THE TRANSNATIONAL LIBERALISATION OF LEGAL SERVICES: A CASE STUDY OF INDIA

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DECLARATION

I declare that the dissertation entitled "THE TRANSNATIONAL LIBERALISATION OF LEGAL SERVICES: A CASE STUDY OF INDIA" submitted by me for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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Abbreviations and Symbols

Abbreviation		Full Extension
ABA	:	American Bar Association
ASEAN	:	Association of South East Asian Nations
CAAC	:	Chartered Accountants Action Committee for Level Playing Field
CPC	:	Central Product Classification of United Nations
FLC	:	Foreign Legal Consultant
FTA	:	Free Trade Agreement
GATS	:	General Agreement on Trade in Services
IBA	:	International Bar Association
MDP	:	Multi-Disciplinary Practice
MFN	:	Most Favoured Nation
OECD	:	Organization of Economic Cooperation and Development
PTI	:	Press Trust of India
RBI	:	Reserve Bank of India
RTA	:	Regional Trade Agreement
USPTO	:	United States Patent and Trademark Office
WTO	:	World Trade Organization

CHAPTER I
INTRODUCTION

CHAPTER I

INTRODUCTION

The question of liberalisation of legal services in India has been a vexed issue since long. The conundrum that it presents pertains to the conflict between the two values related to the liberalisation of legal services. The first value emphasises the isolation of legal services from that of the rest of the world, so as to preserve the national character of the law, while the second value prescribes liberalisation of the legal services for a seamless integration of the Indian economy with that of the world economy. The conflict between the two norms led to a state of indecisiveness within the echelons of Indian policy set up and affected the discourse on the topic. Lately, however, the issue of liberalisation of legal services has acquired renewed significance, partly due to the reason of increased pressure on the Indian government to open up legal service sector (PTI 2005) after the conclusion of the Hong Kong ministerial meet[1] of the WTO and partly as a result of new found confidence in the Indian legal community, that is now more open to the idea of liberalisation[2] (PTI 2005). Also a perception is gaining ground that the liberalisation of legal services would lead to increased investment in India. In the light of the above it becomes pertinent to examine the scope and ambit of legal services liberalisation.

[1] At the Hong Kong ministerial meet (DOHA WORK PROGRAMME, Ministerial Declaration, (Adopted on 18th December 2005) Ministerial Conference, sixth session, Hong Kong, 13-18 December 2005. WT/MIN(05)/DEC, 22 December 2005), it was decided that members will adopt the mode of offering plurilateral requests to member states and in pursuance to that seven countries made a collective request on legal services dated February 2006. (Collective Request Legal Services, available at http://commerce.nic.in/trade/Plurilateral%20Requests%20in%20Legal%20Services.pdf, last accessed, 2nd July, 2009)

[2] The Chief Justice of India, Hon'ble Justice K G Balakrishnan said in an interview to the PTI that "They (foreign-based law firms) could only be allowed entry here if they do the same for us. It has to be on the basis of reciprocity". The opinion of the then Union Law Minister H R Bhardwaj was 'Indian lawyers would gain with the opening of legal sector to foreign companies', available at http://economictimes.indiatimes.com/News/News_By_Industry/Services/Foreign_law_firms_may_be_allowed_in_India_on_reciprocal_basis/articleshow/4029382.cms, last accessed on 11th July, 2009

Legal services have been categorised in various documents, such as the UN Central product classification (CPC)[3], the GATS classification[4] and the IBA classification (IBA 2003). These categorisations suffer from the inherent infirmity of reflecting the legal services from the point of view of liberalisation and thus fall short of analysing the scope of 'legal services'. A comparatively broader definition is provided by the 'Appendix A to the report of the study of the Commission on Multidisciplinary Practices' (ABA 1999), which defines legal services as services provided by a lawyer, which would bring him under the purview of rules of professional conduct. It says

> 'Legal services' denote those services which, if provided by a lawyer engaged in the practice of law, would be regarded as part of such practice of law for the application of rules of professional conduct.
>
> 'Practice of law' means the provisions of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of the another:
>
> a. Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instrument intended to affect interest in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents estate, documents relating to business and corporate transaction, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
> b. Preparing or expressing legal opinion;
> c. Appearing or acting as an attorney in any tribunal;
> d. Preparing any claims, demands or pleadings of any kind, or any written documents containing legal arguments or interpretation of law, for filing in any court, administrative agency or other tribunal;
> e. Providing advice or counsel as to how any of the activities described in sub-paragraph (a) through (d) might be done, or whether they were done in accordance with applicable law.
> f. Furnishing an attorney or attorneys, or other person, to render the services, described in subparagraphs (a) through (e), above

From the above definition it is evident that the 'legal services' form an important interface in the relations between two persons, whether the person are natural or legal,

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[3]UN CPC classification Ver. 2 Code 821. The classification is available at the website http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=25&Lg=1&Co=821, last accessed on 2nd July, 2009

[4]Services sectoral Classification List, Note by the Secretariat (MTN.GNS/W/120)

individuals or organisations or the State itself. Such is the importance of 'legal services' and the legal professionals, that the corporatist culture of America is regarded as emerging from the law courts and the workings of the lawyers (Morgan and Quack 2006: 411). Similarly, Arup (2000) says that lawyers and legal services have been at the forefront of creation and strengthening of state institutions and civil societies and they have also been recognised as taking part in the building of communities. In short, it can be said that 'legal services' are indispensable for the formation and conduct of relations in a human society.

Legal services, in the context of globalisation, deal with two distinct and separate species of law – laws of particular jurisdictions (home country, host country and third country law) and international law. Though water-tight compartmentalisation of the two species is neither possible nor desirable, yet these species are distinct enough to merit separate categories. This categorisation of legal services proceeds from the fundamental characteristic of law as representing the cultural sensitivities and aspects of a particular community or nation. While the laws of particular jurisdictions represent the cultural and social aspects of the particular nation, international law is a framework that is applicable to all nations in equal measure and hence devoid of any speciality applicable to a particular State alone. However, though the laws of a nation represent the cultural and social sensitivities of a State, yet the demands of globalisation reflected in the worldwide operations of business firms, banks and transnational corporations, make it imperative upon the States to engage in capacity building in the laws of other States and international law, so as to become a part of the globalised world.

A globalised world is reflected in the increased harmonisation of cultural, social, ethical and commercial norms across the whole world. However from the aspect of legal services, it is the transnational commercial activity pursued by firms, companies, banks and individuals which forms the core of demand for liberalisation of legal services. Vagts (2001) says

> The sector of legal activity that is furthest along the path of globalisation is concentrated in the corporate and commercial side. It was the business firms with worldwide operations that demanded correspondingly extensive support for their services. Thus the clients are commercial and investment banks, multinational

> manufacturing enterprises and the like. The services they call for would be classified in law school usage as falling into such fields as securities regulation and corporation (company) law, bankruptcy and secured transactions, banking and financial institutions law, and along with everything else, tax law. (Vagts 2001: 35)

These transnational commercial and economic transactions between two individuals and persons are ensured and guaranteed by the laws and legal framework of a country. International trade and international commercial transactions is thus dependant upon the laws and regulations of various countries in whose jurisdiction the commercial transaction is being conducted. This fundamental conception of legal framework as underpinning the commercial transactions and providing the certainty and assurance required for commercial, trade and investment decisions necessitates an inquiry into the laws and regulations of the countries and international organisations, through which such commercial transactions are conducted.

Thus the aspect which then becomes the defining feature of the liberalisation of legal services is an inquiry into the laws of the countries and international organisations. This inquiry is provided through the legal professionals either as commercial legal services or advisory services and is provided as an intermediate service to corporate clients. This makes legal services a critical component of international commercial and economic transactions.

The emergence of globalisation and the consequent transnational commercial and economic relations thus posit an increased interaction between the legal frameworks of the different countries which can only be provided by the liberalisation of legal services. However, any move towards liberalisation will have to take into account the sensitivities related to the national character of the law and try to balance the two different objectives of law.

Legal Services Liberalisation in India

In the GATS scheme of classification, legal services have been classified under professional services along with accountancy services and other services. During the WTO negotiations several countries entered commitments regarding legal services sector. India did not enter legal services commitments during the WTO negotiations nor has it taken on commitments in the preferential trade agreements (bilateral and regional trade agreements). The reason for non-committal on the part of India has been the stiff resistance offered by the stakeholders such as the Bar Council of India and others who have been firmly against any liberalisation of the legal services. The reasons that have been provided as an argument against the liberalisation of legal services are related to the perception of legal services being a noble profession and not a business activity. Another argument against the liberalisation of legal services is that it would take away the livelihood from legal professionals in India, who because of the structure of organisation – sole proprietorship or partnership – would be unable to compete with the large law firms from foreign States. A third argument has been that entry of foreign lawyers in the country will change the national character of the law and law then that would emerge out of the law courts would have deviated from the social realities of the country. A fourth argument, which has largely been the biggest bone of contention, has been the lack of reciprocating arrangements with the bar authorities of other countries. The Advocates Act itself provides that professionals from those countries, who allow Indian professionals to practice in their jurisdiction, will be allowed to practice in India. However, there has been a lot less development on the reciprocity arrangements than was desired. Commerce ministry official have this to say on the lack of reciprocity of other countries :

> There are only two options. Either we make our systems equally complicated for foreign lawyers or wait till we get real market access. Though we are keen, we are unable to progress in the liberalisation of legal services due to the reluctance of other WTO members in opening up the sector," senior officials of the commerce department said. The real irony is that some WTO members want full-fledged access to our market while they want to maintain restrictions in their market, they added (Subramaniam and Sinha 2005).

The growth in commercial relations of India with other countries makes it pertinent for India to seriously consider the liberalisation of legal services sector in a manner that commercial relations with foreign countries are encouraged. It has been often stated that the allowing the legal professionals from the country of foreign investor will impart greater confidence to such foreign investor and will make India a more preferred destination for foreign investment. This argument has been advanced by WTO (WTO 1998) and relies upon the fact that institutional actors like transnational corporation who transact transnational business are more comfortable in relying upon the legal service professionals who are already familiar with the corporations business and can be relied upon for high quality service. The trade data from certain countries suggest that trade in legal services is mainly in the field of laws that can be clubbed under 'business laws'. Further, Vagts (2000) has pointed out "It was the business firms with worldwide operations that demanded correspondingly extensive support for their services". This argument also found support with the commerce ministry where it was felt that "Foreign companies investing in India would be comfortable to bring their own battery of lawyers" (Subramaniam and Sinha 2005)

The present situation then calls for a fine balancing between the different objectives of law and legal services. It appears from the above going discussion that the perception is that legal services liberalisation is beneficial for India, it is necessary to consider what route for liberalisation should be adopted such that the twin objectives of liberalisation as well as retention of flexibility for policy decisions is attained. The liberalisation of legal services can be accomplished by any of the three routes – entering multilateral commitments under GATS, entering into treaties with regional groupings or particular states or unilaterally liberalising the laws as related to the entry of foreign legal professionals. This then calls for a detailed and meticulous study of the various options of liberalisation, keeping in view the above objectives that are sought to be attained.

Objectives and Scope of Study

This dissertation is a broad based attempt at investigating the advisability of opening up of legal services. It will inquire into the preferred route for such liberalisation if the answer to the first question is in the affirmative. The advisability of opening up of the legal services sector will be conditioned upon the several factors which will include the safeguarding the national character of the laws; preventing the corporatisation of legal profession in a manner as making the legal professionals out of the reach of common individuals; the volume of trade that is likely to come into the country as a result of liberalisation of legal services, natively under the head of legal services and due to its role as an intermediate service in transaction of commercial relations and on the feasibility of reciprocity that may be available to the Indian legal professionals. The dissertation will investigate the extent to which the States have entered commitments in GATS or have opened up their legal services sector through regional or bilateral trading agreements and would identify the benefits and shortcomings of the two modes of liberalisation. It will also examine the changes that will be required in the laws to allow the liberalisation of legal services. In the light of the above the study will offer suggestions and recommendations for the liberalisation of legal services in India.

Research Questions

The key objective of the study may be formulated as a set of questions which are

a. How the liberalisation of legal services will affect the national character of the laws?
b. What could be the impact of legal services liberalisation on the legal practice in India?
c. How many countries have entered commitments under GATS or have made offers of commitments and which are the areas to which these offers relate to?
d. How much trade is India presently transacting in legal services alone and what is the future prognosis of the volume of trade that might flow into the country?
e. Which are the areas in legal services that the countries have liberalised through the bilateral and regional trading agreements?

f. What are the pitfalls in the three modes of liberalisation of legal services and which one is the most suited mode for liberalisation of legal services? Should unilateral liberalisation be a preferred mode of liberalisation?
g. What are the laws in selected countries that deal with the liberalisation of legal services?
h. Which are the areas where India should allow the foreign legal consultants to practice?
i. What are the laws that deal with the liberalisation of legal practice in India and what amendments would be required in them for allowing foreigners to practice in India?

The dissertation does not endeavour to analyse the normative aspects of liberalisation of legal services in terms of impact of harmonisation of laws which it would have on the social and cultural milieu of the country nor does it attempt to present an empirical analysis of the effect that the liberalisation of legal services have had on the social structure of countries. It merely endeavours to provide the best route for liberalisation such that the country retains its flexibility in modifying the laws according to its needs.

An important caveat has to be added at this juncture, namely, that there is a paucity of statistical data as regards legal services trade. Legal services are treated as a part of professional services and separate data on legal services is not easily available. Secondly, there is a lack of secondary literature dealing with the impact of liberalisation of legal services on an economy. This dissertation has been constructed basing itself largely on primary documents and an analysis has been presented so as to inform the stakeholders as to the pitfalls in the liberalisation of legal services.

Hypothesis

The dissertation is based on the following hypothesis

1. Liberalisation of legal services is in the interests of the country.

2. The best mode of liberalisation of legal services is the autonomous or unilateral liberalisation.
3. Foreign lawyers should be allowed to practice in the country, but under safeguards so that the national element inherent in legal services of a country is not compromised.

Structure of the Dissertation

The dissertation has been divided into seven chapters

Chapter II has been titled as "**Liberalisation of Legal Services**". This chapter discusses the unique position of the legal services in an economy and tries to illuminate as to the pitfalls in the opening up of the legal services sector in the country. This has been achieved by comparing the trade-data in legal services and efforts have also been made to provide rationale for the type of restrictions that are required to be imposed while opening up the legal services sector for the foreigners. It also takes a look at the restrictive index and the experience of the accountancy sector to develop an idea about the challenges present in the liberalisation of the legal services.

Chapter III is "**Liberalisation of Legal services under the GATS framework**". This chapter deals with the liberalisation that has been accomplished under the GATS framework and gives an idea of the negotiations that are going on under the GATS framework, both with regard to the negotiations on commitments and domestic regulation provisions. It takes a look at the GATS commitments – original and revised offers that have been submitted for the Doha rounds and tries to evaluate the scope of the commitments and the extent of liberalisation that has been achieved through these commitments. This analysis has been done to evaluate whether it would be beneficial for India to liberalise legal services through the GATS route.

Chapter IV has been titled as "**Legal Services Trade under RTA/FTA Framework and Autonomous Liberalisation**". This chapter follows the scheme of the earlier chapter and tries to evaluate the liberalisation that has been accomplished through

the regional trading agreements and the bilateral trading agreements. Again the purpose of the chapter is to evaluate whether the preferential trading agreement (regional and bilateral) mode would be suitable for India or not. Finally it takes a look at the unilateral liberalisation and tries to find out the most suited mode for the liberalisation of legal services.

Chapter V is titled "**Laws of Various Countries related to Legal Services**". This chapter analyses the laws of various countries as related to the provisions allowing for the practice of foreign lawyers in their respective countries. This chapter has been developed to understand which are the areas in which the countries have allowed to foreign lawyers to appear and under what conditions

Chapter VI is titled "**Legal Services Liberalisation in India**". This chapter takes a look at the Indian Laws and evaluates the laws as are proving a hindrance to the entry of foreign lawyers in the country.

