	5	Other W.Hemisphere	10
Spain	12		
Sweden	12	**Asia Pacific**	**198**
Switzerland	20	Australia	29
United Kingdom	253	China	23
Other European	57	Hong Kong	18
		India	6
Africa	**13**	Indonesia	8
South Africa	5	Japan	64
Other	7	Korea	20
		New Zealand	2
Middle East	**20**	Philippines	3
Israel	5	Singapore	5
Saudi Arabia	9	Taiwan	8
Other	5	Thailand	5
		Other Asia	5

Source: US, Bureau of Economic Affairs, 2003

17. There are also a growing number of countries engaging in mode 3 export of legal services. There are law firms from nearly 30 countries[15] with branch offices in the major legal centres – London and New York. There are also law firms from other countries with overseas offices who choose to invest regionally rather than in the world's biggest legal hubs. For example, there are firms from Japan, China, Korea and Singapore that are established elsewhere in the Asia-Pacific region. There are also Gulf law firms with a small presence in other countries in North Africa and the Levant. In total, there are an estimated 70-80 countries playing host to law firms from other countries.

18. In the absence of satisfactory import statistics, the best proxy measure of key importers of legal services is the list of countries that were the focus of the plurilateral request on legal services issued by the 'Friends of Legal Services' following the Hong Kong WTO Ministerial Summit. Twenty-nine countries[16] (counting the European Union as a single entity) were considered to have markets of sufficient international importance that they made up the 'critical mass' of the world's actual or potential legal services trade. There are however important distinctions between this group and the individual countries can be divided into at least five categories of importer or potential importer.

- The most significant importers are the USA and the European Union, which are also the world's largest exporters of legal services. They are major importers of legal services in all four modes.

- Second, there are the mode 1 importers. These are usually relatively open economies which have small but sophisticated domestic markets for legal services, such as Australia, Canada, Argentina and Norway. In these countries, the domestic legal markets are insufficiently large to entice new entrants from abroad to establish there, but international law firms may serve clients from these countries on an offshore basis with specialist advice that they cannot source.

- Thirdly, there are the mode 3 importers who have sufficiently large domestic markets to warrant investment by international law firms as well the supply of cross-border services but which have not developed their own domestic export capacity. The most notable examples of this are China, which now has over 100 branches of foreign law firms established in its major cities and Japan, which hosts 43 branches of foreign law firms in Tokyo. There are a number of other countries that might be expected to become both larger importers and potential exporters of legal services, such as Brazil and South Africa, but whose markets are only partially integrated into the international legal services market.

- Fourthly, there are the re-exporters of legal services. These countries have developed as importers of legal services in order to establish an export capacity. In most cases the development of a legal services export capacity has grown out of the development of efforts to establish a regional financial services hub. The most obvious example of this phenomenon is Hong Kong, which has used its relatively liberalised approach to legal services to become an exporting centre in North Asia, notably into China but also taking advantage of closed markets elsewhere in the region, such as South Korea. Since the mid-1990s, Singapore has endeavoured to do the same for South East Asia and the UAE is rapidly developing as a key legal hub for the Middle East/South Asia. In each of these examples, the growth of re-export trade in legal services has occurred

[15] Australia, Azerbaijan, Bermuda, Brazil, Chile, Cayman Islands, Canada, Denmark, England and Wales, France, Germany, Ireland, India, Italy, Luxembourg, Jersey, Nigeria, Netherlands, Portugal, Panama, Scotland, Spain, Switzerland, Russia, Ukraine, United States.

[16] Argentina, Australia, EC, Iceland, Israel, Japan, New Zealand, Oman, Switzerland, Canada, Chile, China, Chinese Taipei, Indonesia, Korea, Malaysia, Norway, South Africa, Thailand, UAE, USA, Brazil, Hong Kong China, India, Jamaica, Mexico, Philippines, Singapore and Sri Lanka.

because of explicit government action to attract foreign law firms to establish in order to underpin the development of a financial and legal services centre. This has, in each case, provided a springboard for wider legal services export activity.

- Finally there is an important category of, mostly large, emerging markets, such as India, Korea, Malaysia, Philippines, Indonesia and Israel who maintain significant restrictions on international legal services but who have the potential in future to be major importers and possibly exporters of legal services. In all cases these countries have a prohibition on the establishment of branch offices of foreign law firms but in some cases, such as India and the Philippines, an effective nationality requirement has been imposed on the delivery of all legal services in their jurisdictions. This has meant that they have become significant exporters of mode 2 cross-border demand for legal services.

4. Intra-industry trade in legal services

19. Despite the growing number of countries engaged in legal services trade, the international market is dominated by US-EU trade. In 2003, United States exports of legal services were recorded at $3.4 billion, of which $1.8 billion was exported to the European Union. Moreover in the same year, imports of legal services into the United States amounted to just under $900 million, of which 56% or $499 million came from the European Union. Based on less complete information, total EU legal exports were estimated to be around $4-5 billion in 2003 of which UK legal service exports alone accounted for about $3.2 billion.

20. This pattern of intra-industry trade between the European Union and the United States is also borne out by the pattern of mode 3 investment by law firms. There are 215 branches of US firms in Europe, of which 65 are in London and 150 in the rest of the EU. In contrast, there are only 22 branches of European firms in the United States, mostly in New York. These patterns of investment reflect to a large extent the cluster effect of financial markets and the demand from clients for law firms to be present to provide supporting advisory services[17].The work undertaken by US firms in Europe, outside of London, tends to be more general corporate and commercial work driven by the economic reform agenda in these economies.

5. Changing patterns of legal services

21. It is clear, even from the extremely patchy statistics that are available, that the legal services market has experienced extraordinary growth over the last couple of decades. Moreover, even though the market for international legal services remains heavily dominated by Anglo-American law firms, there are encouraging signs of many new entrants from a wide variety of countries and many of these are countries which started as importers of legal services and have used this position to develop an export base. In Singapore, for example, there are three or four local firms that have opened offices in other parts of the region, particularly in China, and are undertaking an increasing amount of cross-border work for clients from Malaysia, Indonesia and Vietnam.

22. There are other trends that are expected to become more evident in the coming years. The first is a continuing growth in the demand for legal services in line with increasing globalisation. There are also a number of factors which suggest that legal services could experience trend growth rates higher than the growth in global output. These include the growth of the international risk culture, increasing legislation and regulation governing the conduct of the corporate sector and increasing judicial extraterritoriality. All of these trends will lead companies to increase their expenditure on legal advice.

[17] City of London Research Paper

23. However, the international law firms that might be expected to benefit from such trends are also likely to experience greater competition themselves. This competition is likely to come from three sources. Firstly, there are likely to be new entrants into the international legal market from amongst those countries who are opening their legal markets and developing more competitive domestic bases from which to expand. India, in particular, if it opens its legal market in the near future, may well produce home grown law firms that are in a position to challenge the dominant position of Anglo-American law firms over the coming decades. Secondly, there is already a growing commoditisation of legal services, which is largely being driven by technology, and this is eating into the profitability of lower value transactional work. Lastly, outsourcing is also making a growing impact on the legal market. The first wave of such outsourcing has tended to focus on traditional back office functions but in the last couple of years, a number of law firms have begun to send their research and pre-litigation preparatory work to jurisdictions like India where the cost base is considerably lower. A survey of the BPO market published by Business Week in 2003 suggested that the number of legal jobs that the US alone would outsource could increase by 435% to 75,000 between 2005 and 2015.

24. A further trend that is becoming evident in the legal market in many countries as a result of greater competition is a growing emphasis on standards and standards raising. Countries that do not have post-graduate training for lawyers, such as Spain, have taken, or are planning to take, steps to do so[18] whilst the emphasis on life-long training for qualified lawyers through continuous legal education has led to the proposed introduction of formal continuing education schemes in countries as diverse as Cyprus and Malaysia. Even those countries which already have high standards of entry to the profession, such as Germany, the Netherlands and England and Wales, there is a growing debate about how regulators can offer better guarantees about the quality of legal services offered to consumers. Measures such as regular 'health checks' on legal practices and recertification are now being more widely debated amongst regulators in the more sophisticated legal markets.

25. Continuing globalisation trends are also likely to fuel the argument put across by some international law firms that there should be differential regulation in the legal sector between those serving the high end, wholesale market and those serving the consumer market, where there is perhaps a greater need for consumer protection. But, although such a distinction has its attractions, it is not easy to draw a hard and fast boundary between the 'wholesale or B2B legal market' and the 'consumer' market. What we are perhaps more likely to see therefore in the near term in OECD countries, is a growth in additional post qualification requirements for specialist areas of 'consumer' or individual client driven practice. This is already the case in some countries where government funding dictates access to legal advice in immigration tribunals or family courts and additional qualifications are increasingly being required on top of basic legal qualifications.

26. In summary, the traded legal services market may be expected to continue to expand, internationalise and to experience significant innovation in the coming decades.

[18] Spanish Law 34/2006 of 30 October 206 on Access to the Professions of Abogado and Procurador de los Tribunales

II. THE REGULATORY STEPS AND PROCEDURES INVOLVED IN WORKING ABROAD

1. Regulation and Market Access

27. Any individual legal practitioner or law firm who wishes to take advantage of this growing internationalisation and practise abroad will be confronted by a number of issues. The very first issue is the need to understand how lawyers and law firms are regulated in the market that the individual or firm wishes to enter.

28. Most countries have some kind of primary legislation covering legal services, if only to address the issue of who can or cannot appear in court. Primary legislation on legal services usually sets out the objectives of regulation, the scope of the regulated market and may also give an outline of the rights and obligations of lawyers in the jurisdiction as well as how they are to be regulated. The regulation of legal services, as with most other professions, focuses on the qualifications of individuals and the creation of areas of work reserved to those who have obtained the requisite qualification. The justification for this approach is discussed further in section IV of this paper. Whether there is any body of domestic regulation governing the legal market, in addition to primary legislation, will depend to a great extent on the sophistication of the local legal market and in particular whether there is much transactional legal practice outside of the courts. In less sophisticated legal markets there may be no separate legal services regulator and the task is left to the local courts. In these circumstances, the court will manage the roll of admitted practitioners and take responsibility for striking off advocates who have committed disciplinary offences. The absence of a framework of regulation for transactional legal practice, which is the area in which foreign lawyers will engage, can create problems both in terms of uncertainty for the legal services exporter and in terms of a backlash from local practitioners who fear the consequences of foreign law firm entry.