Chapter VII is titled "**Conclusion**" and provides a brief outline of the research problem and gives the main findings and implications of the study

CHAPTER II

LIBERALISATION OF LEGAL SERVICES

CHAPTER II

LIBERALISATION OF LEGAL SERVICES

A discussion on the topic of liberalisation of legal services merits an exposition on the importance of legal services in terms of its value for the society and the total volume of trade that is being conducted in this area. Accordingly this chapter in section I takes a look at the importance of legal services in the context of internationalisation of the world economy and then proceeds to evaluate the reasons for restrictions on the liberalisation of legal services in the context of impact of legal profession on the society. In section II, it takes a look at the data of the trade volume that is being generated in the legal services and analyses it with reference to the fields in which the legal services trade generally occurs. It also tries to analyse the volume of trade that is occurring in India and tries to find out whether liberalisation of legal services sector would be beneficial for India or not. Section III examines the classification of legal services in the context of the fears expressed so as to find out whether the modes of classification can help deal with them. Section IV takes a look at the restrictions that are generally imposed on the legal services, their rationale and effect. It also provides a chart which compares the position of the countries on the basis of restrictiveness index. Finally section V presents an overview of the chapter

1. Importance of Legal Services in the Context of Liberalisation

The rapid internationalisation of the world economy as exemplified through the increased presence of transnational corporations and burgeoning trade between nationals of different states (Background Note 1998), has produced another facet which is the proliferation of disputes involving laws of different states. Further the legal relations are not confined just to the disputes but also involve carrying on business activity in accordance with the laws of the state. This then requires the services of the legal

professionals not just of the parent state but also of the other state and creates a demand for transnational legal services.

The transnational legal services, while being the producer or intermediate services, necessarily required for the conduct of any business activity, also lead to encouraging trade between the nations. On one hand they provide the investors with the confidence and incentive to invest in the country (Background note: 1998), while on the other hand, it integrates the recipient country into the legal architecture and framework of the world economic law, thus leading to the creation of a singular legal architecture.

A fundamental roadblock to the liberalisation of legal services is the national character of the law. (Background note: 1998) Law besides providing the framework for the conduct of business relations has also the got the function of ordering and affecting the growth of society. A basic requirement for any framework working across different jurisdictions is that there should be harmony in the architecture that is working in the different jurisdictions. While this harmonisation of financial services or architectural services is relatively easy, as the framework under which these services function is fundamentally similar or susceptible to similarity everywhere, the legal services which are characterised by national character, are difficult to harmonise, for the evolution of the laws of the country is based on the needs of the particular society at a particular time. Friedmann (1967), Allen C. K (1964).

A semblance of harmonisation of the law does exists in the presence of the great legal families[5], but this harmonisation remains a semblance or only superficial in nature as it is neither complete nor satisfactory, for a lawyers main education remains his knowledge of national law and legal families are no substitute for the education in national law. (Background note 1998: 1)

[5]"Comparative lawyers have identified the following main legal families: Romano-Germanic Law, Common Law, Socialist Law, Hindu Law, Muslim Law, Laws of the Far East, Black Africa and Malagasy Law.", in *"David, René, "Major legal systems in the world today : an introduction to the comparative study of law," (Les grands systemes de droit contemporains) translated and adapted by John E.C. Brierley, 3rd ed., London, Stevens, 1985."* reproduced from "Background Note by the WTO Secretariat on legal services. Document number S/C/W/43 6 July 1998"

Transnational Liberalisation of Legal Services and Blurring of Sovereignty

The above discussion suggests that the benefits of liberalisation of legal services will result in increased trade and investment and only the national character of law is proving to be a hindrance in the process of liberalisation. This hindrance can be easily addressed by separating the two fields of legal practice – viz business and the domestic law fields, seeking liberalisation in the former, while retaining the restrictions in the latter. However, the picture is much more nuanced than this simple exposition. Legal services while not a major trade sector in terms of volume or revenue, form part of the business or producer service which are crucial to the internationalisation of economic relations in goods, finance, knowledge, investment and other trade flows. These trade flows will lead to the breakdown of national economic, political and cultural differences widening and deepening the reach of globalisation and result in the emergence of generic type of business laws stripped of all local cultural and political associations that is inherent in the conception of law. (Arup 2000)

The transnational lawyers through their practices would produce new transnational law as well as apply the laws of the nation states (Dezalay and Garth 1996), resulting in dilution of the power of the state to govern the economy, law and the legal profession and thus presenting an indirect challenge to the state sovereignty.

The law shaping the new global order is sometimes known as the new '*lex mercatoria*' or a supra-national and possibly a-national type of business law (Arup 2000). In the operation of this new '*lex mercatoria*' the relationship between lawyers and capital is *seen as a reciprocal one* (Cain and Harrington 1994). Thus the '*lex mercatoria*' and its practitioners shape not just the markets in law, but also the social construction of world markets (Powell 1993) in the form of construction of the necessary bonds of social solidarity like trust, legitimacy and morality besides of course the *construction of* market subjects (Arup 2000).

The lawyers besides being a part of the making of markets are also involved with the states, civil societies and communities and are inevitably involved in the construction

of politics itself. Their skills can contribute to the strengthening of state institutions or it may even severely undermine the legitimacy of the nation state and even the liberal system itself (Krygier 1995). With the civil society, lawyers can contribute to the creation and maintenance of the civil society (Arup 2000). Such is the role of the lawyers in the constitution of the societies that they are subjects of increased attention (Kessler 1995). Lawyers also take part in the building of communities. By their active participation the lawyer can act as a reservoir of local legal culture (Arup 2000). Thus the role of the lawyer is not limited to the business laws but extends to domain of the society, politics and community, so much so, that entrepreneurial and diplomatic lawyers have used the skills to engineer major changes in the legislative regimes around the world (Arup 2000).

Resistance to the Liberalisation of Legal Services

The resistance towards the liberalisation of legal practice is thus to a great extent informed by political and cultural sensitivities which inspires policies that are designed to shield certain areas of law and legal practices from foreign influences (Arup 2000). The r resistance may arise from the state, the bureaucracy or civil society (Waelde and Gunderson 1994) on the ground that liberalisation is incompatible with the political traditions of decisions making or cultural practices of conflict resolution or that lawyers are officers of the court and must show commitment to the local administration of justice, even in some states, to national political institutions (Arup 2000: 150). Besides this another factor which militates against the liberalisation of legal services is the style and values of lawyers in different countries. The aggressive, technocratic style of big Anglo-American firms is seen prevailing over the more gentlemanly, almost aristocratic tradition of Europe leading to friction between the two distinct value systems (Dezalay and Garth 1996).

Liberalisation of transnational legal practice is then seen as a tussle between the claim of professionalism and commercialism (Whelan and McBarnnet 1992). Commercialism is seen as a threat to the traditional professional ethics of collegiality independence and public service (Baxi 1996) liberalisation may mean lawyers becoming detached from the traditional sense of 'noblese oblige' or commitment to the welfare

state. They may also not feel bound by the traditional standards of professional conduct (Arup 2000).

However, the growth in international trade and the consequent necessity of providing the necessary framework for the conduct of international trade pre-empts any possibility of such resistance becoming potent enough to restrain liberalisation. However, the concerns expressed will always have a bearing on the extent of liberalisation of the legal services.

The internationalisation of legal services is direct outcome of this requirement of corporate architecture, which places an acute emphasis on the quality of legal services available. Thus while on one hand the corporate world creates the demand for the quality legal services in the jurisdictions deficient in the legal services, on the other hand, the countries desirous of foreign investment see the opening of legal sector to foreign service providers as an instrument which provides confidence and incentive to the foreign investor to invest in their country.

The greatest obstacle to the liberalisation of legal services is thus the predominantly national character of the law and of the legal education.

2. Volume of Trade in Legal Services

While legal services are important as producer services and are important for international trade in goods, the trade in legal services has to be analysed in the light of its own volume of trade, for this would provide a idea as to its importance. A rising or huge volume of trade in legal services will point towards the importance of trade in legal services and provide support for its liberalisation.

This section takes into account the trade from USA, Australia, UK and India and tries to analyse the data so as to derive an idea as to the total market for legal services and the areas in which the market exists, from the point of view of India.

Trade Volumes of Legal Services in Different Countries

The volume of trade in legal services has been considered for the following countries

Volume of Trade in Legal Services for USA.

The legal services data in USA for the year 2006 receipts were 5294 million US dollars, while for 2007 it was 6,424 Million US dollars. The payments were 1,222 million dollars in 2006 and 1,561 million dollars in 2007. The Proportion of India in receipts terms (Payments by India) was 24 and 36 million dollars respectively for 2006 and 2007 respectively. In payment terms (receipts for India) was 15 and 14 million US dollars respectively for the years 2006 and 2007 (Bureau of economic analysis 2008).[6] A comparable feature is the data for China which is at 165 and 248 million dollars for 2006 and 2007 respectively (receipt terms for USA, payment terms for China), and 32 and 44 million dollars for 2006 and 2007 respectively (payment terms for USA, receipt terms for China) (Bureau of economic analysis 2008)[7]. Since the economic growth of China is way ahead of India, this data may point towards the importance of legal services in economic growth.

Volume of Trade in Legal Services for Australia

ILSAC (International Legal Services Advisory Council) lists the data for export of Australia's legal services for 2006-2007 at $675 million (Australian dollars) of which the share of China/Hong Kong is 16 percent. For 2004-2005, the corresponding figure was 13.61 percent. This data points towards the increased value of legal services in economic liberalisation. The area of practice (Relevant share for 2006-2007) were Corporate (Mergers and Acquisitions) (214,744 million AU dollars); Intellectual Property, Information technology, Telecommunications (156,775 million AU dollars); Litigation (44, 722 million AU dollars); Banking and Finance (67, 347 million AU

[6]The data for the years 2006-2007, is available in the form of excel file at U.S. International Services: Cross-border trade for 1986-2007, and services supplied through affiliates for 1986-2006: Table 7: Business, professional, and technical services, for the years 2006-2007 http://www.bea.gov/international/xls/tab7c.xls

[7] ibid

dollars); Energy and Resources (43, 814 million AU dollars); Real Estate and Property (41,421 million AU dollars). An interesting development that emerged from the data given by ILSAC was that the absolute income in the category of litigation came down from 94,588 million AU dollars (2004-2005) to 44,722 dollars (2006-2007), while the income in all other categories moved up. This appears to points towards the fact that litigation doesn't play a huge role in transnational legal services (Attorney-General Department 2009).

Volume of Trade in Legal Services for UK

In the case of UK, the legal services market has shown a growth of 9.8% in 2007 over 2006, with 70% of the market dominated by top 100 law firms (Business wire 2008). This points to the fact that while there is a huge market in the legal services waiting to be harvested, caution has to be exercised to see that the legal firms of India are not swamped by foreign competitors.

Volume of Trade in Legal Services for India

While there is paucity of relevant data on the volume of legal trade in India, but certain material are there that point towards the potential of trade in legal services. Bhattacharya (2007), observes the Indian revenues from legal services off shoring is likely to grow from USD 146 million for the calendar year 2006 to reach USD 640 million by end 2010. The value notes database gives data on the total volume of legal services that is likely to be there in 2010. It says "the global legal services market — which includes major developed English speaking countries, the US, the UK, Canada, Australia and New Zealand — is estimated to be around $190 billion in 2005, but less than five per cent of this is "off-shore able"" (Ravindran 2006), "the overall addressable offshore opportunity in legal services will work out to $4.5 billion by 2010." (Ravindran 2006).

A further measure of the volume of Legal Services flowing in and out of India can be had from the look at the data of the United Nations. It says that the Import and Export

data of legal services of India for 2004 was $73,000,000 and $257,000,000 respectively, while for the 2005 it was $94,000,000 and $390,000,000 dollars respectively.[8] Looking at the above data, one can safely assume that there is a huge potential for trade in legal services waiting to be tapped.

An Overview of the Market for Legal Services

The impetus for the liberalisation of legal services comes from USA, UK and increasingly Australia as these are the major exporters of legal services (Goldsmith 2007:173). Goldsmith says that the legal services have seen continuous growth due to increased International Trade and Business and emergence of new practice areas in Business and trade laws. The growth of International Legal Services have resulted in the firms looking towards modes 3 and 4 as their clients demand multi-jurisdictional advice and an integrated service covering all aspects of a transaction. In order to meet these demands, law firms often attempt to build their own international networks through commercial presence and develop a pool of lawyers with knowledge of many countries, including host countries, and practices relevant for their clients business (Goldsmith 2007:173). He also observes that Asian countries are also witnessing a huge growth in Legal Services, because of the huge growth in the exports business of the Asian economies (Goldsmith 2007) as can be seen from the total number of Barristers being employed by the Hong Kong[9] and the total revenue in of the Singaporean law firms (Ministry of Law 2004)

There have been other instances which prove that Legal services have grown at a very fast pace. USA reported a twenty times increase in the export of legal services over a period of thirteen years from 1986 to 1999, while UK reported an almost 100% increase in the exports of legal services in the period from 1997 to 2002.[10] Similarly Hong Kong (China) showed an almost 87% jump in the export of legal services over a period from

[8] United Nations Trade Statistics Division

[9] Hong Kong Professional Services Available at http://www.lowtax.net/lowtax/html/hongkong/jhprof.html. last accessed 2nd May, 2009

[10] In the early 1990s the output of legal services represented 14% of all professional services and 1.1% of the economy in a "representative" industrialised country. (Background note: 6)

2000 to 2001 (HKTDC 2008) while Australia grew from AUD 74 million in 1987/88 to about AUD 250 million in 2000/01.(Goldsmith 2007).

Another important part is the assertion by the OECD "Moreover, with globalisation, OECD countries are confronted with stiffer competition, which is already testing the capacity of some countries to create new jobs. Certain business services, like consulting and legal services, can now quite easily be purchased across borders, (OECD Observer No. 249 May 2005) in particular if they involve an intensive use of information technology and require little face-to-face contact." (Pilat 2005). The importance of legal services is thus seen as growing due to the use of information technology and since it has got the ability of shifting jobs from the developed countries, liberalisation of legal services assumes greater importance.

3. Classification of Legal Services

The traditional function of the legal services was divided into legal representation, advisory and notarial services. The legal representation services implied representation of the client before the courts which required maintaining physical establishment within the territorial jurisdiction of the local court. As opposed to this the advisory services which evolved from the legal representation services for fulfilling the need for counselling in matters such as transactions, agreements, bills etc. The third type of services is the notarial services and they deal with property transactions, successions, affidavits, etc. While the representation services have been strictly regulated by the professional associations, professionals other than lawyers, such as accountants, bankers were permitted into the advisory services. However, the distinction between the representation and advisory services is losing rigidity. The main reason behind the blurring of distinction between representational and advisory services is the increase in trade, which renders the necessity of maintenance of an office in the location of practice unnecessary. The notarial services on the other hand are regarded as public services, and hence have been tightly regulated. (Background note 1998: 3)

Legal Services Classification in the Context of Liberalisation

The present environment which is witnessing growth in international trade and emergence of new fields of practice, in particular in the area of business law, such as corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property rights, new financial instruments and competition law have generated an increasing demand for more and more sophisticated legal services in the past years. Just as the increasing trade earlier produced a shift from legal representation services to advisory services, increasing international business activities are likely to lead to growth in the demand of transnational legal services. In such a scenario a broad definition of legal services is required which would provide for advisory and representation services as well as all the activities relating to the administration of justice (judges, court clerks, public prosecutors, state advocates) etc.

Legal services have been classified under three different frameworks. The first two that is the UN Central product classification (CPC) and classification as required for scheduling legal services under GATS, can be taken as operative, for the IBA resolution has not yet been accepted as providing a proper classification

UN CPC (Central Product Classification) [11]

In the UN CPC[12] the entry "legal services" is sub-divided in

a. "legal advisory and representation services concerning criminal law" (8211),
b. "legal advisory and representation services in judicial procedures concerning other fields of law" (8212),
c. "legal documentation and certification services" (8213) and
d. "other legal services" (8219).