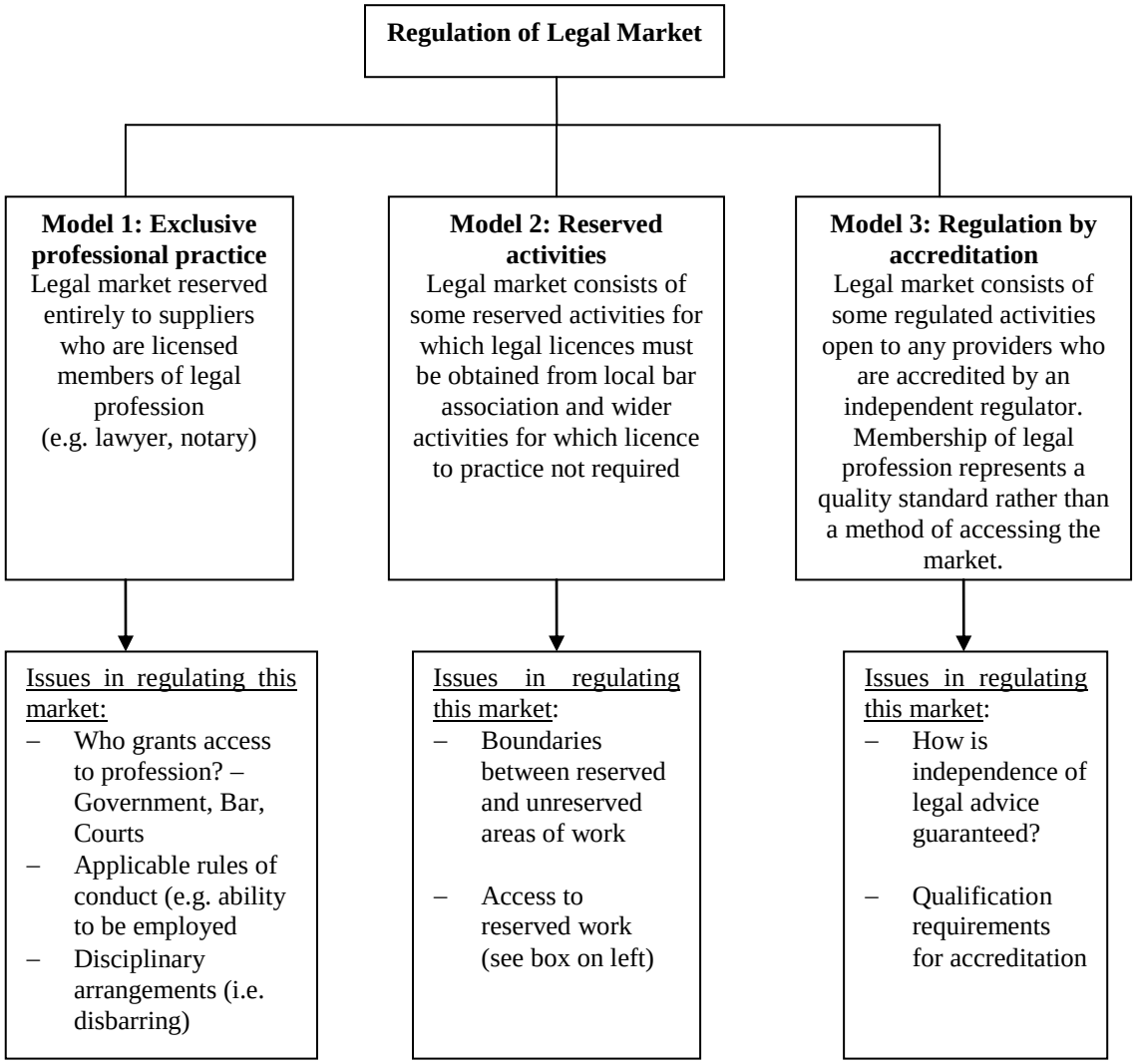
29. In most jurisdictions, however, there will also be a bar association whose role is to bring legal practitioners together to promote lifelong legal training, make collective representations to the courts or government, or simply to act as a club for lawyers. These voluntary associations have often been given the power to regulate the legal profession[19] by governments when they wish to conform to international obligations in the regulation of the legal profession by giving it a level of independence from state interference. The typical 'Legal Practitioners Act' will often establish a regulatory role for the local bar association and delegate specific powers to it. A recent example of this has been the creation of the Indonesian Bar Association (PERADI) following the Advocates Act 2003. In the OECD, the trend in recent years, however, has been to move away from regulation by self-governing professional bodies with both representational and regulatory powers, on competition policy grounds, towards separate independent regulators who are focusing on the market rather than the individual service provider.

30. Diagram 1, below, gives a diagrammatic representation of the various ways in which regulation of the legal sector can work. As a general rule, the regulation of legal services in most countries falls somewhere between model 1 and model 2 and, as a result, the issue of access to the legal market is bound up very closely with access to the legal profession in the country concerned. The extent to which a jurisdiction has made arrangements to fit foreign suppliers of legal services into this regime (e.g. the extent

[19] As the discussion in section 1 illustrated, in many cases the power to regulate the legal profession equates to the power to regulate the legal services market because of the reservation of certain services to qualified and regulated practitioners.

to which it recognises a foreign supplier or requires the foreign supplier to assimilate entirely into the domestic regime) will determine the extent to which legal services can be imported into that country.

Diagram 1: Regulatory Models for the Legal Market



31. Although there are many common principles underlying the regulation of lawyers in different markets around the world, there are also significant differences which can hinder trade in legal services. Some of these issues are examined in more detail below. As there are different issues that arise in domestic regulation for individual lawyers and for law firms who are trying to export their services, the following discussion deals with individual and collective practice separately. Where possible, an attempt has been made to compare the regulation imposed by those countries which are more open, net exporters of legal services and those countries which retain significant barriers to trade in legal services.

2. Issues for Firms

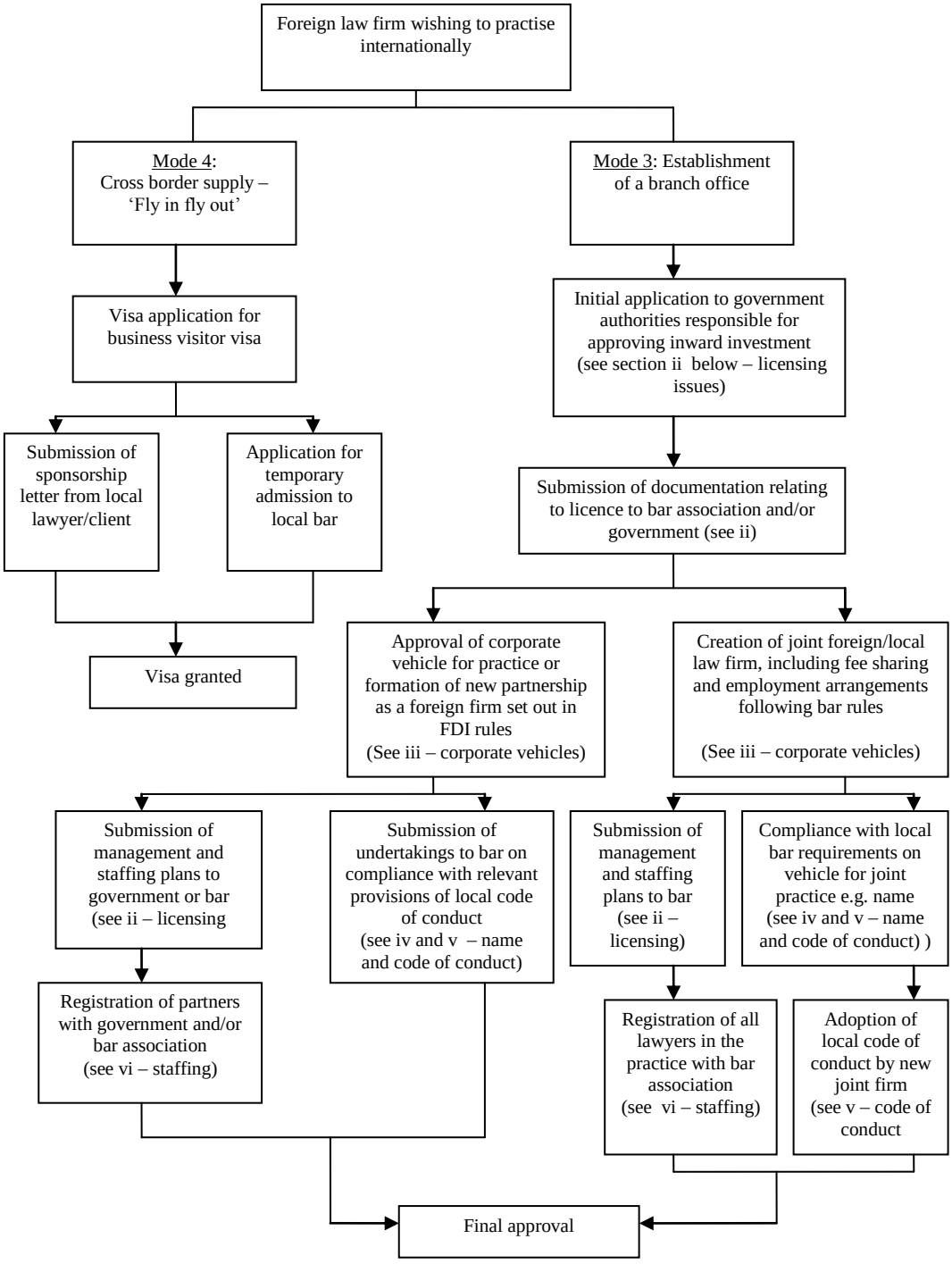
i) Background

32. The flow chart shown below sets out the main steps that a foreign firm or service provider will often need to go through in order to practise in another jurisdiction (modes 3 and 4 are the most heavily regulated). This illustrates that even for fly in-fly out practice there can be domestic regulatory hurdles to overcome in the form of registration with the local bar. The flow chart shown below is inevitably a highly stylised example. It is possible that a country may not require a law firm wishing to open a branch office to go through all of these steps, or approach them in the order shown. However the diagram is intended to illustrate two things: First, that legal practice which involves fee sharing with the local profession will involve a much higher level of domestic regulation than a stand alone foreign firm, and second that the local bar and its code of conduct will tend to be involved under whatever conditions foreign law firms are allowed to practise.

33. A foreign law firm that wishes to set up an office in another country, will usually need to go through at least a two step process; first obtaining a licence to establish an office and then, secondly, obtaining permission for the staffing arrangements in that office. Each of these steps will often have multiple levels beneath them. There may also be significant differences in the steps involved depending on whether the foreign firm intends to take domestic lawyers into the practice as partners or form some kind of joint venture with a local firm. The following discussion elaborates on some of the most commonly reported issues facing law firms wishing to establish in other countries.

34. The first problem that a foreign firm may encounter is that the host country may not have domestic regulation governing any form of collective practice by lawyers. WTO schedules do not require countries to make commitments to introduce a corporate vehicle for legal practice where none exists. Some jurisdictions may therefore appear on paper to be very open whilst in effect preventing foreign legal practice of any significance. Countries may also have de facto domestic regulatory barriers because they simply do not have rules permitting the employment of one lawyer by another and therefore by extension will prohibit the establishment of law firms. These restrictions would not necessarily show up on a WTO schedule because they are neither market access nor national treatment restrictions.

Diagram 2: Flow Chart showing the regulatory steps commonly required for foreign legal practice in another jurisdiction



ii) Licensing Issues

35. Licensing regimes for foreign law firms tend to follow one of two approaches, either 'integration' in which every effort is made to bring the foreign firm under a very similar regime to local law firms and impose upon them the same rules, or 'separation' in which the foreign firm's scope of practice and/or ability to integrate with the local profession may be strictly limited. These two approaches are depicted on diagram 2, above, which illustrates that an integration approach tends to involve much heavier regulation.

36. The integration approach is more unusual but is adopted by countries who wish to encourage a 'transfer of technology' to the local profession. Classic examples of this approach include Singapore's joint law venture model or Hong Kong's local law firm approach.

37. The separation approach is more common and is typified by China where the scope of foreign firms' licences are severely restricted and employment and partnership with local lawyers is prohibited. The underlying objective of this approach is usually to provide the local profession with time to develop and become more competitive.

38. It is possible for these approaches to be mixed. In England and Wales, for example, a foreign firm that does not wish to take an English solicitor into its partnership, is subject to a very light regime which involves a brief submission to the Home Office, a letter of no objection from the Law Society of England and Wales[20] and a signed undertaking that the foreign firm will not undertake reserved work. The foreign firm does not need any further registration or licensing and can practise any unreserved local or foreign law. However, the licensing process is more complex if the foreign firm wishes to take an English solicitor into its partnership and create a licensed Multi-National Partnership[21]. Under these circumstances, the MNP becomes an entity that is regulated by the Law Society and all the partners in it, whether foreign lawyers or not, will be governed by the rules that apply to English solicitors. The rationale underlying this approach stems from the fact that the legal market is relatively open and regulation exists to control those holding the title of 'Solicitor of the Supreme Court of England and Wales' rather than controlling market entry.

39. Whether the importing country chooses an 'integration' or a 'separation' approach, there are a number of common licensing concerns that are frequently raised by international law firms in exporting countries when they are looking to establish abroad. These are: transparency of the licensing process, conditions imposed on licences, availability of multiple licences, staffing of the branch, restrictions on corporate structure, restrictions on use of brand name, application of local codes of conduct.

a) Transparency

40. One of the very first issues to be confronted by a foreign law firm wishing to enter another market is the transparency, or lack of it, of regulations on establishment. It may even be unclear to the applicant law firm how it can obtain a licence, or indeed whether it needs one at all, given that the practice varies so dramatically from country to country. The process of approval may be dealt with solely by government, as in Singapore, or it may require the involvement of both government and the bar association in a two stage process, as in Japan.

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20 With effect from 01/01/07, the regulatory branch of the Law Society of England and Wales will be known as the Solicitors Regulatory Authority

21 Following rules made under section 31 of the Solicitors Act 1974, see bibliography for further details

41. In countries in which crossborder legal practice has evolved relatively recently there may be no formal legal framework covering what is permitted and what is prohibited to the foreign lawyer, and this can create problems which grow beyond simple transparency issues. In India, for example, foreign law firms were able to obtain licences by the Reserve Bank of India to open representative offices until 1995, under a law that applied to foreign investors in general. But the lack of clarity on what these law firms could or couldn't do and their separation from the local regime governing legal practice soon provoked a backlash from the local profession, who felt that foreign firms were undertaking work that should have gone to them. A group of local practitioners with the support of various local Bars took a case to the Bombay High Court which led to the reinterpretation of the Indian Advocates Act and the expulsion of foreign lawyers from India. This illustrates that an ambiguous definition of scope of practice may simply store up problems for the future.

42. A further transparency issue may arise because it is unclear on what grounds the decision to grant or refuse a licence is to be made. In the United Arab Emirates, for example, the licence application process is relatively informal and foreign lawyers practise at the discretion of the Rulers Office, which approves licences for foreign lawyers to practise. There are no published guidelines or rules governing who may or may not qualify for such a licence and what paperwork they need to submit in order to obtain one.

b) Processing and conditions imposed on licences

43. Exporting jurisdictions will often lay down rules on how applications for licences are to be handled. However, there are a number of concerns that crop up frequently in those countries that have only more recently permitted legal services trade.

44. In China, for example, the licensing system for foreign law firms established under the terms of WTO accession [22] has been criticised by the Legal Working Group of the EU Chamber of Commerce in China on a number of grounds. Firstly, there is unhappiness amongst foreign law firms that they need to obtain approval from two tiers of government, the State Council and provincial level. This can significantly extend the time required to obtain a new licence. In addition, the fact that it is also the responsibility of the applicant firm to manage the application process through both tiers of government rather than to make a single application, adds to the legislative burden. Other federal countries that are exporters of legal services[23] have only one level of licensing approval, usually at the state or provincial level where the foreign law firm is to establish.

45. The time taken to deal with licensing applications is also sometimes a cause of concern. In many countries there are no requirements on regulatory authorities to deal with licence applications within certain time limits. In China, the application process can take more than a year, in part because of the two tier approval system outlined above. Exporting countries tend to have shorter deadlines for processing license applications.

46. The amount of information requested by authorities who are examining licensing applications can also sometimes create difficulties. In Singapore, the Attorney General's office, which is responsible both for licensing approvals and the subsequent regulation of foreign firms, requires the submission of a two year business plan by any foreign law firm looking to establish. This should include information on the number of lawyers/partners in the joint venture; the scope of practice of the joint venture; the geographical reach of the JV; the projected increase of lawyers/partners over the life of the business plan; the projected

22 'The Administration of Representative Office of Foreign Law Firms in China Regulation' – implementing provisions 1440/02.07.04

23 Australia, Canada, United States

percentage increase of revenues and from which sources; proposed technology investment; proposed training of Singapore lawyers; the location of Asian Hub activities of the foreign firm and any other material information.

47. Similarly in China, the regulations that implement China's WTO commitments on legal services[24] state that, on applying to establish a representative office, foreign law firms must demonstrate that there is a need for them to open such an office and they must submit a "feasibility report on the business prospects of the proposed representative office and a development plan". Foreign law firms looking to establish in other countries are sometimes concerned about submitting such confidential commercial information.

48. There may be other conditions imposed on the granting of licences which do not always have a clear regulatory purpose. For example in Hong Kong, a branch of a foreign law firm is permitted to register as a local law firm (i.e. staffed by Hong Kong lawyers and practising Hong Kong law) provided that a registered foreign firm of the same name has practised foreign law there in the immediate past three years; at least one of the principals in the Hong Kong firm is a partner in the overseas firm; and one of the principals of the Hong Kong firm has, for not less that three years during the five years immediately preceding the establishing of the firm, been a partner in, or a consultant to, or employed by the foreign firm. It is not immediately obvious why it is not possible for a foreign firm to register immediately as a local firm, without a three year qualification period, provided it has locally qualified lawyers as principals.

49. It is also the case that some countries, on granting licences, will place time limits on their duration. In Brazil for example, licences for foreign legal consultancy firms must be renewed every three years even though the foreign firm is under a separate obligation to inform the regulatory authorities whenever relevant changes take place. This creates added uncertainty and risk which discourages foreign law firm investment. The need for such a review clause is unclear since a breach of the terms of a licence could lead to its revocation at any stage.

c) Multiple licences

50. As a rule, exporting countries do not maintain restrictions on the number of branches that a foreign law firm can establish in their jurisdiction and they tend to allow the market to determine its own requirements. However, despite the WTO prohibition on quantitative restrictions on licences, some more protectionist jurisdictions have found ways to circumvent controls on the number of branch offices that foreign law firms can establish[25].

51. In China, for example, the rule implementing China's WTO legal commitments requires any additional branches to fulfil an economic needs test and sets out a number of specific factors by which the Ministry of Justice will assess 'the need' for a additional branches. Moreover, a foreign law firm can only establish an additional representative office once its most recently established office in China has been practising for "three, full consecutive years"[26]. In Japan, foreign law firms are effectively prohibited from

24 'The Administration of Representative Office of Foreign Law Firms in China Regulation' – implementing provisions 1440/02.07.04

25 See typology of importing jurisdictions in section I, part 3. There is often a strong correlation between the development of an export capacity in international legal services and the existence of a relatively unrestricted import regime. This is because international legal services exports depend on law firms obtaining experience in complex multijurisdictional transactions.

26 China, WTO implementing regulations

establishing more than one office[27]. The official justification for this restriction is that only incorporated structures are permitted to have more than one office and multi-national legal partnerships cannot be incorporated. This discriminates against foreign law firms as there is no prohibition on domestic law firms opening more than one office.

iii) Restrictions on corporate structure of foreign law firms

52. A major issue for many foreign law firms when establishing offices abroad is the existence of restrictions on the corporate vehicles that they are able to use and the associated restrictions this may impose on the way in which they can integrate a new branch office into their overall structure. Some countries will also impose additional restrictions on the level of participation that foreign law firms can have in a law firm in their jurisdiction.

53. Many countries set out rules on forms of association that are permissible between lawyers. These often tackle questions relating to co-operation between lawyers and other professionals, as well as management, control and ownership. The purpose of such rules is usually justified on the grounds that lawyers must be independent and therefore free from control by non-lawyers. This can create problems in countries which define 'a lawyer' as synonymous with a locally qualified lawyer, because this effectively means that foreign lawyers are classified as non-lawyers and any form of multi-national partnership or fee sharing arrangements between local and foreign lawyers is impossible. This was the situation in England and Wales until the Courts and Legal Services Act 1990, which made multi-national partnerships possible.

54. In some EU countries the creation of new vehicles for joint practice, as part of the implementation of the Lawyers Establishment Directive[28], has created anomalies between the position of EU lawyers and non-EU foreign lawyers. For example, in Italy, the Società Tra Avvocati which is a form of limited liability partnership is only permitted between Italian and EU lawyers. The status of non-EU lawyers is not expressly addressed by the law and this creates a difficulty for international law firms with offices in Italy, where they have Italian and non-EU lawyers as partners.

55. Multi-disciplinary partnerships (MDPs) are prohibited in most jurisdictions with a few exceptions[29]. MDPs between accountants and lawyers are permitted by law in Germany but are reportedly rendered inoperable by the implementing rules adopted by both professions on how these should work. Opinion is divided on how important a restriction this is as take up of MDP status has been very limited even where it is permitted[30]. One effect it can have is to require the overseas branch of the foreign law firm to establish itself as a separate firm and this can impose additional costs on the firm.

56. Limited liability status may also be a hurdle that a foreign firm needs to overcome if it is to establish a branch in another country. This status may not be available in the country concerned, such as Slovenia for example, or may require permission from the Bar Association, as in Estonia. In these circumstances, a foreign law firm which is established as a limited liability partnership in its home country will need to form a separate partnership under local law if it wants to open a branch abroad. The need to create a new legal vehicle in order to be able to practise in another jurisdiction simply adds to the cost of

27 Article 9, Regulations on Gaikokuho Joint Enterprises, Japanese Federation of Bar Associations

28 98/5/EC

29 New South Wales, Germany and Washington DC

establishment and may make it harder to integrate the local lawyers in that branch into the wider partnership.