[11] UN CPC classification Ver. 2 Code 821. The classification is available at the website http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=25&Lg=1&Co=821, last accessed on 2nd July, 2009

[12] The Classification followed by the members in WTO classification followed the system of CPC prov classification. Here the latest classification Ver 2 has been given. In the earlier classification, 'legal services' had the code '86', while in the latest version it has been given the code '821'

Subsequent to revision of the UN CPC classification in 1997, "Arbitration and conciliation services," which was previously a part of management consultancy services has been added to the entry "Legal services".[13]

WTO- GATS Classification

In the WTO "Services Sectoral Classification List" [14] "(a) legal services" are listed as a sub-sector of "(1) business services" and "(A) professional services". This entry corresponded to the CPC classification. However, since the CPC classification did not reflect the concerns of the members scheduling "legal services' under GATS, a different mode was taken by them in the classification of services. "Legal services" under GATS has been classified under

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

This classification appeared better suited to represent the degree of market openness in the legal services. (Background note 1998: 5) However, the second part of the legal services, that is services relating to the administration of justice is effectively excluded from the scope of GATS by virtue of Article I(3)(c) of the Agreement as a "service supplied in the exercise of governmental authority". GATS thus covers advisory and representation services in various fields of law and statutory procedure.

[13]"Detailed analysis of the modifications brought about by the revision of the central product classification," Note by the Secretariat – Addendum, S/CSC/W/6/Add.10, 27 March 1998
[14]Services sectoral Classification List, Note by the Secretariat (MTN.GNS/W/120)

IBA (International Bar Association) Scheme of Classification[15]

The IBA scheme of classification was evolved to provide for a new scheme of classification as it was felt that the above two classification did not represent the realities of the legal services in a proper manner. It recommended that the following system of terminology be used for classification purposes:

(a) Home-country law
    (i) advisory services
    (ii) representation services
(b) Third-country law
    (i) advisory services
    (ii) representation services
(c) Host-country law
    (i) advisory services
    (ii) representation services
(d) International law
    (i) advisory services
    (ii) representation services
(e) International arbitration and mediation services.

The efficacy and relevance of a particular scheme of classification is predicated on its ability to reflect the requirements of the purpose for which that classification is being made. In the case of legal services, the purpose of liberalisation is the object of such classification. The relevance of any of the three schemes thus depends entirely on the ability of the scheme to reflect the demands of the businesses and individuals for legal services.

Transnational businesses have traditionally been the major demanders of legal services. Their transnational business activities compel the businesses to utilise the

[15]International Bar Association 'Resolution in Support of a System of Terminology for Legal Services for The Purposes of International Trade Negotiations', available at URL < http://www.ibanet.org/Search/Default.aspx?q=terminology%20for%20legal%20services>, last accessed on 30th June, 2009

services of their own lawyers as well as the lawyers of the host state. The lawyers of the firm's country of origin have a comparative advantage in knowledge of the firm's activities while the lawyer of the state has the comparative advantage of the knowledge of the local laws of the state (Background note 1998). For this reason transnational businesses form the major force behind the move for liberalisation of legal services.

Demand from individuals for legal services has also been increasing, in areas such as property law, divorce and other fields of domestic law largely on account of increased mobility of labour (Background note 1998: 7), however it still forms a minor component in the trade in legal services, when compared with the businesses who are still the primary demanders of transnational legal services.

Another aspect that is required to be reflected in a scheme of classification that may be adopted is the modes through which the legal services are being transacted and relative significance of the modes in terms of the volume of trade being transacted. Trade in legal services takes place either through Mode 1(Cross border trade) or Mode 4 (Temporary stay of Natural Persons). Affiliate trade (Mode 3) forms a very small portion of the total trade due to the high costs involved and is limited to large firms alone and is mostly directed towards the world major financial and business centres (Brussels, Frankfurt, Hong Kong, London, New York, Paris, Singapore, and Tokyo) where the demand for legal work in the fields of business law and international law is highest (Background Note 1998:7).

The above discussion posits the need and necessity for a scheme of classification that reflects the requirements of the different stakeholders and the necessities of the four modes of trade (presently the GATS scheme of classification is in operation and members have utilised the CPC classification also in their schedules). IBA has proposed a new scheme of classification of legal services, but it has not been adopted till date. Negotiations are on with respect to determining the method of classification but as of now, guesses cannot be made on the results of these negotiations.

4. The Regulatory Barriers to Trade in Legal Services

The regulatory barriers to trade in legal services can be categorised under three categories – market access, national treatment and domestic regulations. Though these categories are being inherited from the GATS, but they are capable of giving the full range of regulatory restrictions that may or are being imposed on the Trade in Legal Services. This section identifies the various restrictions that are imposed on the liberalisation of legal services, the rationale for their imposition, and the grouping of economies based on the restrictiveness index

Restriction that are Imposed on the Entry of Foreign Lawyers and Firms

The legal services because of its impact on the politics and culture of a country are subject to large and myriad restrictions. These restrictions are being stated here:

a. Requirements on the form of establishment - restrictions on incorporation and other business structures. For example, professionals may be prohibited from incorporating, and hence may only practice in partnership or sole proprietorship.
b. Foreign partnership restrictions - limitations on foreign firms and professionals seeking to enter into partnership or joint venture with local professionals. Partnership with local professionals also represents a way to enter the domestic market without the need to obtain a local licence.
c. Ownership and investment restrictions - limitations on ownership and control of local firms by foreign professionals, and limitations on ownership and control of local firms by non-professional investors.
d. Nationality requirements - conditions to practice on the basis of nationality or citizenship.
e. Residency and local presence requirements - obligations to be established or resident in the market where the service is provided. Residency requirements apply to individual professionals, while local presence requirements apply to professional firms.
f. Licensing and accreditation of foreign professionals - licensing and qualification conditions that exclude foreign professionals by not recognising their foreign licence and qualifications.
g. Limitations on the scope of activities - regulations that reserve certain activities to the exclusive exercise of the profession or some groups within the profession

h. Multi-disciplinary practices restrictions - regulations that restrict partnership or association between different professions or between particular groups within the profession
i. Fee and advertising restrictions - regulations that set limits or prohibit fee setting and advertising among professionals. These regulations typically reduce competition on the basis of price (Nguyen-Hong 2000)

The Rationale behind the Imposition of Restrictions

OECD papers (1996 and 1997) discussed several motivations underlying the application specific types of restrictions in its member economies.

- Nationality requirements often have the justifications of providing reciprocity (as a trade negotiating tool), familiarity with local rules, and loyalty of professionals (Background note: 9).
- Residency requirements may help to ensure consumers' redress in the case of professional malpractice, adherence to professional association's disciplines, and proximity to consumers;
- Restrictions on incorporation have the stated aims of limiting company type structures which can reduce personal liability of professionals and hence, their accountability when professional malpractice occurs; (Background note: 9).
- Restrictions on non-professional ownership are advocated on the grounds that unlimited non-professional investment can undermine the independence of professionals — for example, a bank, as a shareholder of the auditing firm, may exercise influence over the audit of its financial statements;
- Licensing and qualification requirements are to ensure standards of competence, performance and accountability; and
- Fee and advertising restrictions are designed to limit competition which may lead to lower prices and reduced service quality.
- Restriction on the use of foreign firm's name - This restriction or limitation is imposed on the assumption that clients are more likely to gravitate towards the foreign firms instead of the domestic firms, thus

altering the balance in terms of competition between the domestic firms and foreign firms. (Background note: 9).

However, the OECD documents have questioned the use of trade barriers to achieve the above objective and have called for the removal of nationality, residency and partnership restrictions, review and relaxation of requirements on foreign investment in professional firms, freedom of firms to choose the form of establishment, and promotion of recognition of foreign qualifications and standards between member economies.

Restrictiveness Index

Nguyen-Hong (2000), has given a restrictive index which gives the extent of restriction a market imposes. Surprisingly, quite a few developed and developing countries rank above India on the restrictiveness score.[16] A range of restrictive regulations have been put in place, for instance, of the 29 countries examined, 15 imposed nationality requirement on legal practice. (Nguyen-Hong 2000)

Table 1: Foreign Restrictiveness (legal services) index of Nations

Summary of foreign restrictiveness index results			
	Restrictiveness scores from 0 to 0.25	Restrictiveness scores from 0.25 to 0.45	Restrictiveness scores greater than 0.45
Legal services	Finland, Netherlands	Australia, Belgium, Denmark, Greece, Hong Kong, India, Korea, Portugal, Singapore, Spain, Sweden, Thailand, united kingdom	Austria, Canada, France, Germany, Indonesia, Italy, Japan, Malaysia, Mexico, new Zealand, Philippines, Switzerland, Turkey, USA

Source: Nguyen-Hong, D. 2000, *Restrictions on Trade in Professional Services*, Productivity Commission Staff Research Paper, AusInfo, Canberra, August 2000, page no. 20

[16] For a discussion on how the restrictiveness score has been arrived at refer Nguyen-Hong (2000)

Table 2: Domestic Restrictiveness (legal services) index of nations

Summary of domestic restrictiveness index results			
	Restrictiveness scores from 0 to 0.09	Restrictiveness scores from 0.1 to 0.19	Restrictiveness scores greater than 0.19
Legal services	Finland, Hong Kong, India, Singapore	Denmark, Greece, Indonesia, Italy, Korea, Malaysia, Netherlands, New Zealand, Philippines, Sweden, Thailand, United Kingdom,	Australia, Austria, Belgium, Canada, France, Germany, Japan, Mexico, Portugal, Spain, Switzerland, Turkey, USA

Source: Nguyen-Hong, D. 2000, *Restrictions on Trade in Professional Services*, Productivity Commission Staff Research Paper, AusInfo, Canberra, August 2000, page no. 22

From the above chart it becomes evident that India ranks considerably lower in both - foreign restrictiveness index and domestic restrictiveness index, as compared to other developed countries.

Effects of Restrictions on Legal Services

The first impact is on the price of service which goes up between various ranges, 4% - 33% (Cox and Foster 1990) and between 14% - 100% (Kinoshita 2000 - entry regulation in legal services in Japan). Other studies suggest drop in service prices following the removal of restrictions Baker (1996) and Domberger and Sherr (1995), report a fall in conveyancing fees following the removal of restrictions of legal services.

The restrictions that are imposed to improve the service quality do not seem to have any effect. This is evident from the study of Cox and Foster (1990). Other than this certain studies have suggested that market factors play a greater role in pricing of legal services and rather than restrictions in the form of Bar exams. Lueck et al. (1995), Rosen (1992).

5. Conclusion

A look at the trade volumes for legal services, the classification structure for the legal services and the areas where legal services generate trade makes it evident that the liberalisation of legal services if handled in a proper way would produce benefits for the country, without affecting the domestic political or cultural structure of the country. However, the liberalisation of legal services has to be proceeded with slowly with acute consciousness and knowledge at every stage of liberalisation as to the impact of such liberalisation.

The next chapter will take a look at the WTO/GATS mode, through which liberalisation of legal services has been achieved and the areas where the countries have made their commitments. Since India has not liberalised legal services, it is pertinent to examine the areas where the other countries have made their commitments so as to find out though which mode and in which areas the country should enter its commitments

CHAPTER III

LIBERALISATION OF FOREIGN LEGAL SERVICES UNDER GATS FRAMEWORK

CHAPTER III

LIBERALISATION OF LEGAL SERVICES UNDER THE GATS FRAMEWORK

GATS has been the first multilateral agreement incorporating provisions for the liberalisation of services. The services sought to be liberalised under the GATS framework of services included legal services under it. This chapter deals with the various facets of liberalisation of legal services under the GATS framework and tries to analyse the benefits and shortcomings of liberalisation through the GATS framework. The chapter has been divided into three sections. Section 1 describes the framework of WTO for the purpose of liberalisation of trade in services. It analyses the provisions as regards the entry of commitments, relevant to the legal services sector and takes a look at the commitments that have been entered by the nations in the legal services sector. Section 2 deals with the development of disciplines regarding qualification and recognition for the legal services sector. Section 3 presents the other areas and provisions of GATS that are relevant to the legal services liberalisation, and section 4 is the concluding section giving an overview of the chapter.

1. Liberalisation under the WTO Framework

Liberalisation under the WTO framework proceeds under the General Agreement on Trade in Services (GATS), which forms Annex I b to the agreement creating the World Trade Organisation. 'GATS' is an integral part of the agreement establishing WTO.[17] 'GATS' came into force along with the other WTO agreements on 1 January, 1995 and is the first and only set of multilateral rules governing international trade in services (Paton 2003). It covers most major services, most major world markets, the different ways in which a service can be supplied to a customer in a foreign market, and

[17] General Agreement on Trade in Services: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services, available at http://www.wto.org/english/docs_e/legal_e/final_e.htm last accessed on 9th July, 2009

the establishment of commercial operations in foreign markets (Foreign Affairs and International Trade Canada 1999). Its Twenty-nine Articles and Eight Annexes divide the obligations of the parties into fundamental and voluntary ones. The fundamental obligations are those that are provided in the framework itself and are obligatory on the parties while voluntary obligations are those which are taken upon by the parties themselves through commitments. These commitments define the extent of access to their domestic market which a country provides to the foreign suppliers.

In regard to the legal services, just as in other services, market access and national treatment limitations and restrictions form an important barrier to the trade in legal services, but legal services being a part of the professional services suffer from the licensing and qualification restrictions also. These licensing and qualification restrictions form a major hurdle to the liberalisation of legal services and are under the purview of domestic regulation provisions of article VI:4. Article VI:4 mandates the development of disciplines for the professional services so as to ensure that measures related to qualification requirements and procedures, technical standards and licensing barriers do not constitute unnecessary barriers to trade in services. This section deals with two parts of the liberalisation process under GATS. The first liberalisation as related to market access and national treatment and the second part deals with the development related to the development of disciplines.

GATS Commitments Relevant to Legal Services

'GATS' in general does not define services but distinguishes among them according to mode of supply. Under the classification of GATS there are four categories of services: Services provided from one country to another (mode 1); receipt of foreign services (mode 2); installation of branches of foreign firms in other country in order to provide services (mode 3) and lastly where a provider of services travels and provides services in other country (mode 4) (Gromek-Broc 2007)

Similarly the WTO doesn't defines legal services although a hazy definition can be implied from other documents. The WTO 'Services Sectoral Classification List'[18]; legal services are seen as a sub-sector of (1)' business services' and (A) professional services. The GATS categorisation of legal services thus corresponds to the particular barrier to trade and the commitment made by member states to remove this barrier.

The liberalisation of legal services under GATS has to be studied in detail under three heads, one the commitments, that are imposed on the countries as a result of their status of being a signatory to the GATS (which includes obligatory and voluntary (those made under the Schedule of Specific Commitments) commitments) and the second that is due to their being a part of the new developments under GATS, which includes negotiations for establishing a uniform regulatory mechanism for the regulation of legal services and the third, the progressive liberalisation agreement which imposes on the member states an obligation to enter into negotiations for achieving a higher level of liberalisation.

The first part deals with the commitments that a country undertakes and is divided into two parts – the general commitments (as a result of its status as being a signatory to GATS) and voluntary commitments (as a result of entering the specific service in its Schedule of Specific Commitments). The second part deals with the domestic regulation provisions under Article VI, para 4, and recognition provisions under article VII. Article VI deals with the development of necessary disciplines for providing measures relating to qualification requirements and procedures, technical standards and licensing requirements keeping in view the necessity that such obligations do not constitute unnecessary barriers to trade in services. The recognition provisions under article VII provide directions for the recognition of lawyers licensed in other jurisdictions. The development of Mutual Recognition Agreement, as a mode for the licensing of foreign lawyers, is also considered under this provision. Lastly, the third part deals with the progressive liberalisation provision of article XIX, which requires all member states to engage in progressive liberalisation and is the basis for the GATS 2000 negotiations, that

[18]WTO Doc MTN/GTS/W/67

had to commence under the provisions of the article, five years after the coming into force of WTO.

Commitments Entered by Nations in Legal Services Sector

The obligations incumbent on a country, as regards to a sector subject to liberalisation, is applicable only when a country lists a particular sector or sub-sector under its schedule of specific commitments. The schedule of specific commitments, *inter alia*, requires the members to provide terms, limitations and conditions on market access; conditions and qualification on national treatment and undertaking relating to additional commitments. Thus a member's obligations as regards a sector or sub-sector listed in its schedule of specific commitments becomes conditioned upon the MFN exception (listed in annex on article II exemptions) and the limitations and conditions entered with respect to the market access and national treatment conditions.

The MFN provision under article II requires a member to provide members "treatment no less favourable than that it accords to like services and service suppliers of any other country" , except as may be allowed under the Article II exemptions listed in the Annex on Article II exemptions[19]. There are certain other exceptions to the MFN principle. Article VII permits a WTO Member State to negotiate a "Mutual Recognitions agreement" with another country, provided that the WTO is notified at the onset of such negotiations and provided that each country is willing to offer the same MRA to all other WTO Member States and provided a notice is given, GATS Article V permits more favourable treatment resulting from economic integration agreements, such as European Union and NAFTA.

The market access provisions[20] prohibit limitations on the total number of service suppliers, total value of service transactions, total number of service transactions, total number of natural persons that may be employed in a particular service sector, the type of organisation and maximum percentage limit on the foreign shareholding. The national

[19]GATS Article II:2
[20]Article XVI

treatment[21] provisions provide for the principle of non-discrimination which provides equality of treatment amongst the domestic service suppliers and foreign service suppliers as regards the supply of a service in the domain of a member state. These obligations under market access and national treatment provisions cannot be derogated from unless the member lists the limitations as regards the two provisions in its schedule of specific commitments.

Besides the above there is one more provision that impinges upon the member states flexibility in regulating the scheduled service in their domain. These are the additional commitment provisions[22]. The additional commitments are those commitments that are not subject to scheduling under article XVI and XVII of the GATS, but if a member is desirous of adopting those commitments, those can be scheduled in the members list of additional commitments in the member's schedule.

An analysis is thus necessitated so to determine as to how far the legal services have been liberalised through the negotiation of market access and national treatment commitments. This examination is necessitated to draw conclusions regarding the impact of liberalisation as to legal services with regards to India. An analysis of the commitments offered by various countries will present the picture as to how far liberalisation has been successful under GATS and what are the commitments that have been offered by countries for liberalisation of legal services. The following table presents the commitments that have been entered or have been offered by the nations in legal services sector. The purpose of the table is to gather an idea of whether legal services liberalisation is beneficial for a developing economy.

[21]Article XVII
[22]Article XVIII

Table 3: The legal commitments of the members of the WTO – committed as well as offered[23]

Serial no.	L[24]	Countries[25]	Market Access				National Treatment				Reservations [26]
		Modes □	1	2	3	4	1	2	3	4	
1.		**Antigua and Barbuda[27]**			.	.			.	.	S1
2.	§ 30	**Argentina[28]**	.		.	.	.		.	.	
3.		**Armenia[29]**				.				.	
4.	# 12§ 19	**Australia[30]**			.	.			.	.	S1, F
		Australia off[31]				*				*	LL
5.		**Austria[32]**			.	.	.		.	.	S1, EEA/EC Law and Place of practice
6.		**Barbados[33]**	.	.	.	.	.	.			CPC 86130
7.		**Bulgaria[34]**				.				.	S1, Rep
8.		**Cambodia [35]**			*	.				.	Rep
9.	# 10 §5	**Canada[36]**			.	.			.	.	S1, F
		Canada Off[37]			*	*				*	S1, F

[23]Few other countries have also offered commitments, but their offers were not accessible, at the time of writing this dissertation. It is also not known whether those countries have offered commitments in the legal services sector.

[24]The rank of a country is determined on the table given in International Trade Statistics Report 2008

[25]The commitments of the countries as regards legal services can be found at the site http://tsdb.wto.org/matrixlist.aspx. However the present study also gives the names of the documents that contain the commitments.

[26] Two categories of reservations have been included, the first denoted by alphabet S, followed by a number denoting the areas in which Legal services have been entered and the second denoting the type of reservations entered. Absence of Alphabet S in the reservations column implies that legal services commitments have been entered for the full scope of legal services.

[27] GATS/SC/2

[28]GATS/SC/4

[29]GATS/SC/137

[30]GATS/SC/6, GATS/SC/6/Suppl.2 and GATS/SC/6/Suppl.1/Rev.1,

[31] Australia revised offer of 26th May, 2005, available at http://www.esf.be/003/008.html, last accessed 2nd May, 2009

[32]GATS/SC/7

[33]GATS/SC/9

[34]GATS/SC/122

[35]GATS/SC/140

[36]GATS/SC/16, GATS/SC/16/Suppl.2 and GATS/SC/16/Suppl.2/Rev.1

10.	# 31§ 26	**Chile**[38]	.	.		.	.	.		.	S2. Rep
		Chile Off[39]				.				.	S1, S3, Rep
11.	# 4§ 2	**China**[40]			.	.			.	.	DL, R, F
		China Off[41]			*	*			*	*	DL, R, F
12.	# 14§ 11	**Chinese Taipei**[42]			.	.				.	S1, F
		Taiwan Off[43]			*	*				*	S1, F
13.	§ 40	**Colombia**[44]			.	.			.	.	S1
14.		**Croatia**[45]			.	.			.	.	S1, Rep
15.	# 32	**Cuba**[46]	.			.	.			.	
16.		**Czech Republic**[47]			.	.			.	.	Q (for DL)
17.		**Dominican Republic**[48]				.	.	.		.	CPC 86190
18.		**Ecuador**[49]				.				.	S1
19.		**El Salvador**[50]				.				.	CPC 86190, Q
20.		**Estonia**[51]	.		.	.	.			.	(Excludes CPC 86190), Q
21.		**European Communit y**[52]	N.A .	N.A .	N.A .	N.A .	N.A .	N.A .	N.A .	N.A .	Different countries
22.		**Finland**[53]			.	.					S1, Q, R
23.		**FYR**				.				.	S1

[37] Revised conditional offer of Canada of 18th May, 2005 available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/Canada%20Revised%20Offer.pdf, last accessed on 2nd May, 2009

[38] GATS/SC/18

[39] TN/S/O/CHL/Rev.1 (5 July 2005)

[40] GATS/SC/19, GATS/SC/135, GATS/SC/135/Corr.1

[41] TN/S/O/CHN/Rev.1, available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/China%20Revised%20Offer.pdf

[42] GATS/SC/136

[43] TN/S/O/TPKF/Rev.1, Available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/Taiwan%20Revised%20Offer.pdf

[44] GATS/SC/20, GATS/SC/20/Suppl.1, GATS/SC/20/Suppl.2, GATS/SC/20/Suppl.3, GATS/SC/20/Suppl.3/Corr.1 and GATS/SC/20/Corr.1

[45] GATS/SC/130

[46] GATS/SC/24

[47] GATS/SC/26

[48] GATS/SC/28

[49] GATS/SC/98

[50] GATS/SC/29

[51] GATS/SC/127

[52] The commitments of EU have not been analysed. This is because there are a large number of countries in the grouping and it was not possible to condense their commitments in this table

[53] GATS/SC/33

		Macedonia[54]									
24.		**Gambia**[55]			.	.				.	
25.		**Georgia**[56]				.				.	
26.		**Guyana**[57]				.				.	Q
27.		**Hungary**[58]			.	.				.	S1 (only home country law), Rep
28.		**Iceland**[59]				.	.	.		.	Q (for home country law only)
		Iceland Off[60]				*	*	*		*	Q (for home country law only)
29.		**Jamaica**[61]			.	.				.	Q
30.	# 3§ 4	**Japan**[62]	.	.	.	.	.	.	.	.	F, R, DL
		Japan Off[63]	*	*	*	*	*	*	*	*	F, R, DL
31.		**Jordan**[64]				.			.	.	S1, Rep
32.		**Kyrgyz Republic**[65]			.	.				.	Rep (for Kyrgyz law)
33.		**Latvia**[66]			.	.				.	Rep (for Latvian law)
34.		**Lesotho**[67]			.	.			.	.	
36.		**Lithuania**[68]				.				.	S1, Rep
37.	# 17§ 13	**Malaysia**[69]			.	.				.	S1, Rep
		Malaysia Off[70]			*	*				*	
38.		**Moldova**[71]			.	.				.	Rep (DL)
39.		**Nepal**[72]				.				.	Rep

[54] GATS/SC/138
[55] GATS/SC/112
[56] GATS/SC/129
[57]GATS/SC/37
[58]GATS/SC/40,
[59]GATS/SC/41
[60]TN/S/O/ISL/Rev.1 of 14 June 2005
[61] GATS/SC/45
[62] GATS/SC/46
[63] TN/S/O/JPN/Rev.1 of 24 June 2005
[64] GATS/SC/128
[65] GATS/SC/125
[66] GATS/SC/126
[67] GATS/SC/114
[68] GATS/SC/133
[69] GATS/SC/52
[70] TN/S/O/MYS/Rev.1 of 31 January 2006, available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/Malaysia%20Revised%20Offer.doc
[71] GATS/SC/134

40.	# 30§ 42	**New Zealand**[73]				.				.	
		New Zealand Off[74]				*				*	
41.	# 11§ 20	**Norway**[75]			.	.			.	.	S1, Rep
		Norway Off[76]			*	*			*	*	S1, Rep
42.	§ 43	**Oman**[77]				.				.	
43.		**Panama**[78]				.				.	S1, Rep
44.		**Papua New Guinea**[79]				.				.	
45.		**Poland**[80]			.	.					Q
46.		**Romania**[81]			.	.			.	.	
47.		**Rwanda**[82]									
48.	# 34§1 2	**Saudi Arabia**[83]			.	.			.	.	S1, Rep
49.		**Sierra Leone**[84]			.	.				.	F
50.		**Slovak Republic**[85]			.	.			.	.	Q(DL)
51.		**Slovenia**[86]	.		.	.	.		.	.	F, Q, Legal Documentation services (unbound)
52.		**Solomon Islands**[87]			.	.			.	.	F
53.	# 24	**South Africa**[88]	.	.	.	.	.	.	.	.	F (DL)
54.		**Sweden**[89]	.		.	.	.		.	.	S1, Q, Rep

[72] GATS/SC/139
[73] GATS/SC/62
[74] TN/S/O/NZL/Rev.1 of 17 June 2005
[75] GATS/SC/66, GATS/SC/66/Suppl.2 and GATS/SC/66/Suppl.2/Rev.1
[76] TN/S/O/NOR/Rev.1 of 28 June 2005
[77] GATS/SC/132
[78] GATS/SC/124
[79] GATS/SC/118
[80] GATS/SC/71
[81] GATS/SC/72
[82] GATS/SC/107
[83] GATS/SC/141
[84] GATS/SC/105
[85] GATS/SC/77
[86] GATS/SC/99
[87] GATS/SC/117
[88] GATS/SC/78
[89] GATS/SC/82

55.	# 9§ 15	**Switzerland**[90]				.			.	.	S1, Rep
		Switzerland Off[91]				*				*	S1 (Includes arbitration, mediation and patent services), Q (For patent services under modes 1, 2 and 3)
56.	# 15§ 16	**Thailand**[92]	.		.	.	*		.	.	E
		Thailand Off[93]	*			*	*			*	
57.		**Tonga**[94]				.				.	
58.	§ 47	**Trinidad and Tobago**[95]									S1, Rep, Patent agents(no restrictions)
59.	# 16	**Turkey**[96]							.		S1, Rep
		Turkey Off[97]							*		S1, Rep
60.	# 2 § 3	**USA**[98]	.	.	.	.	.	.	.	.	Q, R and F
		USA Off[99]	*	*	*	*	*	*	*	*	Q, R and F (Nationality restrictions on Patent services removed)
61.		**Venezuela**[100]	.		.	.	.		.	.	
62.	§ 34	**Viet Nam**[101]			.	.				.	S1, Rep, F

[90] GATS/SC/83, GATS/SC/83/Suppl.2 and GATS/SC/83/Suppl.2/Rev.1
[91] TN/S/O/CHE/Rev.1, available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/Switzerland%20Revised%20Offer.pdf
[92] GATS/SC/85
[93] TN/S/O/THA Rev.1available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/Thailand%20Revised%20Offer.pdf
[94] GATS/SC/143
[95] GATS/SC/86
[96] GATS/SC/88
[97] TN/S/O/TUR/Rev.1 of 29 September 2005
[98] GATS/SC/90
[99] TN/S/O/USA/Rev.1 available at http://www.esf.be/pdfs/GATS%20Revised%20Offers/USA%20Revised%20Offer%20(2).pdf, last accessed on 2nd May, 2009
[100] GATS/SC/92

63.	#8, §6	**Korea Off**[102]			*	*			*	*	S1 (except notarial, family and property), Rep, F
64.		**Liechtenstein Off**[103]			*	*			*	*	S1

Excludes intra-EU trade

Abbreviations and Symbols -. - indicates that the commitments are either unbound or there are reservations; # - The rank of the country, out of a list of 35, in respect of services trade (excluding Intra-EU trade) (Only export rank for the purpose of ranking); § - The rank of the country, out of a list of 50, in respect of commodity trade (excluding Intra-EU trade) (Only export rank for the purpose of ranking); **86130** – Commitments entered only in respect of legal documentation and certification services; **DL** – Domestic law excluded; **E** – Equity restrictions; **F** -Partnership restrictions; **LL** – Limited License for Practice in foreign law, while full license to practice in domestic law. Full license will require the applicants to fulfil the admission requirements which will include qualification requirements; **Off** – Offer ; **Q** – Qualification requirements (This basically implies certification by the bar association of the state); **R** – Residency requirements; **Rep** – Only advisory services permitted, no legal representation allowed; **S1** – Commitments in home country and international Law (where certain areas are excluded from the ambit it is indicated within brackets); **S2** – International law and international commercial law; **S3** – Arbitration and mediation services,

From the table it becomes evident that only 16[104] countries out of the 35[105] countries that are major exporters of commercial services (excluding non EU) have entered legal services commitments. India ranks 5th, in the list of countries exporting commercial services. In the list of countries, exporting merchandise, India ranks 18th and only 18[106] countries out of total of 50[107] major exporters of world merchandise trade have entered legal services commitments[108].

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[101] GATS/SC/142

[102] TN/S/O/KOR/Rev.1 of 14 June 2005

[103] TN/S/O/LIE/Rev.1 of 20 July 2005

[104] The 16 countries are Australia, Canada, Chile, China, Chinese Taipei, Cuba; Japan; Malaysia; New Zealand; Norway; Saudi Arabia; South Africa; Switzerland; Thailand; Turkey; USA. (see above table)

[105] The 35 Countries are - Extra-EU; United States; Japan; China; India; Hong Kong; Singapore; Korea; Switzerland; Canada; Norway; Australia; Russian Federation; Chinese Taipei; Thailand; Turkey; Malaysia; Brazil; Israel; Egypt; Mexico; Macao(China); Ukraine; South Africa; Croatia; Lebanon; Indonesia; Morocco; Argentina; New Zealand; Chile; Cuba; Saudi Arabia; Philippines; Kuwait. The countries have been listed in descending order of their rank in the table on 'Leading exporters and importers in world trade in commercial services (excluding intra-EU (27) trade), 2007'. Table 1.11, available at page number 15 of the 'World Trade Statistics 2008'

[106] The countries are Argentina; Australia; Canada; Chile; China; Chinese Taipei; Columbia, Japan; Malaysia; New Zealand; Norway; Oman; Saudi Arabia; Switzerland; Thailand; Trinidad and Tobago; USA; Vietnam. (see above table)

[107] Extra-EU; China; United States; Japan; Canada; Republic of Korea; Russian Federation; Hong Kong; Singapore; Mexico; Chinese Taipei; Saudi Arabia; Malaysia; United Arab Emirates; Switzerland;

Thus the major conclusion that emerges from this table is

a. 21 countries out of 62 that play a role in world trade either through merchandise export or exports of commercial services have entered legal services commitments. This comes to a ratio of roughly 33% of leading trading nations have entered legal services commitments.
b. Out of these 21 countries that have listed legal services commitments, only 8 countries rank above India as a trading nation in either or both of the two heads – commercial services/merchandise exports
c. Out of the countries ahead of India, in commercial services exports – China, USA and Japan, two are developed countries and China is a rapidly growing country
d. Out of the above three countries – the USA and Japan have entered complicated services commitments for legal services. China, as it entered late into the WTO framework, cannot be compared with the other two.
e. Most of the countries have entered reservations regarding trade in legal services under mode 3 and 4, effectively narrowing the scope of liberalisation
f. Several members have set out nationality and citizenship requirements or limitations on the type of legal entity. Some members have also scheduled national treatment restrictions, particularly relating to residency requirements.
g. Looking at the commitments that have been offered in 'legal services', it appears that barring Thailand, no other country has offered major legal services commitments.