57. Finally, importing countries may impose quantitative limits on a foreign law firm's participation in the legal market. In Austria, foreign lawyers' equity participation and shares may not exceed 25% of the law firm capital. In France, 75% of the partners holding at least 75% of the shares must be lawyers fully admitted to the Bar in France. The effect of these restrictions has been to keep a cap on the size of foreign law firms in France and to restrict their geographical spread.

iv) Name

58. A further issue for foreign law firms establishing in another jurisdiction is the name under which they are allowed to operate. Given that law firms trade to a large extent on reputation, it can be a disadvantage if they are not allowed to use their brand name in all the jurisdictions in which they operate.

59. In England and Wales, if a foreign law firm and an English firm merge to form a multinational partnership (MNP), the MNP can adopt *either* the name of the foreign law firm, *or* the name of the solicitors' firm, *or* a completely new name, provided the name complies with section 1(c) of the Publicity Code 1990. This prohibits any name which is misleading.

60. In the European Union, the Lawyers Establishment Directive (EC/98/5) was able to reconcile the different approaches of different member states by allowing foreign lawyers to use the name of the grouping that they used in their home member state[31], subject to the caveat that the host Member State could require this name to be supplemented either by mention of the legal form of the law practice in the home member state or by additionally mentioning the name of a host law firm with which the foreign law firm was practising in partnership. The declared purpose of these rules is to ensure that consumers of legal services understand who is giving them legal advice and how that advice is regulated.

61. However, there are still many different approaches in different countries, which can make it difficult for an international law firm to have a consistent brand across its offices. In France, for example, non-EU firms are not permitted to establish branch offices under their own names, whilst in Turkey and Japan, a foreign law office must include the name of one of the resident foreign lawyers in the firm's name.

v) Double deontology

62. Lastly, as part of the process of establishing an office, the foreign law firm will often need to make some undertaking that it will adhere to local bar rules and this may impose some restrictions or impose some additional costs on practise in that market. These rules apply equally to local law firms so are dealt with in more detail in the section of this paper dealing with the regulation of domestic legal practice. However, it is worth observing that the foreign law firm may face day-to-day problems arising from the application of host country ethical obligations, where these conflict with the law firm's own home country ethical obligations.

63. The ethical conflicts which arise most frequently in cross-border practise range from the management of conflicts of interest through to publicity. The underlying rationale for such rules is usually a desire on the part of the regulator to protect the client.

[31] Article 12, EC/98/5

64. In the case of conflict of interest, the objective is to ensure that the client can be reassured that their lawyer is working solely with their interests[32] in mind. However, requirements can vary significantly from jurisdiction to jurisdiction, both in terms of how specific requirements are and more particularly, the circumstances under which law firms are allowed to put information barriers in place which will allow them to work for clients on different transactions in circumstances that might otherwise be considered a conflict of interest. Most international law firms will therefore have to invest heavily in conflict checking procedures not only in order to ensure that they are complying with local rules in any jurisdiction but also to ensure that lawyers with different qualifications are complying with the rules of their home bars regardless of where in the world they are located.

65. As far as publicity is concerned the rules are usually designed to ensure that consumers are not mislead because they mistake a foreign firm for a local firm or assume that lawyers who no longer work in the firm because they have retired (or died!) are still practising. As far as publicity rules are concerned, in most countries, foreign law firms will be affected by local rules to the same extent as local law firms. However, in Denmark, foreign legal consultants face advertising restrictions, that do not apply to local lawyers, including on their use of letterhead or signs on office doors.

66. It may also be the case that by their very nature, local rules are more difficult for international law firms to conform to than their local counterparts. In some jurisdictions, for example, law firms must communicate with clients using stationery that lists all of the partners in the partnership. This is clearly a problem for large international law firms with hundreds, if not thousands, of partners worldwide. The German Bar has, however, through a special dispensation allowed partners to be listed on the reverse side of stationery.

67. In Singapore, foreign law firms engaged in joint ventures with local firms must be careful about their use of emails. According to a guidance note from the Attorney General's Office of 29 March 2001[33], emails that concern matters of purely Singaporean law must contain a sign-off which clearly indicates that the advice was given by the Singaporean constituent partner of a joint law venture.

68. Issues such as these are to some extent a minor inconvenience for international law firms; however they do create a significant managerial burden for large law firms when multiplied across many jurisdictions. Moreover, it is not always clear that such rules are best targeted on their underlying objectives, which usually relate to protection of the consumer or the development and preservation of an independent local legal sector.

vi) Staffing the branch office

69. Once a law firm has obtained a licence to practice, it will then be confronted by the need to staff this office. In countries that are major exporters of legal services, such as England and Wales or New York, a foreign law firm wishing to establish, would need only to fulfil immigration requirements in order to staff a branch office. In England and Wales, the Law Society is only interested in the staffing arrangements of a foreign law firm if there are solicitors in the partnership. If solicitors are merely employed by the foreign firm, then the only regulation that applies is that the associate solicitors must have at least three years of post qualification experience of working under the supervision of a qualified English solicitor.

70. Generally speaking, in countries that are more cautious about trade in legal services, there will be more specific requirements on who the chief representative of any foreign branch may be and on how a

[32] Subject of course to other ethical considerations arising from the responsibilities of lawyers to the courts etc.

[33] Circular from Singapore Attorney General's department, 29 March 2001 ref: 16-LPS20010329

foreign law office may be staffed. For example, it is not uncommon for an importing country to require that the firm's main representative should have a certain number of years of post-qualification experience and for it to be required that they are a partner in the exporting firm.

71. In Singapore, a formal joint venture between a foreign law firm and a Singaporean firm requires the foreign law firm to have not less than five foreign lawyers resident in Singapore, at least two of whom are equity partners in the foreign law firm. In China, the Administrative Regulations require that a different partner must head each representative office of a foreign law firm. Given that the average profit of the top 25 global law firms is more than $1.2 million, in which each equity partner shares, such rules reduce the willingness of law firms to open new branches in developing markets where the returns are likely to be lower in the early years of such an investment.

72. Ironically, the more detailed the regulations governing partner and staffing requirements are, the more they can have the inadvertent effect of reducing rather than increasing opportunities for local lawyers.

73. For example, in Vietnam, the chief representative of a foreign law firm must have practised outside of the jurisdiction for at least five consecutive years. This requirement prevents the promotion of a locally engaged lawyer already working in the firm, which is the preferred option for most foreign law firms.

74. Foreign law firms can also employ trainee Vietnamese lawyers but not qualified lawyers, which reduces the incentive for a foreign firm in training local lawyers because they will not obtain any return on the investment they have made in the training process. In Japan, foreign law firms are discouraged from employing Japanese nationals and putting them through a more widely recognised international legal qualification. This is because foreign qualified lawyers must have three years' prior practice experience in the country in which they are admitted before they can be employed by a foreign law firm.

75. There are also rules which exist in some countries which prevent law firms from staffing their offices with lawyers from their own home countries. In Russia, for example, intra-corporate transferees are limited to one year. Whilst in South Africa intra-corporate transferees must have been employed by the firm seeking to transfer them to South Africa for at least one year. This effectively prevents law firms from hiring laterally within the country or being able to hire lawyers to serve a new client or meet the needs of new project. Local rules may also require any lawyers employed in the branch, whatever their original qualification and whatever work they are undertaking, to requalify as local lawyers (e.g. Hong Kong). This can impose a significant barrier to the staffing and expansion of a branch office if local requalification requirements are onerous. It is also highly questionable whether a foreign lawyer practising foreign law should need to be qualified in local law when he/she is not giving advice on local law.

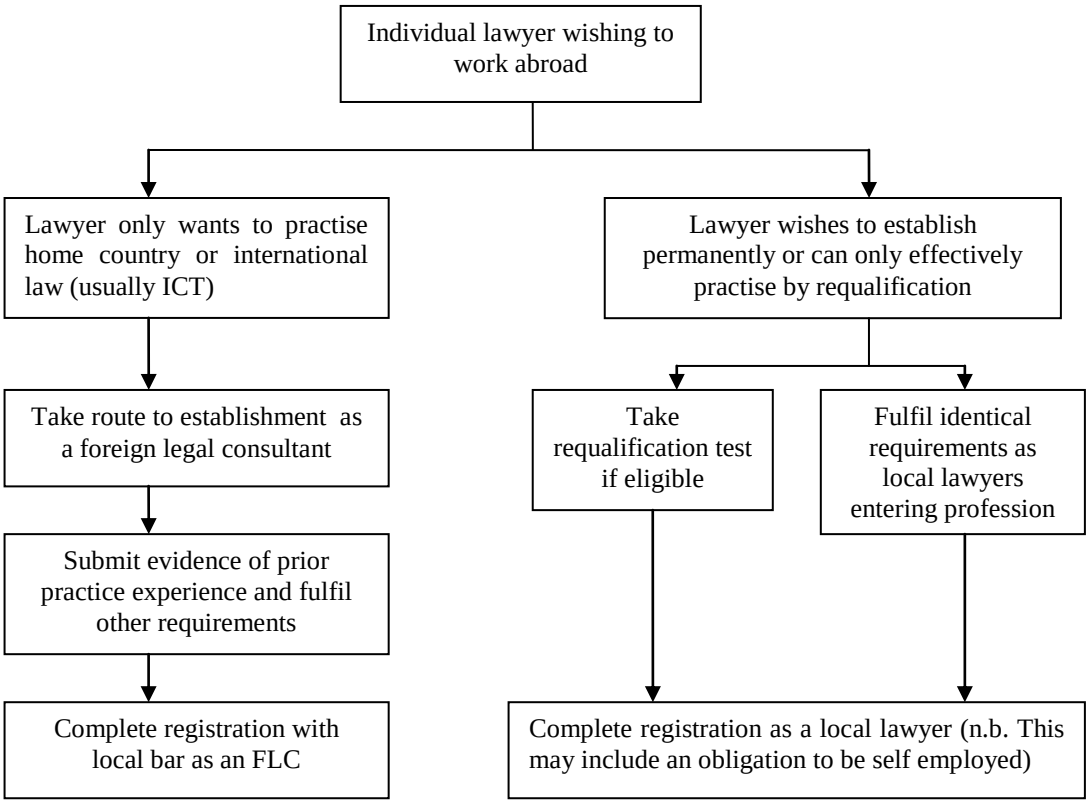
76. Whilst rules on employment are often put in place to protect the employment position of local lawyers they can often have the reverse effect and have a particularly chilling effect on new lawyer employment by foreign firms.