Brazil; Thailand; India; Australia; Norway; Indonesia; Turkey; Islamic Republic of Iran; South Africa; Bolivarian Republic of Venezuela; Chile; Nigeria; Kuwait; Algeria; Argentina; Israel; Philippines; Ukraine; Viet Nam; Kazakhstan; Libyan Arab Jamahiriya; Qatar; Iraq; Angola; Colombia; Peru; New Zealand; Oman; Belarus; Pakistan; Egypt; Trinidad and Tobago; Tunisia; Morocco; Ecuador. The countries have been listed in descending order of their rank in the table on 'Leading exporters and importers in world merchandise trade (excluding intra-EU (27) trade), 2007'. Table 1.9, available at page number 13 of the 'World Trade Statistics 2008'

[108] Commitments offered by countries have not been included in the analysis.

A leading exporter of commercial services or exporter of merchandise trade implies, a vibrant business executed through companies and other legal forms. The rationale proffered for liberalisation of legal services is that liberalisation of legal services encourages investment and hence helps in the growth of the economy. The table above does not prove the contention. Quite a large number of major trading nations have not entered legal services commitments. Second, the large number of reservations and restrictions placed by the countries that are above India as trading nations render the entire commitments meaningless.

The conclusion that comes from this study is entry of commitments under the legal services doesn't leads to a huge impact on the growth of trade and economy. Further in terms of liberalisation of legal services the stated purpose of which is the stimulating growth in the commercial relations across the world, the developed world fairs poorly when the liberalisation under the GATS framework is taken into account. Secondly, if the argument is accepted that the liberalisation of legal services leads to increase in trade and investment, the data should have pointed towards a more liberalised legal services markets of the developed economies and arguably it is not so. Third, in view of pressure being mounted on India, to liberalise its legal services sector, it becomes a question to be asked why India should do so when the major countries have not opened their markets to any significant extent.

2. GATS Provisions on Domestic Regulation and Recognition

From the aspect of liberalisation of legal services, it is necessary that there should be harmonisation as regards the qualification requirements and legal education of the professionals in various states. This requires that the states should develop modalities or disciplines which would provide the requirements for the licensing of the legal professionals in various states.

> Cross-border legal practice requires some convergence in legal education, professional qualifications, access requirements and licensing of foreign lawyers (Gromek-Broc 2007: 200)

The above requirement seems to be satisfied by GATS article VI and VII. Article VI, para 4, requires that the members should through appropriate bodies it may establish, develop necessary disciplines for the purpose of the attaining the objective of providing the modalities as to the licensing requirements of cross-border movement of professionals. Similarly article VII provides for the recognition of foreign degrees and qualifications of a member country in a different country. It provides that the recognition could be provided autonomously or it may be achieved through harmonisation or otherwise and may be based upon an agreement or arrangement with the country concerned. It further directs that the members shall work with the relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.[109]

Thus in tune with the mandate granted by article VI, para 4 of the GATS agreement the GATS ministers issued a "Decision on Professional Services". This decision directed the Council on Trade in Services to create a Working Party on Professional Services and to begin its efforts to develop disciplines by focussing on the accountancy sector. The Working Party on Professional Services (WPPS) issued disciplines for the domestic regulation of the accountancy sector[110], which was adopted by the Council on Trade in Services in 1998. The disciplines on accountancy sector gave recommendations as regards the transparency, licensing requirements, licensing procedures, qualification requirements; qualification procedures and technical standards. The accountancy disciplines were communicated to the International Bar Association in 2002 and their response sought. The IBA after deliberation forwarded certain suggestions to the WTO secretariat which suggested certain amendments to the disciplines on domestic regulation of accountancy sector.

> The IBA 2003 accountancy resolution did not address the question of whether additional 'Disciplines' were necessary or what their content would entail. The

[109] Article VII para 5 of GATS

[110] WTO, Disciplines on Domestic Regulation in the Accountancy Sector, Council for Trade and Services, S/L/64, 17 December 1998)

proposed seven changes were acknowledged in exhibit B (explanatory memorandum) of the 2003 resolution. IBA suggested a modification of article II(2) expanding 'legitimate objectives' by providing additional examples particularly relevant in the context of legal services, including the protection of confidentiality and professional secrecy, independence, and the avoidance of conflicts of interests. Furthermore, article II (2) needs an additional language to ensure that the WTO appellate body treats legal service measure similarly to the health and safety measure. This means giving the WTO member state the highest possible discretion.

Article III (3) should expand transparency requirements to lawyer licensing and discipline whereas article III (4) as a matter of clarity should add to 'technical standards' ethical rules and rules of professional conduct. In relation to article IV, the IBA recommended three changes. Article IV (8) should clarify the understanding of 'qualification' and 'licensing' and their connection with the previous IBA terminology: the 'full license' and 'limited license'. Moreover article IV (12) should oblige the WTO member states to recognise any pension, social security schemes or insurance that lawyers have acquired in another member state. Article VI (19) requires an additional explanation that both 'full license' and 'limited license' systems could impose qualification requirements. Article VI (last sentence) was recommended for deletion due to its confusing nature with regard to qualification examinations. (Gromek-Broc 2007: 203)

The 'UNION INTERNATIONALE DES AVOCATS', found that accountancy disciplines are not applicable to the legal services because of the inherent difference in the nature of the two services and therefore advocated a separate discipline for legal services and for this it suggested that the Working Party on Domestic Regulation should also consider the interests of the clients while framing the discipline (UIA 2004)

The position of the national bars was also hostile to the application of accountancy disciplines to legal profession. The position of the Canadian bar, for example, emphasised the independent nature of the legal profession which needs to stay away from the state in order to maintain the independence (CBA 2004; Paton 2003: 395). Similarly the law society of England and Wales took the position that the disciplines for the legal sector should be developed independently and that the disciplines of other sectors should not be imposed upon it. (Gromek-Broc 2007: 209)

Present Position as Regards the Development of Disciplines Relating to the Legal Services Sector

After the communication from the IBA to the Council on Trade in Services, the ministers passed a resolution in the Hong Kong Ministerial meet where it was decided that the members shall develop disciplines on domestic regulation before the end of negotiations. This meant that the WTO members had agreed to reach agreement on GATS track 2 negotiations by December 2006 (Terry 2006: 28). Several documents were submitted by the member states as for negotiations on disciplines. The documents dealt with the negotiations of horizontal disciplines for the professional services and offered several proposals. These proposals have been compiled in the informal note on disciplines on domestic regulation pursuant to gats article VI:4 prepared by the chairman (WPDR 2008) Only Australia (WPDR 2005) submitted specific proposals related to the development of disciplines related to the legal services sector. According to Terry (2006), the negotiating proposals of Australia, resembled the International Bar Association (IBA) WTO discipline resolution. Thus the negotiations are still continuing on the development of disciplines for the professional services, without any result so far.

3. Other Sections of GATS Relevant to the Trade in Legal Services

From the point of view of liberalisation of legal services in the context of developing countries three provisions of GATS are important. The first provision is article IV of GATS, the second is article XIX and the third is article XXI of GATS.

Article IV provides for the increased participation of developing countries in world trade and says that their participation shall be facilitated through negotiated specific commitments, inter alia, by the liberalisation of market access in sectors and modes of supply of export interest to them. It further provides that for the benefit of developing countries, the developed countries shall facilitate the access of the developing country members service suppliers to information, related to their respective markets, concerning registration, recognition and obtaining of professional qualification.

Article XIX provides for progressive liberalisation of services. It provides for the liberalisation through successive rounds of negotiations starting five years after the entry into force of the WTO commitments and that such negotiations will be directed towards the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. The article says that the purpose of progressive liberalisation would be to promote the interests of all the participants on a mutually advantageous basis and to secure an overall balance of rights and obligations. It further provides that there shall be appropriate flexibility for individual developing country member for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign services suppliers, attaching to such access conditions aimed at achieving the objectives referred to in article IV, which provides for increased participation of developing countries.

The third provision that concerns developing country is article XXI of the GATS agreement. This article provides that members can modify commitments once entered only after three years have elapsed from the date on which the commitments had entered into force. Before withdrawing or modifying a proposed commitment, the member has to enter into negotiations with the member affected, for reaching an agreement for any necessary compensatory adjustment. These compensatory adjustments have to be made on a most favoured nation basis. The article further says that if an agreement is not reached between the member affected and the modifying member as to the compensatory adjustment, the matter shall be referred to arbitration. The article provides the penalty that if the member modifies or withdraws its commitments and does not comply with the finding of the arbitration, the affected member may modify or withdraw substantially equivalent benefits in conformity with those findings.

The implication of the articles and its impact on the developing countries presents a very anomalous picture. On one hand the article guarantees policy space to the developing countries, but on the other hand, it takes away what it gives through article IV. Developing countries through their low level of development cannot fully appreciate the impact (Yen 2003) which liberalisation of their service sectors will have on their

economies and in the legal services on their national character of law as well. Further while article XIX provides that the flexibility to which the developing countries are entitled should be kept in view in negotiations but experience suggests that this is not the case as very heavy demands are made on developing countries for opening up their sectors (Yen 2003).

4. Conclusion

The purpose of this chapter was to understand the liberalisation of legal services under the GATS agreement. This was sought to be accomplished by taking a look at the general provisions dealing with the liberalisation of services, following it with specific provisions having an impact on legal services and finally with looking at the provisions affecting the obligations of the developing countries. The analysis of the three categories of provisions along with an empirical analysis of the value of commitments entered by the member states of WTO, for the purpose of liberalisation of legal services has presented a dark picture. There have been very few commitments in legal services sector, which actually tend to liberalise the sector, the development of disciplines is still at the negotiating stage and the provisions of WTO make the consequences of hasty commitments very onerous, in the terms that withdrawal from those commitments is extremely difficult. In the light of the above aspects, it is inadvisable for developing countries to adopt the WTO/GATS route for the liberalisation of legal services sector.

The next chapter seeks to discuss the experience of liberalisation of legal services through the RTA/FTA route.

CHAPTER IV

LEGAL SERVICES TRADE UNDER RTA/FTA FRAMEWORK AND AUTONOMOUS LIBERALISATION

CHAPTER IV

TRADE IN LEGAL SERVICES IN THE CONTEXT OF REGIONAL/BILATERAL AGREEMENTS AND UNILATERAL TRADE LIBERALISATION STRATEGY

The main concern of this chapter is to evaluate the impact of opening up of legal services outside the framework of WTO/GATS. An examination of the Regional/Bilateral and unilateral modes of liberalisation is necessitated by the fact that the GATS framework as evaluated in the earlier chapter has not been found suitable for the purpose of liberalisation of legal services. This examination has also been encouraged by the fact that a large number of countries are jettisoning the WTO framework in favour of liberalisation through the Regional Trading Agreements (RTA)/ Free Trade Agreements (FTA) route. The total numbers of RTA/FTA that have been notified or are under consideration have seen a phenomenal jump in recent years (Lamy 2007). Though the number of RTA/FTA agreement have seen a phenomenal jump in recent years, yet there are certain that suggest that if countries went ahead and opened their services markets unilaterally, they would gain almost as much as under a multilateral agreement (OECD 2005). In the light of the above it is necessary to evaluate the mode through which the legal services should be liberalised – RTA/FTA or Unilateral Liberalisation. Accordingly this chapter tries to study the suitability of RTA/FTA and Unilateral mode of liberalisation, for legal services liberalisation, in the following sections.

Section 1 studies the different RTA/FTA in which the legal services have been liberalised. It takes a look at the provisions of the RTA/FTA and seeks to evaluate the extent of liberalisation that has been achieved under them by examining the relative commitments entered into by the participating nations. Section 2 identifies the experience of bilateral trade deals as regards the liberalisation achieved under the RTA/FTA framework. Section 3 takes a brief look at the suitability of autonomous liberalisation. Section 4 finally offers conclusion of the chapter.

1. A Study of Various RTA/FTA with respect to Legal Services

This section seeks to provide an analysis of the provisions relating to the liberalisation of legal services through the RTA and FTA entered into between the different countries. The basis for looking at the RTA and FTA, which are entered into by different countries, is their economic development. Thus the following settings are used for the purpose-

a. Developed – developed countries
b. Developed – developing countries
c. Developing – developing countries

An analysis of the regional trading agreements and bilateral trading agreements is necessary, first, to understand whether the regional and bilateral trade agreements fare better as compared with the GATS liberalisation modes and second, to find out as to what relative differences can be noticed in regional trade agreements entered between different groups, such as, between developed and developed countries; developed and developing countries; and among the developing countries. On the basis of present analysis of the liberalisation modes under the RTA/FTA, the conclusion is to be drawn as to whether the liberalisation of legal services should proceed under the RTA/FTA mode or alternatively, under the unilateral mode. Under the first group, i.e., developed –developed countries it is supposed to examine the agreement between US-Australia FTA, while under the second group, i.e., the developed and developing countries group the agreements examined are as follows-

a. NAFTA (US – Canada – Mexico)
b. US – Bahrain
c. US – Panama
d. US – Chile
e. US – Singapore
f. Australia – New Zealand – ASEAN

The reason for examining different bilateral trade agreements is to exclude the possibility of any bias that may develop due to the examination of agreements of a single country. For the Developing – Developing countries group, the RTA/FTA included in the examination are the following:

a. MERCOSUR
b. ASEAN

Developed – Developed country FTA

This section discusses the FTA between United States of America and Australia

United States of America and Australia

The primary feature that emerges in the US – Australia FTA[111] is the negative list approach of the FTA as against the positive list approach of GATS. The negative list approach posits that all services are automatically liberalised unless the non-conforming measure is notified under Annex I or is notified under Annex II. Notification in Annex I makes the existing non-conforming measure immune from the obligations of agreement, while notification in Annex II allows a party to maintain existing, or adopt new or more restrictive measures that do not conform with obligations imposed by certain provisions of the agreement, chiefly among them being National treatment, market access, MFN and local presence requirements

The other notable feature that emerges in the US – Australia FTA is extending the scope of the agreement much beyond the GATS and adding provisions to it that make liberalisation mandatory. The scope of the agreement encompasses production, distribution, marketing, sale, and delivery of a service; purchase or use of, or payment for, a service; access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service; presence in its territory of a service supplier of the other Party; and provision of a bond or other form of financial

[111]Chapter 10 and Annex 10-A of the US-Australia FTA

security as a condition for the supply of a service[112]. On the other hand the liberalising provisions in the FTA are more onerous than GATS in that restrictions cannot be imposed on the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test; on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; on the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test[113]. The agreement further prohibits the maintaining of the specific type of legal entity or joint venture or the requirement of having local presence in the territory as a condition for cross border supply of service.

In the United States of America- Australia FTA, both the US[114] and Australia[115] have made reservations mandating that all regional non-conforming measures with respect to National Treatment, MFN and local presence requirements shall not be subject to the obligations imposed by the provisions of the agreement. Further reservations have been made by Australia imposing requirements of residency and commercial presence on legal practitioners who wish to practice as patent attorneys[116]. Similarly, USA has made reservations with regards to practice before USPTO. The reservations listed by USA in Annex I provide that a patent attorney should be a US citizen or an alien lawfully residing in USA. Further, it lists the condition of reciprocity for foreign citizens who wish to practice before the USPTO and limits such practice only to the presenting and prosecuting of patent applications of applicants located in the country in which he or she resides.[117]

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[112]Chapter 10, article 10.1 of the US-Australia FTA
[113]Chapter 10, article 10.4 of the US-Australia FTA
[114]Annex I to the US-Australia FTA, (ANNEX I-UNITED STATES-12)
[115]Annex I to the US-Australia FTA, (ANNEX I –AUSTRALIA-1)
[116] Annex I to the US-Australia FTA ,(ANNEX I –AUSTRALIA-7)
[117]Annex I to the US-Australia FTA, (ANNEX I-UNITED STATES-11)

With respect to domestic regulations, the agreement provides that the parties shall amend the provisions of the chapter related to domestic regulations on the entry into force of negotiations held pursuant to GATS article VI:4 or pursuant to negotiation under another international forum to which both the States are parties[118].