3. Individual Lawyers

77. When an individual lawyer wishes to establish abroad, they usually do so because they are either planning to work temporarily as a foreign lawyer in that jurisdiction, either independently or as an intra-corporate transferee, or because they wish to assimilate fully and requalify as a local lawyer. In some cases (e.g. Hong Kong) there are residency requirements which must be fulfilled before a foreign national can sit the local transfer examination and so registration as a foreign lawyer will be a necessary precursor to requalification. It is also the case that some jurisdictions limit what a foreign lawyer can do and therefore

make requalification the only route to effective practice. Typical regulatory problems encountered therefore relate either to the process and requirements for registration as an FLC or barriers to requalification. The stages involved in these processes are outlined in diagram 3, below.

Diagram 3: Individual Establishment Abroad



i) Foreign Legal Consultants

78. The concept of the foreign legal consultant (FLC), which originated in New York has provided a template that has been adopted in and adapted by many other jurisdictions. This status provides recognition of a foreign lawyer's qualification in order to permit them to practise their home country law or international law, but not the host country law. The American Bar Association adopted a model rule on foreign legal consultants[34] in 1993 which lays down a model that has been taken up by 26 states in the US. This model rule sets out the qualifications for FLC status and the scope of permitted practice as well as disciplinary provisions. Even draft legislation produced by the Ministry of Justice in Korea in December 2006, for the opening of the Korean legal market, draws on the use of this FLC model.

79. One of the major barriers facing a prospective FLC is the post-qualification experience requirement. These requirements can vary dramatically between countries. In Oman, for example, a foreign lawyer requires 10 years practice experience before they can register, even though they will not be practising Omani law. By contrast, registration as a foreign lawyer in Japan requires only 3 years of prior

[34] ABA FLC model rule, 1993

professional experience, however, this must be gained outside Japan. This provision makes it impossible for foreign law firms to take on trainees in Japan and qualify locals as foreign lawyers.

80. In Saudi Arabia and Taiwan, restrictions on prior professional practice are even more restrictive. A foreign lawyer wishing to register in either of these jurisdictions not only requires at least five years' of prior professional practice but this must have been undertaken in their jurisdiction of qualification. This effectively restricts the free movement of lawyers who have obtained a qualification in a country that is different to the jurisdiction in which they have been practising. For example, a lawyer who had qualified in New York but who had obtained most of his or her practise experience in Korea would be prohibited from moving to many other jurisdictions because his or her qualification and the experience obtained were in different legal jurisdictions.

81. Many jurisdictions maintain in their regulations governing foreign lawyers some provisions on reciprocity. In Brazil for example, proof of reciprocity is one six conditions that a foreign lawyer must fulfil in order to register. However, there are some examples of a discretionary approach to reciprocity, most notably in the ABA model rule. In these circumstances, reciprocity in the country of the foreign lawyer's origin is a factor that may be taken into account. This creates uncertainty and possible unevenness in the way in which the reciprocal provisions are implemented.

ii) Requalification requirements

82. No matter how well qualified, foreign lawyers are excluded from at least some aspects of the practice of local law in just about every jurisdiction in the world. The justification given for this exclusion is usually related to client protection. Because laws differ, it is important that a lawyer fully understands the local law before advising or representing clients in a host jurisdiction. There is however, a very wide spectrum of rules governing how and the extent to which foreign lawyers can requalify, not to mention a very variable definition of what is 'local law'.

83. At one end of the spectrum are jurisdictions like England and Wales which defines the areas of law which are reserved to homegrown lawyers very narrowly[35]. It is therefore only necessary for a foreign lawyer to requalify if he or she wishes to practise in one of these areas. On the other hand full requalification as a local lawyer may be necessary in certain jurisdictions which define reserved work very broadly, which is the case in New Zealand[36] at present.

84. There are also many jurisdictions that impose nationality requirements on qualification as a domestic lawyer – ranging from Denmark and France through to Trinidad and Tobago and Thailand. It may be possible for a foreign lawyer in these countries, for example in Denmark and France, to practise as a foreign legal consultant but a foreigner could never requalify and practise domestic law regardless of how much education or practical training he or she had obtained.

85. Some jurisdictions will allow foreign lawyers to requalify but will give no credit for any existing qualifications or experience. In Germany, for example, a foreign lawyer can be admitted to the bar to practise German law, following the full period of five years of study and two years of practical training that

35 Under the law of England and Wales only practising solicitors, registered European lawyers and some other categories of person and their employees may undertake certain specified activities in conveyancing, probate and the drawing of court documents, conduct litigation, exercise rights of audience before the courts or provide immigration advice or immigration services in England and Wales.

36 The entry into force of the Solicitors and Licensed Conveyancers Act, 2006 will increase the range of work that a foreign lawyer can do without requalification.

a German would need to undertake, regardless of how much experience they bring with them from elsewhere.

86. Some other jurisdictions offer transfer routes to foreign lawyers which enable them to integrate fully into the local profession, however it may be unclear why some foreign lawyers are allowed to take this route and others not. In England and Wales, for example, lawyers from common law jurisdictions and the European Union are permitted to integrate fully into the English profession by a transfer examination[37]. In Ireland lawyers who have been admitted to the Bar of England, Wales or Northern Ireland, practiced as an attorney in New York and Pennsylvania (with five years experience required in Pennsylvania), or New Zealand, or have been admitted as lawyers in either an EU or EFTA Member State are entitled to take a transfer examination to be admitted to the Irish Bar[38]. In New York, foreign lawyers are allowed to sit the bar exam provided that they have three years of university level academic legal education and have obtained an LLM from an ABA accredited law school in the United States.

87. There is also a patchwork of mutual recognition arrangements between countries which had colonial relationships and closely related legal systems. For example, Brazil and Portugal recognise each other's legal qualifications and will automatically admit lawyers from the other country on application without a test. The same arrangements exist between Spain and Argentina.

4. In-House Counsel

88. There is an additional category of legal practice not fully captured above. This is the practice of law as carried out within a non-legal company or organisation. There is a distinction between the treatment of in-house company lawyers in civil law and common law jurisdictions, usually arising from the civil law tradition that lawyers should not be employed, as this will compromise the independence of their advice and lead to a conflict between their duty to the client and their duty to the employer. As a result, in many civil law jurisdictions, lawyers working in house in companies will either not be admitted as members of the bar or will have to surrender their licence to practice when entering employment with a company. Common law countries, in contrast, will usually make no such stipulation. But this does not necessarily make it easier for foreign legal practitioners to move within their companies e.g. in some US states the giving of any legal opinions, even to an employer, represents the unauthorised practise of law and is prohibited to anyone who is not locally qualified. More generally, the unwillingness to grant attorney-client privilege to in-house lawyers in many jurisdictions, because they are not fully recognised as lawyers with the same rights and obligations as locally qualified and registered lawyers, creates an obstacle to cross-border practise and an impediment to business more generally.

5. Conclusions

89. Amongst the many issues rehearsed above, the most economically significant domestic regulations are those affecting foreign law firm practice[39]. Anecdotal evidence[40] suggests that for multinational law firms there are two major preoccupations amongst those listed above. The first is the difficulty of creating an efficient corporate vehicle that can easily be integrated into the existing worldwide

37 Qualified Lawyers Transfer Regulations, 1990, Law Society of England and Wales

38 Foreign Trade Barriers Report, 2004, USTR

39 Law Society of England and Wales data for example shows that in 2004, of the 3094 solicitors practising abroad, 83% were inter-corporate transferees, 13% were working in house and 3% were self-employed.

40 See published representations made through various chambers of commerce and trade bodies cited elsewhere in this document and ad hoc representations made to the Law Society of England and Wales international department

legal partnership and the second is the ability to advertise that office as part of the worldwide network, using the name of the worldwide partnership. However, code of conduct issues and barriers to staffing are also regularly cited as hindrances to international practice by international law firms[41]. There is scope for a more comprehensive survey to be undertaken of these various barriers to practice.

III. REGULATORY REGIMES IN ORIGIN COUNTRIES

1. Regulation affecting domestic and foreign lawyers

90. Some importing countries argued during the Doha trade negotiations that they required time for their domestic legal markets to develop, so that home grown law firms would be in a better position to withstand foreign competition and ensure continued access to justice for local clients.

91. However, this infant industry argument has not always been backed up by subsequent action to promote the local legal industry, let alone remove regulatory handicaps on the development of a local legal profession. Nor is it clear that such protection helps a local legal profession to establish a basis on which to compete in the international legal market, given that the latter is driven by the demands and expectations of international clients. In many countries with underdeveloped legal markets, regulatory measures are also sometimes put in place on the basis of a justification that they preserve the standing of the local legal profession and hence contribute in some way to its independence of the legal profession more generally. In many cases, jurisdictions have chosen to impose protection on foreign service providers rather than to tackle the underlying issues which are holding back the development of the local legal sector. In such cases, there is usually little thought given either to the impact of such measures on clients or to their impact on the economy more generally.

92. Research[42] suggests that there is a high correlation between the domestic and external restrictions in the legal market and that domestic regulatory reform is therefore much more likely to bring results in terms of improved competitiveness. Table 4 below, shows the results of some analysis undertaken by the Australian Productivity Commission which illustrates the high level of correlation between restrictions on domestic and foreign legal service providers in many countries. The index used by the Australian Productivity Commission is a frequency measure that estimates the restrictiveness of an economy's trading regime for services based on the number and significance of restrictions. The value of the index is between 0 and 1, with 1 being more restrictive. The external index measures the restrictions that hinder foreign firms from entering and operating in the local legal economy. The domestic index covers non-discriminatory barriers that affect legal service providers regardless of whether they are domestic or foreign. The difference between the two indices gives a measure of the degree of protectionism in the legal economy.

93. These indices throw up some interesting results which might be challenged by those operating in the market. For example, many domestic Indian law firms would challenge the contention that their domestic market is one of the least restrictive in the world, given the antiquity of many of the rules

41 The 2004 recommendations of the IBA Section of Business Law Taskforce on International Multijurisdictional practice contain further illustrations of barriers to practice as identified by international law firms.

42 Productivity Commission of Australia see website www.pc.gov.au

governing legal practice. The overall rankings within this table in terms of the overall 'index of protectionism' do, however, conform to the anecdotal evidence available. It should also be stressed, however, that this table is based on data from 2002 and a number of countries have undertaken legal sector reforms since then.

Table 4. The Linkage between external and domestic restrictiveness

Jurisdiction	Index of Restrictions on Domestic Service Providers	Index of Restrictions on Foreign Service Providers	Index of Protectionism
Belgium	0.21	0.31	0.10
Finland	0.03	0.14	0.11
United Kingdom	0.18	0.31	0.13
Spain	0.31	0.45	0.14
Australia	0.27	0.42	0.15
Netherlands	0.10	0.25	0.15
Switzerland	0.12	0.27	0.15
Sweden	0.12	0.27	0.15
Hong Kong	0.08	0.27	0.19
Japan	0.33	0.52	0.19
Portugal	0.21	0.41	0.20
Germany	0.29	0.49	0.20
Canada	0.31	0.52	0.21
Austria	0.33	0.57	0.24
Mexico	0.22	0.49	0.27
Denmark	0.15	0.43	0.28
India	0.09	0.40	0.31
Korea	0.11	0.44	0.33
New Zealand	0.13	0.47	0.34
France	0.22	0.58	0.36
Italy	0.18	0.54	0.36
Indonesia	0.17	0.57	0.40
Malaysia	0.13	0.54	0.41
Philippines	0.10	0.54	0.44

Source: Australian Productivity Commission

94. One of the striking things about the above table is that with the exception of Finland, even the most open legal regimes still maintain a significant level of domestic regulation.

95. The following section elaborates on the typical form that domestic regulation takes in the legal sector and in particular highlights those regulations that might affect the business development of the domestic legal sector.

2. Restrictions imposed on the domestic market for legal services

96. There are a number of common economy wide and legal sector specific regulatory issues that can affect the competitiveness and development of a local legal sector because of the way they affect that sector in particular. These restrictions in turn create unwillingness in the local legal sector to open up to foreign competition on infant industry grounds.

i) Economy wide issues affecting legal services

(a) Company law: Perhaps the most common and significant problem facing international law firms wishing to establish elsewhere is fact that the idea of law 'firm' may be much less developed in the destination economy. It is a vehicle for delivering legal services that has developed to a much greater extent in the common law environment, where the historical divide between advisory lawyers (solicitors) and representational/court advocates (barristers) certainly helped to contribute to the rise of the law firm, even if this distinction is disappearing over time. The reconciliation of the independence of the lawyer and the legal advice he or she provides with their role as an employee in a law firm, or a corporation, is something that many jurisdictions do not find easy. This leads to the lack of suitable corporate vehicles in which lawyers can practice. However, even where the concept of the legal partnership exists, there may be restrictions imposed through wider company law which effectively restrict the growth of domestic law firms. Limits on the size of legal partnerships for example, exist in India and many jurisdictions have yet to adopt limited liability vehicles which are increasingly popular amongst law firms. The limitations on corporate practice that exist in domestic company law may be further exacerbated by professional code of conduct restrictions placed on who can own, or be a partner, in a law firm.

(b) Taxation: Tax laws may also discourage the growth of law firms because of the way in which partnerships are treated by tax laws. In India for example, capital gains tax is imposed on a partnership converting to a limited liability status corporation or partnership. This discourages firms from undertaking this move and acts as a limiting factor on their growth.

ii) Legal sector specific regulatory issues

97. In addition to economy wide regulations which impact on the competitiveness of the domestic legal industry, there are also specific legal sector issues that can arise. These will tend to be the responsibility of the legal sector regulator, often the local bar association.

(a) Advertising: Some jurisdictions impose tight restrictions on advertising by all law firms, even to the extent of banning them from paying for listings in international directories or creating websites. This sort of restriction hampers local law firms in their efforts to generate export led growth.

(b) Name restrictions: A very common restriction in many jurisdictions is the name by which a legal practice may be called. It is not uncommon in heavily regulated jurisdictions for rules to insist that the legal practice must be called after a living partner of the law firm. These rules can obviously cause problems for local law firms wishing to build an international reputation on a continuous basis.

(c) Fee restrictions: Some jurisdictions maintain tight control over the charges that can be levied for legal services or fee scales. In Japan, for example, until 2005 the basis on which legal fees were to be calculated was laid down in great detail. Some European countries such as Germany have also maintained fee scales for broad types of legal work. These limitations can have a stifling effect on competition in the domestic market.

(d) Sectoral taxation issues: There are occasionally indirect taxation issues which are specific to the legal sector and which can disadvantage the local legal community in relation to their foreign counterparts. For example, there are some countries which either exclude legal services from VAT on access to justice grounds, like France, or which have complex opt-in-opt-out models, such as Belgium. Whilst these systems allow lawyers to provide cheaper legal services to end consumers, they may also discourage the growth of a wholesale legal market.

98. This brief survey of domestic regulatory issues illustrates that governments and regulators can inadvertently stifle the development of an internationally capable legal sector through measures designed to protect the position of the local profession. In many cases, the limitations may be self imposed by the self-governed Bar itself, which may fear that any change will weaken its independence from government or ability to be a self-governing profession.

(e) Ownership and fee sharing issues: Most jurisdictions impose some kind of restrictions on who a lawyer can enter into partnership with and share fees as well as who can own a law firm. Rules which vary from jurisdiction to jurisdiction can require a law firm to set up different entities in different countries in order to comply with different rules on who can be part of the partnership. This imposes costs on the firms, which are usually passed on to clients. Although ownership of law firms by non-lawyers has occasionally found its way onto the agenda it has not yet been an issue of significant concern. This may change in 2008 once legislation enters into force in the UK[43] to allow non-lawyers to own law firms. If this does become possible there may be attempts in other jurisdictions to prevent such entities operating in the legal sector or employing non-English solicitors or taking them as partners.

3. Education and Training Issues

99. Another major factor in the competitiveness of domestic legal markets is the standard of legal education. Where there are failings in the legal education market, these will often be critical in shaping attitudes to international legal practice and make it more likely that foreign lawyers will be seen as a threat. Even more significantly, there is empirical evidence to suggest that it is only following reform of the legal education market that it has been possible for some jurisdictions to begin to hold a debate on opening up to foreign competition. In some cases, such as India, this has been because reforms to legal education have raised standards and made it more likely that local lawyers could compete with their foreign counterparts. In others, such as Japan and Korea, opening up has come alongside an expansion in the number of domestic lawyers and the timing of these measures has meant that more employment opportunities may be required to absorb increased numbers of qualified lawyers coming onto the market and these may only be provided in the first instance by foreign law firms. It is striking that there is often a generational difference in attitudes towards foreign law firms in markets that are looking to open up.

100. The most common regulatory weaknesses in legal education have traditionally been restrictions on the number of lawyers entering the market and a lack of sufficient skills and practice oriented training.

a) Quotas on market entry: There are a number of countries that have traditionally maintained very tight limits on the number of qualified lawyers. This has been possible because of quotas on entry to the market imposed through bar exam qualification rates. The two classic examples of this phenomenon have been Japan and Korea, who have both had very low pass rates of 1-2% of those taking the test. In both cases, over the last decade, efforts have been made to expand the number of qualified lawyers by increasing the pass rates for the bar examination and both are undergoing major reviews of their legal education systems. The tight control on the number of lawyers at home made it

[43] The Legal Services Bill of England and Wales, 2006

easier for barriers to foreign lawyers to be maintained in Japan and Korea, because domestic lawyers were making high rents in an oligopolistic market. In both cases, the relatively rapid expansion in the number of qualified lawyers[44] has reduced the homogeneity of views within the domestic profession and brought about support from within the local legal profession for a broadening of opportunities.

b) Lack of training: Many countries that restrict foreign legal practice have limited postgraduate vocational or practical training regimes. This can often lead to large numbers of inadequately trained lawyers competing for low end work, and can create a dual legal economy in which few local lawyers are able to get involved in more specialised cross border legal work. This can, in turn, set up a resentment of and resistance to foreign law firms, since there is a mistaken belief that their greater competitiveness would also make inroads into the domestic legal market. In India, the establishment of some law schools with longer degree courses has produced a new confidence in the Indian legal sector and is helping to reactivate the dormant debate about foreign access to India's legal market.

4. Conclusions

101. Domestic regulation can reinforce resistance to foreign legal practice by entrenching a lack of competition and distorting the decisions that law firms make about their strategic development. In particular, the regulation of the legal education sector would appear to have been a particularly important factor in determining negative attitudes to international legal practice and by extension, in transforming the views of the local legal practitioners as changes are made to the legal education system and rules governing admission to the local profession.

IV. MEETING THE OBJECTIVES OF REGULATION THROUGH LESS TRADE RESTRICTIVE MEANS

1. The objectives of legal services regulation

102. The way in which the legal services market is regulated varies from one country to another; however, there are a number of commonly accepted principles of legal services regulation which distinguish regulated from unregulated economies. Regulated legal services markets will to some degree or another adhere to the broad principles laid down in the UN guidelines on the independence of the Judiciary and Lawyers[45]. In particular, there is likely to be a statutory framework which establishes the legal profession and gives it some degree of self-governance, or at least independence from government. This requirement for lawyers to be independent of government stems from the role that lawyers play in the justice system and, in practice, it can mean anything from a mixture of Court-Bar regulation, through to exclusive Bar self-governance. By contrast, unregulated jurisdictions will often have few, if any, rules about the practice of legal advisory services and leave it to the courts to determine the basis on which practitioners can appear before it.

[44] In Korea, the number of lawyers has risen from 3,000 in 1996 to more than 10,000 in 2006, source: Ministry of Justice of Korea.

[45] United Nations Basic Principles on the Role of Lawyers (1990)

103. In recent years some governments have begun to ask questions about the role of the self governance of the legal profession and the extent to which this has led to regulation that discourages innovation and undermines the growth and competitiveness of the local legal sector. This has lead to a debate in a number of countries about regulatory reform and the public policy objectives of the regulation of the legal sector.

104. In some economies which have been relatively closed to legal services trade, or which remain closed, the debate on regulatory reform has become intertwined with the debate on liberalisation. In Japan and Korea, for example, moves to open or increase the degree of openness of the legal sector in both countries have coincided with reforms of the domestic legal sector and in particular moves to increase access to the profession and expand the number of domestic legal practitioners. In India the debate about possible liberalisation of the totally closed legal sector, has become directly linked to the issue of domestic reform. The position of many representative groups within the Indian legal profession is that domestic reform, which would create a stronger domestic base from which they could compete, is an essential precursor to any international liberalisation.

105. In a number of federal countries which are open to foreign trade in legal services but which are looking to develop their own export trade in legal services, notably Canada and Australia, there has been a move in recent years towards the removal of restrictions on legal practice across sub-federal boundaries. The removal of these restrictions is designed to create a larger domestic base from which national law firms can expand internationally. Typically the main issues of regulatory concern when opening up practice in federal states have been the differences in education and qualification requirements in different states or provinces and exchange of information about disciplinary arrangements. These concerns exist because regulators will always be wary of the 'weak link' which provides an easier route to qualification that can then be passported to other parts of the Federal structure. Regulators will also be concerned that those committing disciplinary offences elsewhere in the Federation could move to another state or province if they are struck off at home.

106. In the European Union, where barriers on free movement of European lawyers have been progressively removed since the late 1970s[46], the debate has shifted since 2003 from this sort of federal practice concern to focus more on the promotion of competition in the sector. In particular, the European Commission has exhorted national competition authorities to assess the level of regulation of the legal sector in their respective economies and to remove regulation that is not necessary to achieve public policy goals or to consider whether these objectives could be achieved in a less burdensome manner[47]. Particular attention has been devoted to limits imposed on publicity and advertising by law firms, which are severely restricted in some EU member states; and pricing, where the European Commission has encouraged national authorities to act against fee scales for legal services. Regulations in both of these areas are considered to have a potentially damaging effect on competition in the sector without having a strong public interest justification.