Developed – Developing Countries RTA/FTA with Respect to Liberalisation of Legal Services

NAFTA[119] (USA, CANADA, MEXICO)

NAFTA signed in 1992 is generally the structure on which the free trade agreements of the USA are based. Thus US – Australia follows the general structure of NAFTA with some deviations. However NAFTA incorporates provisions on foreign legal consultants which are not present in any other agreements examined. The provisions relating to foreign legal consultants provide that national of a party, who is authorised to practice, is permitted to practice the law of his home country in a foreign State. Further requirement in this regard is the development of standards and criteria for the authorisation of foreign legal consultants to practice and also to make provisions for the determination of form through which the lawyers are authorised to practice in its territory[120]. The agreement also requires the elimination of any citizenship or permanent residency requirement set out by a party in its Schedule to Annex I for the purpose of licensing or certification of professional service providers of another Party.[121]

Reservations have been made by USA, Canada and Mexico with regards to legal services liberalisation. The reservations of USA says that the lawyers of the other countries shall be allowed to provide foreign legal consultancy in the respective States that allow such practice, thus, bringing in, effectively, regional limitations into the framework. Similarly, the reservations designed by Canada are to the same effect[122]. Mexico makes the reservation that the lawyers licensed to practice in the other two States

[118]Chapter 10, article 10.7 of the US-Australia FTA
[119]Chapter Twelve of NAFTA: Cross-Border Trade in Services
[120] Annex 1210.5 Section B of NATA
[121]Article 1210:3 of NAFTA
[122]Annex VI to NAFTA (Miscellaneous commitments), Schedule of USA and Schedule of Canada

will be allowed to practice in Mexico, only if the Mexican lawyers are allowed in the other two States[123]. Further, both USA and Mexico have reserved the right to adopt or maintain any measure in respect of legal services, including foreign legal consultancy services, with regard to the persons of other State.[124]

Bilateral agreements of the USA with developing countries

The other agreements considered here are the US- Bahrain FTA[125], US – Chile FTA[126], US – Panama FTA[127] and US – Singapore FTA[128]. All the agreements follow the pattern of US-Australia FTA, except for elimination of the provision of "presence in its territory of a service provider of another Party", under the scope and coverage of the agreement.

As regards reservations, USA has consistently made the same reservations in every treaty examined here. In every such treaty provisions are made that the legal practice before USPTO would be subject to reciprocity provisions and that the foreign lawyers can only represent the case of their nationals before the USPTO. It has also enacted reservations that all regional non – conforming measures with respect to National Treatment, MFN and local presence requirements shall not be subject to the obligations imposed by the provisions of the agreement, and the US also reserves the right to adopt or maintain differential treatment with countries with which agreement had been entered into prior to the entry into force of the said FTA agreement.

On the other hand, although the partner countries of the USA have made reservations, but no blanket reservations have been provided. Generally reservations are specific, such as, provisions relating to the recognition of decrees, right of representation, etc. An analysis of the US FTA with other countries is presented in table 4.

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[123]Annex VI to NAFTA (Miscellaneous commitments), Schedule of Mexico
[124]Annex II to NAFTA (Reservations for Future measures) – Schedule of USA and Schedule of Mexico
[125]US-Bahrain FTA Chapter 10 and Annex 10-B
[126]US- Chile FTA Final Text, Chapter 11, Cross border trade in services, Annexes I and II
[127]US-Panama FTA - Cross-border trade in services, Annex I and II
[128]US-Singapore FTA – Text of the agreement, Annex 8A and Annex 8B

Table 4: The reservations entered by USA and partner countries in their trade agreements

S. no.	FTA/Countries[129]	Features	Reservations entered
1.	NAFTA (USA (U), Canada (C) and Mexico (M))	Negative list FLC	A (U & M), P, R(M)
2.	US (U) –Australia (A) FTA	Negative List	Pa, R (U) AE[130]
3.	US (U) Bahrain(B) FTA	Negative list	N (B), FLC (B), Pa(U), AE(U) DT(U&B)
4.	USA (U) –Chile (C) FTA	Negative List	N (C), FLC (C), Pa(U), AE(U) DT(U&C)
5.	USA (U)-Panama (P) FTA	Negative List	N (P), FLC (P), Pa(U), AE(U) DT(U&P)
6.	USA (U)-Singapore (S) FTA	Negative List	L (S), F (S), Q (S), Pa(U), AE(U)

Symbols:

A - adopt or maintain any measure relating to provision of legal services, including foreign legal consultancy services, by persons of other state; **AE** – all existing non conforming measures in all states of USA, District of Columbia and Puerto Rico; **DT** – right to maintain differential treatment with countries with whom the country has entered into bilateral or multilateral agreement before the signing of the FTA; **F** – Legal service by foreign lawyers to be provided in other legal forms; **FLC** – Foreign lawyers allowed practicing Home country/International law/Third country law or any of its combinations; **L** – License from authority required. This imposes citizenship and other onerous requirements; **N** – Nationality/Citizenship restrictions; **P** – The laws of the provinces (States in the case of America and Canada, Australia); **Pa** - Patent, trademark and other cases related to the above; **Q** – Qualification requirements are imposed or may be imposed; **R** – Reciprocity (Implying that practice would be allowed to foreign lawyers based on the strict condition of reciprocity);

A glance at the table makes it clear that USA has retained all the existing measure at the regional level and thus has granted nothing in the agreement in the legal services portion. Even the patent practice has been made conditional to reciprocity provisions. On the other hand the partner countries have made substantial commitments in the agreements. This may be due to the reason that commitments by the USA in other sectors have been exchanged with commitments by other countries in legal services sector.

[129]The Alphabets inside brackets are abbreviations for the countries, the purpose of which is to indicate the reservations entered by the country in the reservations column

[130]Similar for Australia

ASEAN- Australia-New Zealand FTA[131]

The ASEAN – New Zealand – Australia FTA is applicable to measures by the central, regional and the local governments, and the non-governmental bodies in exercise of the power delegated to them by the government bodies. The agreement imposes the obligations of national treatment, market access and most favoured requirement on the lines of the US – Australia FTA, though this agreement doesn't follows the negative list principle. A tabular analysis of commitments undertaken by the countries in the ASEAN – New Zealand – Australia FTA has been presented in table 5

Table 5: Analysis of the legal commitments taken by the member States in the ASEAN – New Zealand – Australia FTA

S.no	Countries[132]	Commitments	Market access[133]				National Treatment[134]			
			1	2	3	4	1	2	3	4
1.	Australia	LAFIM(LL)	N	N	P, E, Np		N	N	N	
		LARSH(FL)	N	N	N		N	N	N	
2.	New Zealand	CPC 861	N	N	N		N	N	N	
3.	Brunei	No legal services commitments								
4.	Singapore	No legal services commitments								
5.	Laos	No legal services commitments								
6.	Cambodia	LAFIM	N	N	N		N	N	N	
		LARSH (CPC 861)	N	N	CO		N	N	N	
7.	Indonesia	LAFIM	N	N	*		N	N	*	
8.	Malaysia	LAFIM	N	N	Co		N	N	N	

[131] Chapter 8 of the agreement establishing the ASEAN- Australia-New Zealand Free Trade Area.

[132] The service commitments of the countries are contained in Annex 3 to the ASEAN- Australia-New Zealand Free Trade Area

[133] The mode 4 reservations are in a separate annex and have not been looked here

[134] The mode 4 reservations are in a separate annex and have not been looked here.

9.	Myanmar	No legal services commitments								
10.	Vietnam[135]	CPC 861	N	N	DL		N	N	N	
11.	Philippines	No legal services commitments								
12.	Thailand	CPC 861	*	N	N		*	N	N	

Abbreviations and symbols: * - commitments unbound; **Co** – Corporation reservations; **CO** – commercial association reservations; **CPC 861** – It refers to the legal services categories listed under the UN CPC 861 classification; **DL** – domestic law advice only in consultation with a Vietnamese lawyer; **E** – Employment restrictions; **FL** – Full License requirements; **LAFIM** – Legal and advisory services in foreign law and international law (It includes legal arbitration, conciliation and mediation); **LARSH** – Legal advisory and representational services in domestic law; **LL** – Limited license requirement; **N** – None; **Np** – Natural person restrictions; **P** – Partnership restrictions;

As it is evident from the above table, the developed countries in the FTA, Australia and New Zealand have entered legal services commitments that tend to liberalise legal services in their jurisdictions. Among the ASEAN nations only Cambodia has entered relatively significant legal services commitments. Among the ASEAN countries, the countries that have entered legal services commitments have generally opened up their legal service sector for international and home country law, under which category Australia (developed country) has imposed certain reservations.

What stands out is the legal services liberalisation of New Zealand, but New Zealand has already liberalised its markets through unilateral liberalisation and hence is not bargaining for access to new markets through removal of limitations in its service sectors in the negotiations.

In the case of ASEAN- Australia-New Zealand FTA, it is observed that the developing countries have not entered significant commitments related to legal services, while the developed countries have entered significant commitments. This is exactly opposite to the observation of the US FTA's with developing countries, where the USA did not enter significant commitments to liberalise legal services, while the developing countries had entered commitments to liberalise legal services. This table then forces the conclusion that a trade agreement of developed country or countries with a regional

[135]Excludes participation in legal proceedings in the capacity of defenders or representatives of their clients before the courts of Viet Nam; - legal documentation and certification services of the laws of Viet Nam)

grouping may be better positioned to tackle the pressures of opening up of the sectors which the parties realise as not being in their interests. A regional grouping is further fortunate in the regard that it presents a larger market and a bigger trade volume and thus makes it a strong in negotiations.

Analysis of Developed-Developing Countries RTA/FTA on Liberalisation of Legal Services.

The study of FTA's of USA with developing countries and the study of RTA of Australia and New Zealand produces the result that where the agreement is between a developed country and a developing country, the developing country has liberalised more in legal services than the developed country, while where the agreement is between a developed country and a regional grouping of developing country, the regional grouping has been able to resist the pressure of liberalising of legal services. The conclusion that may be derived from the above study is that a developing country should enter into an FTA with a developed country only within the framework of a regional arrangement.

Developing – Developing Country RTA

In this section two RTAs are being discussed

a. MERCOSUR
b. ASEAN

MERCOSUR[136]

The MERCOSUR protocol on services is quite different from the agreements detailed above. It provides the scope of the agreement applies to supply, purchase of, payment for or utilization of a service, access and utilization, upon supplying of a service and the presence of business persons. However, it completely excludes government services from the scope of the agreement. It provides the same definition of market access and national treatment as in the US – Australia FTA, but differs in the definition

[136]MERCOSUR Protocol on Services

of MFN, where it says that the provision is not applicable to concessions to bordering states, the purpose of which are to facilitate exchanges limited to contiguous border areas, of services that are produced and consumed locally. As like the GATS, the MERCOSUR protocol provides it as a positive list agreement where the obligations related to market access and national treatment apply only to those services listed on the schedule.

An important feature of the MERCOSUR protocol on services is the general exception provision which incorporates a very important safeguard in terms of allowing the member States leeway where the trade regime starts affecting the member State. It says that nothing in the protocol shall be interpreted as impeding a member State from adopting or applying measures necessary to protect the morals or maintain public order, necessary to protect the lives and health of people and fauna or to preserve the flora, necessary to assure the observance of the law and of regulations that are not incompatible with the terms of the present protocol including those relative to preservation of practices that fosters errors and fraudulent practices, protection of privacy of persons and for security

Another feature of the MERCOSUR protocol is complete exclusion of government contracting of services which is not for commercial resale and also allows the introduction of new regulations, unhindered by national treatment and market access obligation so long as they do not annul or prejudice the emerging obligations of this protocol and specific commitments. Thus MERCOSUR allows the leeway necessary to a government for taking on developmental projects. Legal services is conspicuously absent in the protocol on services. It thus appears that legal services do not play a big role in the services trade in MERCOSUR.

The conclusion that can be derived from this is that legal services liberalisation is not particularly important for a grouping of developing countries. The reasons that could be suggested for this is that either the legal framework of the countries have not developed to an extent to provide them with the confidence that they may enter into liberalisation; the second reason could be that the intra-regional commercial activities have not developed to such an extent where the need for legal services liberalisation is

felt. A third reason could be that the laws of developing countries are still geared up to provide for development of the societies and thus give less importance to commercial relations. However, it is evident from the study of MERCOSUR that legal services liberalisation is not important for the grouping of developing countries.

ASEAN Framework Agreement on Services

The framework agreement on services calls for liberalisation of trade in services in a substantial number of sectors within reasonable time frame by eliminating substantially all discriminatory measures and market access limitations and prohibiting new or more discriminatory measures or market access limitations.[137]

The provisions of ASEAN framework agreement on services provides leeway to the member countries in the form of proviso that the negotiations shall be directed towards achieving commitments which are beyond those inscribed in the members' schedule but provisions of this agreement shall not be so construed as to prevent any member state from conferring or according advantages to adjacent countries in order to facilitate exchange limited to contiguous zones of service that are both locally produced and consumed.[138]

Table six in tabular method provides the commitments entered by the ASEAN countries. The various parameters of evaluation are provided in the table and against those parameters the commitments of the ASEAN member countries have been evaluated

[137]Article III of the ASEAN framework agreement on services.
[138] Article IV:3 of the ASEAN framework agreement on services.

Table 6: Legal services commitments of the ASEAN member states[139]

S.no	Countries		Rank on Trade index [140][141]	Market access				National treatment				Notes	GATS commitments
			Modes	1	2	3	4	1	2	3	4		
1.	Cambodia(6th[142])	CPC 861	LDC	N	N	*	*	N	N	N	*	R, F	
		FLC		N	N	N	*	N	N	N	*		
2.	Indonesia(6th[143])	CPC 861	Dvg	N	N	*	* [144]	N	N	*	* [145]	R, E	
3.	Malaysia (6th[146])	FLC	Dvg	N	N	*	*	N	N	N	*	Co [147]	Yes
4.	Thailand (6th[148])	CPC 861	Dvg	*	N	N	*	*	N	N	*		Yes
5.	Vietnam [149]	CPC 861	Dvg	N	N	* [150]							

Symbols: * - Indicates commitments/unbound. Under Mode 4, it means unbound except as indicated in the horizontal section unless indicated otherwise through footnotes; **Dvg** – developing country; **E** – Employment restrictions; **F** – Restriction on association with firms; **FLC** – It implies advisory and or representational services in International law, third country law and home country law or its various combinations; **LDC** – Least developed country; **N** – None; **R** – Restriction on representation;

[139]The member states in the ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam

[140]ASEAN countries accounted for 12 per cent of total commercial services exports and 5 per cent of imports.

[141]ASEAN, show a less pronounced integration, with only 25% of trade being Intra ASEAN

[142] Indicates package in which the commitments were made

[143] Ibid

[144] Cannot represent in courts

[145] Can be employed only as employees and they have to transfer legal knowledge and professional capabilities

[146]Indicates the package in which the commitments were made

[147] Incorporated in the territory of Lauban

[148]Indicates the package in which the commitments were made

[149] Complete exclusion from practice of Vietnamese law, legal proceeding and documentation and certification services

[150]Commercial presence through foreign lawyer organisation – subsidiaries, Foreign law firms partnerships

In the case of ASEAN, only five members out of the grouping of ten have entered legal services commitments and the commitments that have been entered do not go very far in the liberalisation of legal services under the ASEAN framework. In general, the members that have liberalised legal services have not entered any commitments under the modes 3 and 4 in the market access column. Thus the position of legal services liberalisation in ASEAN forces one to draw the same conclusions as with regard to MERCOSUR, and it become certain that for developing countries, liberalisation of legal services is not a very serious matter. The developing countries lay more emphasis upon the national character of law rather that upon its role as the facilitator of commercial services.

Analysis of the Impact of MERCOSUR and ASEAN on the Liberalisation of Legal Services

Intra ASEAN trade is a quarter of the total trade which goes through ASEAN. This compares poorly with EU and NAFTA, where the percentage of intra RTA is 68%[151] and 51%[152], respectively. On the other hand trade in the intra RTA trade in the Andean community is 8%[153], while in MERCOSUR it is 14%[154]. This proves that the developing countries when they enter into RTA do not have that integrated a market as that where developed countries are involved.

This analysis has ramifications for the legal services trade. The rationale that is advanced for legal services is that it will help foster growth since the investor would be more confident while investing in the country. The data for the three RTA given in paragraph above indicates that intra RTA trade is not important compared to extra RTA trade. This extra RTA trade would be with the world at large. This very outcome defeats the logic of opening up legal services in an RTA. Opening up of legal services are fraught with certain risks as the legal services have a cultural angle too. Thus to open legal

[151] International trade statistics 2008 data, page number 3
[152] International trade statistics 2008 data, page number 3
[153] International trade statistics 2008 data, page number 3
[154] International trade statistics 2008 data, page number 3

services in an arrangement which does not has an impact on the trade does not spells itself as a wise move.

Further the commitments that are visible for legal services in the case of ASEAN member countries are conspicuous in the exclusion of domestic laws of the country in the ASEAN member States. Similarly with MERCOSUR, the member States have not entered into any legal services commitments

With intra ASEAN trade a quarter of total trade, the opening up of legal services cannot be called a move which will have a huge impact on the trade that is being transacted. However the situation could be different in the case of NAFTA and EU, where the intra RTA trade constitutes a major percentage of the total RTA trade. A move to liberalise the legal services will definitely enhance the integration of the markets.

2. Experiences of the Bilateral Trade Deals

Experience of bilateral trade deals shows that most trade agreement brings developed and developing countries together. The US-Australia PTA is the only one signed between developed countries. Agreements between developing and developed countries are more common. Trade agreement, involving at least one developed country tends to include service component, while the majority of Trade agreement between developing countries include no service commitments.

A general study of the bilateral trade deals shows that USA generally uses negative list approach in its trade deals and it gets the best deal in all the Preferential trading agreements it enters. Second the conclusion that appears is while most of the largest countries have involved in services PTA's, they do not have PTA's amongst themselves (i.e. China, United States of America, Japan, EC and India). To this day, the multilateral system still remains the main avenue for these countries for resolving service trade issues and negotiating future disciplines. The third implication that appears from the bilateral deals is that while the larger countries tend, overall, not to go as far beyond

GATS, the smaller economies, especially developing ones, go much farther than their commitments in GATS. The other implication is that the smaller countries feel their interests' lies in the seeking preferential access of commodities trade and as a result of which the most protected services activities in larger, especially developed countries remain, despite some improvement on the fringes largely unaffected by the PTA's (Roy et al 2006)

Reasons Why Countries Prefer FTA to Multilateral Trading Agreements

The bilateral deals are less complex as compared to the multilateral trade deals, the smaller countries are able to perceive commercial gains more clearly in bilateral deals than the multilateral deals. The disappointment over Doha regime and concern about free riding also prove to be factors guiding the countries towards the bilateral trade deals. (Roy et al 2006: 56)

The Drawbacks of Free Trade Agreements of the Developing Countries with the Developed Countries

There are several drawbacks, which developing countries suffer while entering into an FTA with a developed country. Chief among these are push agenda, whereby the developed countries insist upon the observation or implementation of rules relating to competition and investment; stricter IPR regime and bringing labour and environmental standards into the trading regime. (Ranjan 2006). The RTA's/FTA's thus tend to reduce the policy space available to developing countries and push liberalisation much farther than is possible under Multilateral Trade negotiations (Pal 2008: 83)

Countries like the US and EU have initiated a large number of bilateral and RTA's with developing countries. The markets of the developing countries have traditionally been big markets for developed countries and this situation is utilized by developed countries, which are keen to secure better market access or retain the existing market access, to enter into FTA's with developing countries (Pal 2008: 83). However Pal in his paper (Pal 2008) did not find any evidence for supporting the hypothesis that

there is a positive correlation between increased market access to developed countries and FTA's.

In the case of North-South agreements higher restrictions are imposed on developing countries and the developing countries are forced to adopt more "market-friendly" approach in areas, such as, Trade and investment (Pal 2008: 91), which results in greater freedom to market forces (UNCTAD 2007). This leads to a serious impact on industrialisation and growth of the economy of the developing countries and also imposes constraints on the policy space available to these developing countries (Pal 2008: 91)

Further in the case of north south trade it is developing countries that are made to adjust their standards to those of developed countries regardless of whether they are appropriate to their conditions or not and when deep integration between two economies with uneven bargaining power is attempted, penetration generally results in being one way (Bhagwati 1994). NAFTA is an example of deep integration where penetration is achieved by United States of America into the Mexican markets and not the other way round (Lawrence 1996). Fred Bergsten who championed the cause of NAFTA has said that under NAFTA US made no concessions to Mexico while she got every concession she sought (Bergsten 1997: 26).

The FTA's after having already opened up markets weaken the power of developing countries in the Multilateral Trade Negotiations (Bhagwati and Panagriya 1996), and thus weaken the alliance between developing countries. On the other hand the gains that countries may be looking for in their endeavour to enter into a FTA/RTA with the developed countries may be transient or minor (Ghosh 2004). Further, there is another aspect to RTA's where a hegemonic power is likely to gain a greater payoff by bargaining sequentially with a group of non-hegemonic powers than simultaneously. (Bhagwati 1994)

3. Autonomous Liberalisation

From the above going argument it becomes evident that the best way to liberalise is take the route of autonomous liberalisation. Evidence suggests that autonomous liberalisation has a beneficial effect on the entire economy. The unilateral liberalisation taken by ASEAN – 5 countries outside the ASEAN framework in the late 1980's united the ASEAN members in Economic Cooperation and contributed to increased intra-ASEAN trade flows (Imada 1993, Ariff 1994, Kettunen 1998). Certain OECD documents suggest that if countries went ahead and opened their services markets unilaterally, they would gain almost as much as under a multilateral agreement (OECD 2005).

Recently autonomous liberalisation got renewed attention when the Council for Trade in Services on 6 March 2003 agreed to adopt the modalities for the treatment of autonomous liberalisation[155]. The modalities provide that the autonomous liberalisation measure should be compatible with the MFN clause, and should be subject to scheduling under part III of GATS and/or lead to the termination of an MFN exception. The liberalising member should be liberalising the sector unilaterally since previous negotiations, in accordance with the article XIX of GATS and should be applicable to all or some service sectors.

The guidelines also give directions regarding the procedure for accessing the value of the liberalising proposal. For this a member may use the certain illustrative criteria as set out in the guidelines. To make an assessment of the value of the liberalised measure, the guidelines say that the members may use both qualitative and quantitative approaches. The liberalising measure neither guarantees any right for credit, nor implies any obligation on the part of the liberalizing Member to bind the notified measure. It provides the ways under which the credit may be sought and provides that the credit may take the form of

a. a liberalization measure to be undertaken by a trading partner in sectors of interest to the liberalizing Member under the GATS,
b. refraining from pursuing a request addressed to the liberalizing Member, or

[155]Modalities for the treatment of autonomous liberalization Adopted by the Special Session of the Council for Trade in Services

c. any other form which the liberalizing Member and its trading partner may agree upon

Thus the autonomous liberalisation entered into by the member countries provides that under the guidelines the members shall be given credit for autonomous liberalisation.

Suitability of Autonomous Mode of Liberalisation

Resistance against the unilateral liberalisation generally results from the fact that it appears that the countries are giving market access to foreign nations in return for nothing. However, if the liberalisation of the particular sector is in the benefit of the country, the country should be adopting the approach of unilateral liberalisation. In the case of legal services, where there are three issues at stake, the primary being that the entry of foreign lawyers will help boost the trade confidence in the country, the second being that our legal professionals should be allowed to practice in the foreign country and the third being that the entry of foreign professionals remains confined to aspects of international trade and commercial law alone.

Autonomous liberalisation achieves these results in a very lucid manner. A country can liberalise its legal services keeping its interests in mind. Here India can provide for liberalisation by changing its laws allowing for entry of the foreign professionals in distinct areas of profession under the supervision of the regulator and under the strict condition of reciprocity. Since the country would be liberalising unilaterally, it would be under no compulsion of withdrawing from the liberalisation entered if the liberalisation affects its interest adversely. It would also provide flexibility in the matter of modification or amendment of the laws according to the needs of the developing nation.

4. Conclusion

From the above going discussion it is evident that the trade in legal services is important for developed countries and they have entered into several RTA/FTA with the developed

as well as the developing countries. The RTA/FTA of developing countries with developed countries suffers from the drawback that there is less flexibi flexibility associated with RTA among developing countries is absent, and hence not suitable for developing countries. With regard to India, it becomes obvious that India being a developing country shouldn't enter into RTA/FTA with developed countries and entering into RTA/FTA with developing countries will serve no purpose so far as the objective of liberalisation of legal services is concerned. On the other hand, autonomous liberalisation provides the flexibility required for a developing country like India in opening up its economy and if the liberalisation of a particular sector of the economy benefits the country without the corresponding liberalisation of a different economy as in commodities trade, it is always beneficial to adopt an autonomous mode of liberalisation.

CHAPTER V

THE LAWS OF VARIOUS COUNTRIES RELATED TO THE LEGAL SERVICES

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THE LAWS OF VARIOUS COUNTRIES RELATED TO THE LEGAL SERVICES

The purpose of this chapter is to provide an overview of the laws that have been enacted in different countries for the purpose of liberalisation of legal services sector and providing for the entry of foreign legal professionals in their respective jurisdictions. An analysis of the laws of various countries would give a sense of what the liberalisation of legal services would entail in terms of changes that would be necessary in the legal framework of the country. The chapter examines the laws of the following nations

1. Australia
2. Brunei
3. China
4. Japan
5. Singapore and
6. USA

The choice of the nations has been dictated by the need of providing a representative overview of the countries of the countries that are at the extremes of the spectrum of development. Thus USA, Japan and Australia are developed countries and have entered legal services commitments in the GATS schedule. Singapore is a rapidly developing economy and Brunei is still a slowly developing economy and both of them have not entered legal services commitments in their GATS schedules. China which has recently joined WTO is a special case, as it has been forced to negotiate commitments.

As a spectrum of nations have been chosen it is not possible to provide the structure of liberalisation under one particular head. In general, the areas considered have been the following

1. The Residency requirements
2. The Practice areas

3. The form of legal organisation
4. The period for which the foreign consultants are allowed
5. Domestic qualification requirements
6. Nationality requirements for foreign legal consultants
7. Ethical/Professional rules

The chapter has been divided into three sections. Section 1 describes laws of various countries. Section 2 gives an analysis of the laws of various countries in tabular form while Section 3 offers concluding remarks.

1. Study of Laws of Foreign Countries Related to the Entry of Foreign Legal Professionals

Australia[156]

Requirement of registration

The Australian model rules and regulations[157] impose a general prohibition on the practice of foreign law in Australia unless the practitioner is an Australian registered foreign lawyer or an Australian legal practitioner[158]. Once registered an Australian registered foreign lawyer is permitted to practice the law of those foreign jurisdictions in which a lawyer is appropriately qualified without having to satisfy Australian admission requirements.

Requirements for the grant of registration – qualification requirements

In order to become an Australian registered foreign lawyer[159]

[156] For this section considerable reliance has been placed on the following paper -Foreign Lawyers and the Practise of Foreign Law in Australia - An Information Paper
[157] Legal Profession – model laws project. Model Bill (Model Provisions) 2nd Edition, August 2006 and, Legal Profession – model laws project. Model Regulations 2nd Edition, June 2007
[158] Chapter 2.2.2 of the Model Bill
[159] 2.8.4, 2.8.5 and 2.8.6 of the Model Bill

- The foreign lawyer must be entitled to practice law in foreign jurisdiction, in that the lawyer is properly registered to engage in legal practice in (that) foreign jurisdiction by foreign registration authority of that country;
- The jurisdiction in question must have an effective system of regulating the practice of law; and
- The lawyer must be a fit person to be registered as an Australian registered foreign lawyer.

Areas of practice in which the foreign lawyer can practice law[160]

Once registered an Australian registered foreign lawyer is permitted to practice the law of those foreign jurisdictions in which a lawyer is appropriately qualified without having to satisfy Australian admission requirement. He is entitled to

- Doing work, or transacting business, concerning the law of a foreign country where the lawyer is registered by the foreign registration authority for the country;
- Legal services (including appearances) in relation to arbitration proceedings of a kind prescribed in the regulations;
- Legal services (including appearances) in relation to proceedings before bodies other than courts, being proceedings in which the body concerned is not required to apply the rules of evidence and in which knowledge of the foreign law of the country in which the foreign lawyers is registered is essential;
- Legal services for conciliation, mediation and other forms of consensual, dispute resolution prescribed under the regulation.

The Australian registered foreign lawyer cannot appear in any court (except on his or her own behalf) and cannot practice Australian law in Australia, except when the lawyer is advising on the effect of an Australian law where the giving of such advice is incidental to the practice of foreign law and the advice is based on advice given on

[160] 2.8.6 of the Model Bill

Australian law by an Australian legal practitioner. However, this arrangement does not allow a foreign lawyer to practice foreign law in Australia.

In addition, the Australian legal practitioner so employed (unless employed in a law firm with an Australian-registered foreign lawyer as a partner with at least one or other partner an Australian legal practitioner), must not provide advice on Australian or practice Australian law in Australia in the course of that employment.

The right to use one's firms' name [161]

An Australian registered foreign lawyer may voluntarily enter into a commercial association with host country lawyer and law firms and has the right to use his or her own firm name while practicing in Australia.

The fly-in/fly-out legal practitioners[162]

The Australian law provides freedom from registration for foreign lawyers who come to Australia to act (such as in commercial contracts and international arbitration) for a client without requiring registration in Australia. The period of practice of such lawyer should not be in aggregate be more than 90 days in a period of 12 months. The other requirement that is imposed is that it shouldn't come within the restrictions imposed by the Migration Act, 1958. Such legal practitioner should not maintain an office in Australia nor should he be partner or director of a law practice in Australia.

Designation requirements of an Australian registered foreign lawyer[163]

The lawyer is entitled to the below given designations

- The lawyer's own name;
- The title of the business name the lawyer is authorised to use in a foreign country where he or she is registered;
- The name of a foreign law practice with which the lawyer is affiliated or associated (although the principals of that firm need not be Australian-registered foreign lawyers).

[161] 2.8.9 (b) of the Model Bill
[162] 2.8.4 (2) of the Model Bill
[163] 2.8.9 and 2.8.10 of the Model Bill

However, the law requires that the Australian-registered foreign lawyer must state on all public documents the fact that he or she is an Australian-registered foreign lawyer and is restricted to practice on foreign law.

Professional, ethical and practice standards[164]

Australian-registered foreign lawyers are subject to the same ethical and practice standards (and complaints and disciplinary procedures) in a way they practice foreign law in Australia as those applicable to an Australian legal practitioner practicing Australian law.

Form of practice of an Australian registered foreign lawyer[165]

The forms of practice that are allowed for an Australian registered foreign lawyer are

- On his or her own account;
- In partnership with one or more Australian registered foreign lawyers and/or one or more Australian legal practitioners;
- As a director or employee of an incorporated legal practice or as a partner or an employee of a multi-disciplinary partnership;
- As an employee of an Australian legal practitioner or law firm;
- As an employee of an Australian registered foreign lawyer.

However, the practice of any of these arrangements does not permit the foreign lawyer to practice Australian law in Australia.