107. There have also been a number of recent judgments handed down by the European Court of Justice which have touched upon the regulation of legal services in the European Union. These have related in particular to admission to the profession, whether by first admission or by transfer from another member state. The Morgenbesser[48] case has perhaps the potential to have the most far reaching effects. As a result of this case, the European Court of Justice declared in 2004 that it was discriminatory for a the legal regulatory authority in any European jurisdiction not to take into account periods of training or

46 Through the Lawyers' Services Directive 77/249/EEC and the Establishment of Lawyers Directive 98/5/EC

47 Communication on competition in professional services 2004, COM(2004) 83

48 European Court of Justice Case C-313/01, November 2003

experience obtained by a part qualified EU lawyer wishing to requalify in another member state. Previously, under the European Directive on Mutual Recognition of Professional Qualifications[49], only formal qualifications needed to be taken into account. Since this judgment a number of EU nationals have been able to requalify in other European Union jurisdictions without repeating or duplicating steps of the qualification process they have already taken elsewhere.

108. In some European Union countries, notably the United Kingdom, Denmark, Poland and the Netherlands, the debate on the regulation of the legal services sector has been even more profound. The origins of this debate can perhaps be traced back to the United Kingdom, where a debate initiated by the Office of Fair Trading in 2001[50] culminated in 2004 with a Government initiated review of legal services regulation known as 'the Clementi review'[51]. The Clementi review fundamentally re-examined the basis of regulation of the legal sector and in particular the premise of 'self-regulation' on which it is founded in most countries. Clementi concluded that significant changes were necessary in the way in which legal services were regulated in the United Kingdom in order to make the regulation of the sector more transparent.

109. In all of these debates, it is possible to discern a number of core public policy objectives that are most frequently referred to either in legislation. These have most recently been succinctly stated in the explanatory note to the New Zealand Lawyers and Conveyancers Act 2006[52], in the following form:

> *"The aim of regulating professions is broadly to protect the public from the risks of a profession carrying out its work negligently or incompetently. Regulation of a profession is justified if consumers will have difficulty in choosing or evaluating the quality of services, there is a likelihood of significant harm to consumers or third parties as a result, and non-regulatory approaches are unlikely to provide adequate protection.*
>
> *There is a significant risk of harm from the provision of some legal services because:*
>
> – *the nature of these services makes it difficult for many consumers to assess the competence of practitioners and quality of services provided*
> – *incompetence or negligence may result in significant loss (including loss of freedom) to consumers and third parties*
> – *incompetent practice can impact on citizens' access to justice and on court outcomes*
> – *lawyers constitute the pool from which judges are selected.*
>
> *Both the Government and the public, therefore, have an interest in the effective operation of the legal system and maintenance of the rule of law."*

110. These objectives were described in a more summary fashion by the European Commission in a report on competition in the liberal professions published in 2004[53] as:

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49 89/48/EC, Mutual Recognition of Qualifications Directive

50 Competition in the Professions, Office of Fair Trading, 2001

51 'Review of the Regulatory Framework for Legal Services in England and Wales', Department of Constitutional Affairs, UK, 15 December 2004

52 Lawyers and Conveyancers Act, 2006, New Zealand

53 Report on Competition in Professional Services, Communication from the European Commission, 9 February 2004 COM 2004(83)

- Asymmetry of information between customers and service providers.

- Externalities: the provision of a service may have an impact on third parties as well as the purchaser of the service.

- Public goods: legal services produce public goods that are of value for society in general such as the correct administration of justice.

111. The reduction of legal sector regulation to these three objectives has not been popular with lawyers and Bar Associations. There has been a philosophical divide in some countries where governments, and more specifically their competition authorities, have increasingly focused on the functioning of legal services markets, which has been a difficult debate for the front line regulators to enter as the legal profession itself is built on the regulation of individuals. This is a key distinction because the regulation required of an individual to undertake representational activity (i.e. the representation of a client in court and the guarantee of the rights of the individual to due process etc) may be very different to the regulation required of an individual who is undertaking advisory or transactional work. There is also great resistance in many quarters of the legal profession towards treatment of the profession as an economic entity because of the perception that this cuts across the public policy role of the lawyer as an agent of the justice system.

2. Can these be achieved in a less restrictive way?

112. The most striking thing about the list of regulatory objectives is that many of the regulatory measures imposed on legal professions around the world go way beyond what is required to meet these objectives. Furthermore, because there is no accepted definition of 'consumer' legal services, regulation is applied in a blanket way to all legal services – even those supplied by foreign firms to their sophisticated international clients.

113. The debate on legal services that has been taking place in the European Union and to a lesser extent in EFTA[54] has led to some interesting developments, and the legal profession itself has begun to look at ways of promoting good regulatory practice. The Council of European Bars and Law Societies (CCBE), for example, has adopted a charter of common principles which expresses ten core issues that should be addressed in codes of conduct. The underlying idea is that this charter will provide a useful template for emerging markets looking to create a code of conduct from scratch and help them to avoid over regulating and thus running into difficulties with competition authorities. However, this set of principles does not deal with the issues that arise from the regulation of foreign lawyers.

114. There are perhaps five approaches that could be used to facilitate regulation of cross-border legal services. These are not all mutually exclusive and are listed here in an escalating degree of ambition.

a) Transparency

The transparency debate is the bottom line of the discussion taking place in Geneva on domestic regulation. Whilst transparency issues do arise from time to time and better information for foreign service providers would definitely assist in promoting cross-border trade in legal services, this is very much a lowest common denominator. As the discussion of issues that come up in legal services trade illustrates in sections II and III of this paper, transparency alone cannot help to resolve most of them.

54 Report from the EFTA Competition Surveillance Authority on competition in the professions

b) The Role of the GATS Disciplines

The transparency debate is taking place in Geneva within the wider discussions in the WTO Working Party on Domestic Regulation. These negotiations are designed to develop horizontal disciplines to ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services. The work done so far on these disciplines, and in particular the note by the Chairman of the Working Party[55] is useful in that it sets out some basic guidance on acceptable procedures to be used in licensing and assessment of foreign qualifications, which conform to international regulatory best practice.

c) Mutual Recognition agreements

Mutual recognition agreements could play a much larger part in promoting better regulation in the legal sector and in particular in facilitating trade than they have done hitherto. Although many countries have agreements on the recognition of qualifications with other individual countries, these are applied in a very patchy and discriminatory manner at present. There is certainly scope for much more comprehensive, possibly multilateral agreements. Indeed, the EU Establishment Directive is at heart a mutual recognition agreement, which allows EU lawyers to practise in each other's countries on the basis of their initial qualification, despite the significant differences in legal systems and law between the 25 EU member states. Although prior to its introduction, there were prophets of doom who foresaw disaster for the higher cost, better qualified lawyers as freer movement was expected to trigger a 'race for the bottom'. In fact, the reverse has been true. Even if it was considered by some jurisdictions to be a step too far to permit assimilation into the local profession on the basis of mutual recognition, access to and provision of an assimilating bar exam for foreign lawyers could be useful.

There is scope for other types of MRA other than those covering education and training. For example, the CCBE is currently discussing a possible MRA with the American Bar Association on disciplinary matters. This could lead to a blanket agreement between the EU and US by which each side agrees that its constituent parts will exchange information on disciplinary cases or supply regulatory information on individuals when required.

c) Model rules

A more ambitious approach would be to seek agreement on common, multilateral foreign legal consultant and model 'foreign law firm' rules. Countries could be encouraged to adopt these as the basis of their regulation. In particular, it would be useful to newly liberalising countries to have access to more guidance on the regulation of law firms. Such model rules would be a useful way of weeding out unnecessary bar rules and regulations.

d) Differential regulation

There are supporters, particularly amongst the larger law firms, for some decoupling from the regulation of their type of practice from the regulation imposed on the consumer end of the market. This decoupling need not necessarily involve the removal of the foreign or larger law firm from the purview of the regulating bar association, but it could mean different treatment. Silver[56], for example, suggests that there is a rationale for regulating foreign firms rather than the

55 Note by the Chairman of the Working Party on Domestic Regulation, 12 July 2006 JOB(06)/225

56 Ibid

individual lawyers in certain instances because what the individual lawyer in a foreign firm is doing is often quite divorced from the local legal market. There are others who have argued that the time has come in the legal profession for an international legal 'passport' which would essentially lead to a regulatory division between the domestic market, where there are clearly established public policy objectives focused on consumers and access to justice, and the international market, where regulation is justified on public good grounds, relating to, for example, corporate governance. If a clearer distinction can be made between these different markets then maybe it is worth exploring a model in which the practice of local law continues to be regulated as at present when it touches on consumers or the administration of justice, whilst the practice of commercial or corporate law is subject to different considerations. On this basis a lawyer could obtain a worldwide licence to practise certain types of law by holding a commonly accepted FLC qualification, in addition to his or her original legal qualification. Clearly there would be many hurdles to overcome before such a concept could become possible, not least the objections of many US State Supreme Courts, which maintain highly restrictive rules on 'the unauthorised practice of law'. To some extent, however, this debate has already begun over the issue of conflicts of interest and the rules which apply to large firms with multiple clients.

e) Harmonisation of Ethical Codes

Conflicting requirements in ethical codes, or 'double deontology' as it is sometimes known can create difficulties for foreign legal service providers and there are periodic attempts in parts of the legal profession to examine whether it is possible to promote some convergence between these codes. The main difficulty that arises almost instantly in any such debate, is the question of sovereignty and the important domestic role of the legal profession. As the recent work on core principles of the legal profession undertaken by the Council of Bars and Law Societies of the European Union has shown[57], most codes of conduct contain the same basic provisions although they can also differ in important points of detail in order to respond to societal differences (e.g. possibilities for allowing conflicts reflecting shortage of legal practitioners). The main difficulty with attempting to promote such an approach in order to resolve barrier to legal services trade is that codes of conduct have important domestic functions to perform and perhaps more significantly, are usually produced by independent bar associations or similar bodies who will not willingly give up their right to make such rules.

115. Table 5, below shows how each of these six different approaches measure up in addressing the obstacles to cross border practice identified in section 2 of this paper.

[57] Charter of core principles of the European Legal Profession, CCBE 2006

Table 5. Which tools solve which regulatory obstacles to foreign legal practice?

	Trans-parency	Full GATS disciplines	Mutual Recognition Agreements	Model Rules	Differential regulation	Common ethical codes
Issues for Firms						
Transparency in licensing	Yes	Yes	Yes	Yes	Potentially	No
Processing of licences	No	Yes	Yes	Yes	Potentially	No
Issuing of multiple licences	No	Yes	Yes	Yes	Potentially	No
Availability of corporate vehicle	No	Potentially	Yes	Yes	Yes	No
Use of worldwide partnership name	No	Potentially	Yes	Yes	Yes	Yes
Double deontology	No	No – but it could clarify relationship between rules	No – but it could clarify relationship between rules	No – but it could clarify relationship between rules	Yes – by making international practice subject to different rules	Yes
Staffing issues	No	Potentially	Yes	Yes	Yes	Partial
Issues for individuals						
FLC requirements	Made clearer	Made clearer	Yes	Yes	Yes	No
Requalification requirements	Made clearer	Made clearer	Yes	Yes	No	No
Political Acceptability						
Legal professions	Mixed	Mixed	High	High	Low	Low

116. This table suggests that mutual recognition agreements and model rules would most likely go furthest towards removing domestic regulatory barriers to international practice and would be most likely to be acceptable to the legal profession. There are nonetheless ways in which governments can promote the idea of such measures and encourage the legal profession in different countries to follow such a route, perhaps by making provision for such agreements or rules in broader trade agreements.

3. Political economy of regulatory standards

a) The main groups involved – beneficiaries and losers

117. Regulatory reform in the legal sector often throws up many common themes and obstacles. There are perhaps three main reasons for this.

118. Firstly, because of the international UN principle of the independence of the legal sector from government[58] and globally accepted standards of democracy and the rule of law, it is often harder for governments to reform the regulation of lawyers than other sectors over which they can exert a greater level of direct control.

58 United Nations Basic Principles on the Role of Lawyers (1990)

119. Secondly, not only is there often considerable conservatism in the sector itself but there is sometimes also support from the general public for this conservatism, given the role that the legal sector may have played historically in the country, either in the transition to democracy, as in Brazil, or on the transition to independence, as in India.

120. Thirdly, the scope of the domestic practice of law in a host country may be relatively limited and focused around litigation. Under these circumstances, the local legal sector will often feel resistant to reforms that encourage successful non-litigation practice – such as the creation of partnership and suitable corporate vehicles, or the removal of fee scales. This will partly be driven by lack of familiarity and partly by fear about what will happen to the traditional litigation sector.

121. There are many different parties involved in the debate about regulatory standards of the legal profession:

- **Governments** will only become involved in the legal regulatory reform debate at the highest level when it becomes a matter of great controversy. This has happened occasionally, for example, in India in the mid 1990s when lawyers conducted a national strike to resist reform. It is however very unusual for the legal sector to attract much high level government attention. A common problem faced by those promoting legal regulatory reform is the availability of parliamentary time for regulatory reforms. The draft New Zealand Lawyers and Conveyancers Act 2006, for example, spent four years in draft form awaiting introduction into Parliament. Even where parliamentary time is found, legal regulatory reform is not an issue that is considered to be of great general importance. In the presentation of the UK Labour government's 2006/7 legislative programme[59] to the Parliament of the United Kingdom, no mention was made of the Legal Services Bill, which proposes a major overhaul of the regulation of legal services in England and Wales and which will be introduced during the 2006/7 session.

- **Departmental Ministries** often hold widely diverging opinions about legal regulatory reform. Traditionally, for example, Ministries of Justice are often sympathetic to the more conservative views held within the legal sector because such Ministries are usually led by lawyers and put particular emphasis on the role that regulation has traditionally played in maintaining an independent profession which is held to be an essential requirement for due process and access to justice. On the other hand, Ministries of Trade, Economics or Finance will often be supporters of reform, either explicitly or implicitly, because of the role that the legal sector plays in facilitating foreign direct investment and in the development of the financial services sector more generally.

- **Competition authorities** are increasingly playing a significant role in challenging traditional approaches to professional regulation, particularly in Australia and the European Union, but these efforts are controversial and, as yet, have failed to win widespread acceptance within the legal profession. There is great unevenness in the approach of competition authorities, even in OECD countries, with some challenging every established principle of legal market regulation, whilst others, such as the US have yet even to consider the application of competition policy in the legal profession.

- **Bars and Law Societies** play a pivotal role in regulatory reform of the legal sector, as they will, in many cases, be required to implement regulation affecting the legal profession in areas such as entry to the profession, the application of ethical codes and the maintenance of disciplinary standards. Bars are often dominated by the more conservative end of the profession, which is not

[59] Queen's speech, UK Parliamentary Session 2006-7

surprising since they are mostly elected representational bodies that tend to attract members of the profession to stand for office on a platform of resistance to government interference or regulatory change. This potential conflict of interest between the role of a bar in representing the interests of its members and in representing the wider interests of society has encouraged governments in some OECD countries either to remove regulatory powers from Bar Councils and Law Societies or to require them to separate out regulatory and representational interests[60].

- **The wider legal profession** has an interesting role to play in the debate about regulatory reform. In most countries there will be a wide diversity of views held by practitioners. Major incumbents who have benefited from tightly restricted entry to the profession are likely to be particularly resistant to regulatory reform. A law firm oligopoly is characteristic of closed and unreformed legal markets and the beneficiaries of this market structure will be unwilling to encourage change that might undermine their position. On the other hand, younger practitioners will often support regulatory reform if it promotes greater opportunities for them by encouraging the creation of new and larger vehicles for legal practice and the broader modernisation of the profession.

- In many countries **the courts** have a significant role to play in the regulation of legal services. The judiciary may instinctively be conservative about regulatory reform because its perspective is shaped by litigation, which changes less rapidly and is less directly connected to client's business needs than the transactional end of legal practice.

- The countries which have tended to have the most active debates about domestic legal services regulation are those in which there is a well developed **consumer** lobby, such as the UK and Australia. Regulatory measures in the legal sector are often justified on the ground of consumer protection, but the consumer protection rationale for certain measures, such as a prohibition on advertising by lawyers, is hard to substantiate. In countries that have active consumer lobbies, legal sector regulation tends to be more closely scrutinised for its proportionality and efficacy in protecting consumers.

- The **corporate sector**, particularly at the larger end of the domestic market is potentially a major beneficiary of legal sector reform. It has been estimated for example by the Italian Antitrust Authority that professional services, including legal services account for 6% of the costs of exporting firms. It is therefore in the interests of companies aiming to maximise their competitiveness that they have access to the legal services that they require. Where they are prepared to speak out companies, trade associations and chambers of commerce can play an important role in promoting reform[61].

b) How can reform be accomplished?

122. Although the Doha Development Round negotiations spent much of 2006 in stalemate, the debate about legal services reform has remained on the agenda in many countries, even without external pressure. In some cases, such as Korea and India, this is because governments have used a combination of the Doha Round and a wider economic reform agenda to initiate a debate on the reform of legal services. In other countries, such as Japan and New Zealand, domestic reforms were already well advanced.

60 Australia – NSW, Victoria and England and Wales

61 See for example, the regular submissions from the EU Chamber of Commerce in Korea on legal services, see bibliography for more details.

123. The underlying impetus for reform in all of these cases has been globalisation, which continues to create pressure on governments to modernise their legal sectors, either because domestic companies want more competitive or specialist legal advice, or because multinationals and investment banks want their chosen advisors to accompany them into new markets. Although they are often invoked, particularly in the domestic legal services reform debate, consumer interests are to some extent peripheral in the cross-border debate.

124. Against this backdrop there are a number of lessons that can be drawn from the experience of legal services liberalisation across a range of countries in recent decades.

125. Firstly, any discussion of liberalisation or regulatory reform will nearly always be accompanied by a demand for information about how reform has worked in other jurisdictions. The sort of information requested often includes: an assessment of the impact of reform on the competitiveness of the local legal profession and on access to justice across the country; information about the various models that can be used for the regulation of foreign law firms; and information about reciprocity. Sometimes, the collection of exhaustive data from elsewhere can be used as a tactic by governments to reduce local objections to reform. As this research has now been undertaken by more than one jurisdiction and there is more evidence on the impact of reform, there is scope for the wider publication or sharing of these materials.

126. The Ministry of Justice in Korea, for example, commissioned significant research on different models of liberalisation in 2004, which apparently went into extensive detail about the different approaches adopted in other countries toward legal market opening. However, this research was not widely published and is only available in Korean.

127. Secondly, experience suggests that the staging of reforms is important. In particular, regulation governing cross border legal practice or foreign legal establishment may only be possible once domestic reforms have taken place. In Japan, for example, regulation to permit foreign lawyers and Japanese Bengoshi to enter into partnership and employment relations was only politically feasible as the last item in a series of domestic reforms of the legal profession, including a major reform of the qualification system and an expansion in the number of lawyers qualifying each year. In Russia, transparency in the corporate vehicles that could be used by foreign law firms was only possible following the introduction of regulation of the local legal profession. In India, the government has acknowledged that any opening of the market must be preceded by domestic reforms[62] such as the removal of restrictions on advertising and limits on the size of partnerships. In federal countries, experience also suggests that moves to free up the regulatory regime affecting foreign lawyers is only possible once internal free movement issues have been resolved. This is certainly the case in the United States where ABA model rules on transnational practice followed on naturally from model rules on multi-jurisdictional practice within the United States.

128. Thirdly, governments should be encouraged to address the non-sector specific service regulation issues such as company law and taxation issues first, as these are likely to have the widest benefits for the economy and represent the most significant barriers to cross-border legal practice. There is much that could be done to promote a debate on best practice regulation in this area.

129. Fourthly, governments need to acknowledge when entering the debate on legal services that there are important public policy considerations relating to access to justice and the rule of law which need to be recognised upfront. Failure to do so can lead to the alienation of key interest groups from the reform process.

62 Manmohan Singh speech to Servin Expo conference 2006, New Delhi, 5 October 2006

130. Lastly, the legal profession should be encouraged to continue with and expand recent initiatives to promote best practice regulation itself, particularly in areas such as standards of entry and mutual recognition of qualifications, ethical codes and disciplinary procedures. It is important for the preservation of the independence of the legal sector that these are led by the profession itself. Nonetheless some form of external benchmarking or scrutiny of such initiatives against internationally accepted regulatory principles may be valuable.

V. CONCLUSIONS

131. There are a number of conclusions that can be drawn from this discussion for the different actors involved in the regulation of the legal services sector.

132. For governments, the following points could be made:

- There are some general reform measures which could assist the competitiveness of the legal sector but only if such reform measures apply to law firms as well as to other types of entities (e.g – allowing LLPs).

- Faster and more effective regulatory reform will be undertaken by working with the legal sector rather than imposing reform upon it, given the importance of its role in the administration of justice and the need for some degree of independence in the regulation of legal services.

- Governments can nonetheless play an important role in working with the legal sector to promote an exchange of best practice and experience of reform.

133. For the legal sector, there are a number of additional conclusions:

- Resistance to foreign competition can often grow out of an uncompetitive domestic regime. Domestic reform is often necessary to make market access for foreign lawyers acceptable to the domestic profession.

- A reluctance to engage with the domestic reform agenda can lead to a loss of control over the pace and extent of reform by the legal profession, with potentially wider consequences for the public policy role of the profession in preserving access to justice and ensuring due process.

- There is much that the legal profession can do to help governments achieve the public policy objectives of domestic regulation without imposing or preserving barriers to foreign service providers. This will, however, increasingly involve collaboration across borders and the elaboration of tools that can be used or shared in many different jurisdictions.

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