Advertisement[166]

Advertisement which might reasonably be regarded as suggesting that an Australian-registered foreign lawyer is an Australian legal practitioner is expressly prohibited (Australian-registered foreign lawyers are prohibited from advertising in the

[164] 2.8.8 of the Model Bill
[165] 2.8.7 of the Model Bill
[166] 2.8.11 of the Model Bill

same way as Australian registered legal practitioner and might reasonably be regarded as "false, misleading or deceptive").

Professional indemnity insurance for foreign lawyers[167]

- he or she must hold professional indemnity insurance that conforms with the requirements for professional indemnity insurance applicable for Australian legal practitioners in any jurisdiction; or
- he or she must have professional indemnity insurance that covers the practice of foreign law in this jurisdiction and that complies with the relevant requirements of a foreign law or foreign registration authority, and, if the insurance is for less than $1.5 million (inclusive of defence costs), he or she must provide a disclosure statement to each client disclosing the level of cover; the foreign lawyer must provide a disclosure statement to each client stating that the lawyer does not have complying professional indemnity insurance, if they do not satisfy either of the two above options.

Brunei

Brunei Darussalam has a dual system, comprising the Civil Courts System and the Syariah Courts System. Conditions for admission to practice in Brunei Darussalam are provided under the Legal Profession Act (Chapter. 132) and the Syariah Courts (Chapter 184) and the Syariah Courts (Syar'ie Lawyers) Rules, 2002.[168]

Brunei is a member of ASEAN[169]. However it provides for the admission of lawyers from other countries besides ASEAN member states. The Legal Professions Act, (Chapter 132, Ed. 2006) has the following provisions with regard to the admission of foreign lawyers in Brunei Darussalam

[167] 2.8. 14 and 2.8.15 of the Model Bill

[168] Chapter 5 – The Legal Profession of Brunei Darussalam. Syariah Courts (Syar'ie Lawyers) Rules, 2002 has been enacted under Section 28 of the Syariah Courts Act (Chapter 184).

[169] The member countries of ASEAN are - Brunei Darussalam; Cambodia; Indonesia; Laos; Malaysia; Myanmar; Philippines; Singapore; Thailand and Vietnam.

Permission of practice to foreign legal professionals and nationality requirements

It allows persons, subject to certain provisions, from the territories of England, Northern Ireland, Scotland, Singapore or in any part of Malaysia and Australia to practice in Brunei[170] The act further provides that only such persons would be permitted to practice in Brunei as are citizens of Brunei or are its permanent residents. However it allows person from United Kingdom, Singapore, Malaysia, Australian State or Territory or in any other country or territory or part of a country or territory in the Commonwealth designated by the Attorney General by notice in the Gazette, provided such a person has been in active practice for at least 7 years immediately preceding such application.[171]

The act further provides for provisional admission to the members, who do not ordinarily reside in Brunei. It says that a person who holds Her Britannic Majesty's Patent as Queen's Counsel and possesses special skill and qualifications for the purpose of the case whether or not such special skill and qualifications are available in Brunei Darussalam can be provisionally admitted. It also provides provisional admission to persons who are entitled to practise before the High Court in Malaysia, Singapore or Hong Kong or in such other Commonwealth country as the Chief Justice may specify. But such persons should not have been admitted in respect of more than two other cases in the current calendar year and possess special skill and qualifications for the purpose of the case which are not otherwise available in Brunei Darussalam.[172]

The act further provides for safeguarding the interest of the domestic lawyers. It provides that if the Chief Justice makes a declaration to the effect that there are sufficient number of lawyers practicing in Brunei Darussalam, the admission of persons of other nationalities other than that of Brunei Darussalam shall be prohibited and the names of the person who are not ordinarily resident in Brunei Darussalam six months after the

[170]Section 3 of Legal Profession act
[171]Section 3 para 2 and para 3 of the Legal Professions Act
[172]Section 7 of the Legal Professions Act

declaration or any other time may be deleted from the rolls on the directions of His Majesty the Sultan and Yang Di-Pertuan in Council.[173]

Qualifications and residency requirements

The Legal Professions Act provides for the qualification of the lawyers practicing in Brunei. It says that only those lawyers can practice in Brunei who have their names on the rolls, have a valid practicing certificate and maintain a place of business in Brunei.[174] Thus the Brunei Law requires residency requirements for practicing in Brunei and allows members from other nations to be able to practice law in Brunei, if they are able to fulfill certain requirements. The residency requirements are not very strict, though where the Chief Justice issues a declaration of sufficiency of the total number of lawyers for Brunei, the registration of foreign nationals becomes automatically prohibited. In conditions where the special skills required for a case is not found in Brunei, lawyers from other nations as given, may be admitted on an ad hoc basis[175].

The practice areas

The advocates and solicitors have the exclusive right to appear and practice in all courts in Brunei Darussalam[176]. Thus if the legal professionals of other countries as stated in the act fulfil the necessary qualification requirements, they are entitled to practice in all areas of law in Brunei Darussalam.

As regards the Syariah Courts, the rules of admission are stricter than the rules for admission into civil courts. Besides fulfilling the conditions of admission prescribed in the Legal Professions Act, it also requires educational qualifications, which require him to be a Muslim, has bachelors degree in Shariah, passed the Syar'ie Lawyer Certificate Examination, has served as a Syar'ie Judge, Kadi or Syar'ie Prosecutor for a period of not less than 3 years and has received professional training in Islamic judicial matters.[177]

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[173]Section 12 of the Legal Professions Act.
[174]Section 18 of the Legal Professions Act
[175] Section 7 (1) (a) (ii) and section 7 (1) (b) (iii) of the Legal Professions Act
[176] Section 17 (1) of the Legal Professions Act
[177] Rule 10 of the Syariah Courts Rules (Syar'ie Lawyers) Rules, 2002

Thus the Brunei Laws do not provide for any additional restriction on the practice in Syariah courts, except the educational qualifications, which could be completed from any educational institution in any country, if it is recognised by the Brunei government.

Form of organisation required for practice

The Law allows sole proprietorship and practice as a partner or employee of a firm of solicitors or advocates[178].

China[179]

China enacted law permitting foreign lawyers to practice in China. The name of the Law is 'Regulations on Administration of Foreign Law Firms' Representative Offices in China'. It was promulgated by the Decree No. 338 of the State Council of the People's Republic of China on December 22, 2001, and effective as of January 1, 2002. The regulation provided for the following rules under the following sub-headings

Professional ethics[180]

The foreign lawyers and law firms shall have to scrupulously observe the professional ethics and practice disciplines of the Chinese lawyers

Liability[181]

The foreign law firms have to assume civil liability for the legal service activities conducted by their representative offices and representatives within the territory of china.

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[178] This appears from the reading of Section 18 (1) (c) of the Legal Professions Act

[179] The provisions for this has been enacted under the title "Regulations on Administration of Foreign Law Firms' Representative Offices in China (Decree No. 338 of the State Council of the People's Republic of China on December 22, 2001, and effective as of January 1, 2002)

[180] Article 3 of the regulation. See footnote 26 above for regulation.

[181] Article 5 of the regulation

Restriction on names[182]

No foreign law firms or other organisation or individuals may conduct legal services activities within the territory of china as a consulting firm or other names

Requirements for registration as a foreign legal practice in china[183]

The law firm seeking to establish practice in china should be in practice lawfully in its home country and should never been punished for a violation of lawyers' professional ethics or practice disciplines.

The representative of representative offices should be practicing lawyers who should be registered as members of the bar or law society of the country where they obtain the qualification to practice, have practiced for not less than two years outside of china, and have never been punished for a criminal offence or a violation of lawyers' professional ethics or practice discipline.

The chief representative of the representative office should have practiced for not less than three years outside of china and is a partner or equivalent of the said firm

Finally, for establishing a foreign practice, it has to be shown that there is an actual need to establish a representative office in china to conduct legal service business.

Business scope and practice rules[184]

The foreign law practice is strictly prohibited from engaging in practice of Chinese law. They are allowed only these following areas

- to provide consultancy services to clients on the legislation of the country from where the lawyer belongs, or on international convention and international practice
- to handle, when entrusted by clients or Chinese law firms, legal affairs of the country where the lawyers of the law firms are permitted to engage in lawyers' professional work

[182] Article 6 of the regulation
[183] Article 7 of the regulation
[184] Article 15 of the regulation

- to entrust to the Chinese legal firms, on behalf of the foreign client, work dealing with Chinese legal system
- to enter into contracts to maintain long term entrustment relations with the Chinese law firms for legal affairs
- to provide information on the impact of the Chinese legal environment

Restrictions on the number of offices to be maintained[185]

It says that representative of a representative office shall not be concurrently a full-time or part-time representative of two or more representative offices

Residency requirements [186]

The regulation requires that the representative of the representative office has to compulsorily stay in China for a period of six months in each year.

Japan

Japan allows foreign lawyers to practice in its jurisdiction under the "Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (hereinafter 'foreign lawyers act')"[187]. This act is complemented by several other acts providing for the various rights and obligations of the foreign lawyers practicing in Japan[188]. However, the main provisions regarding the practice of law by foreign lawyers in Japan is contained in this act.

The practice areas

The foreign lawyers are entitled to render legal services concerning the laws of the state of their primary qualification at the request of the other party concerned or

[185] Article 18 of the regulation
[186] Article 19 of the regulation
[187] The English translation (unofficial) is available at the website http://www.cas.go.jp/jp/seisaku/hourei/data/hls.pdf, last accessed on 2nd May, 2009
[188] A translated version of all the laws are available at http://anlus.wordpress.com/2008/05/24/foreign-lawyers-act-2005-japan/, last accessed on 2nd May, 2009

appointment by a public agency[189]. However a Foreign Legal Consultant (FLC) is expressly prohibited from practicing in the following areas

- giving representation services regarding procedures, before a court/public prosecutors office or other public agency in Japan
- appearing as a defence counsel in criminal case, activities as an attendant in a juvenile protection case or legal assistance in the case of extradition
- giving legal opinion on the interpretation of laws of other jurisdiction other than that of the state of primary qualification
- giving services of procedural documents of a court of administrative agency of a foreign state
- giving representation in the case of notarial services
- dealing in real property located in Japan and Industrial property

The FLC can advice on the above going matters, only in the context of the following listed matters strictly in joint association with an attorney at law or after receiving written advice from an attorney at law.

- Representation/Preparation of legal document in case other than those involving properly located in Japan or Industrial property rights.
- Representation/Preparation of documents for a legal case concerning family relations in which Japanese national is involved as a party.
- Representation and Preparation of documents related to legal case regarding gift of asset/estate, which is located in Japan and owned by a person resided/residing in Japan, and in which a Japanese national in involved as a party.

With respect to third country law a foreign legal practitioner in Japan may provide legal advice on the laws of that country on the basis of written advice from a

- Foreign lawyer in a specified foreign state

[189] Article 3 of the Act

- Registered foreign lawyers for whom the laws of the state of primary qualification or the designated laws are the laws of the specified foreign state

In respect of arbitration cases a foreign lawyer is entitled to perform representation regarding the procedures for an International arbitration case (Procedures for settlement resulting from an International arbitration case)

Application of ethical laws of the Japanese advocates

Japan had a Code of Ethics for attorneys which were applicable to them on a best effort basis. In 2004, the Japan Federation of Bar Associations adopted 'Basic Rules on the Duties of Practicing Attorneys as Applicable to Foreign Special Members'[190], for foreign legal practitioners. By the enactment of these rules, the foreign lawyers are subject to different ethical rules from that of domestic lawyers. The Disciplinary action can be initiated by the Japan Federation of Bar Associations, based on the resolution of the Registered Foreign Lawyers Disciplinary Actions Committee[191]. The grounds for such disciplinary action as stated in the foreign lawyers act are violation of the provisions of the foreign lawyers act or violation of the provisions of the provisions of the articles of association of the bar association to which he/she belongs; violation of the provisions of the Japan Federation of Bar Associations pertaining to a registered foreign lawyer; has caused damage to the good order or reputation of the bar association to which he/she belongs or of the Japan Federation of Bar Associations; or has misbehaved himself/herself in such manner as impairing the dignity of a registered foreign lawyer, whether in performing his/her professional duties or otherwise.[192]

Qualification[193]

The following qualifications are required for a foreign legal consultant to practice in Japan

- He should have the necessary qualifications to become a foreign lawyer in the state of acquisition of qualifications

[190] Available at http://anlus.wordpress.com/2008/05/24/foreign-lawyers-act-2005-japan
[191] Article 51(2) of the Foreign Lawyers Act.
[192] Article 51(1) of the Foreign Lawyers Act
[193] Article 10 of the Foreign Lawyers Act

- He should have a minimum of 3 years practice experience
- He hasn't been subject to disciplinary proceedings which may amount to imprisonment without work/impeachment/disciplinary proceedings under the attorney act
- He should not have been declared bankrupt
- He should be having a plan, residence and financial basis for performing duties properly and should be having the ability to compensate for damages which he/she may cause

The form of legal organisation

A foreign lawyer is allowed to practice in Japan as a registered foreign lawyer, or under his employment or under the employment of attorney at law or in the employment of legal profession Corporation

The foreign lawyer has to use the title of 'Gaikakuho-Jimu-Bengoshi' (registered foreign lawyer) and append to such title the name of the state of primary qualification where is in practice. [194] The office of the registered foreign lawyer is to be called Gaikokuho-Jimu-Bengoshi-Jimusho[195]. The name of the registered foreign lawyer shall not include the name of any other individual or organisation. This provision is subject to the exception that the lawyer may use the name of the juridical person, partnership or other business entity of his/her state of primary qualification, and which has as its object the provisions of legal service and to which he/she belongs.[196]

If the registered foreign lawyer is employed by registered foreign lawyer, or attorney at law or legal profession corporation, a registered foreign lawyer may use the name of the office of the said foreign lawyer, or attorney at law or legal Professional Corporation.[197]

[194] Article 44 of the foreign lawyers act
[195] Article 45 (1) of the foreign lawyers act
[196] Article 45 (2) of the foreign lawyers act
[197] Article 45 (3) of the Foreign Lawyers Act

The office of a registered foreign lawyer shall be established within the district where the bar association to which he/she belongs[198] and such registered foreign lawyer may not establish more than one office[199]

Residency requirements

A foreign lawyer is required to stay for not less than a hundred and eighty days per year[200] but this is subject to the provision that if the lawyer has to stay outside Japan due to his/her own or his/her relative's injury illness or any other unavoidable reason, such stay will be deemed to be period of stay within Japan.[201]

Advertisement[202] and fees

A registered foreign lawyer is not prohibited from advertising his services while a domestic lawyer is prohibited from advertising[203]. But advertisement in such a fashion as misrepresenting facts; misleading; making extravagant claims; causing over-expectation; comparing with other bengoshi, gaikokuho-jimu-bengoshi or their offices; violating laws, regulations, articles of associations or rules of the bar association or the Federation; or degrading the dignity or credit of gaikokuho-jimu bengoshi are expressly prohibited.[204] The fees charged by a foreign lawyer[205] shall be reasonable and appropriate. He has to keep a standard of legal fees, provide an explanation of legal fees charged and should also provide information as to the fees charged, when asked. The laws of Japan prohibit fees sharing by a registered foreign lawyer with anyone except a registered foreign lawyer[206].

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[198] Article 45 (4) of the Foreign Lawyers Act
[199] Article 45 (5) of the Foreign Lawyers Act
[200] Article 48 (1) of the Foreign Lawyers Act
[201] Article 48 (2) of the Foreign Lawyers Act
[202] A separate law is also available for the rules on advertisement titled as 'Rules Concerning Advertising of Practice by Foreign Special Members'
[203] Article 29 of 'Basic Rules Concerning Foreign Special Members'
[204] Article 3 of 'The Rules on Advertisement of Services by Foreign Special Members'
[205] The laws related to charging of fees is provided in 'Rules Concerning Gaikokuho-Jimu-Bengoshi's Fees' and Article 30 of 'Basic Rules Concerning Foreign Special Members'
[206] Article 12 of the 'Basic Rules on the Duties of Practicing Attorneys as applicable to Foreign Special Members'

Singapore

Singapore provides for the provisions regarding the practice by foreign lawyers in Singapore in foreign law as well as Singapore law. The two acts that provide for this are the Legal Profession Act (CHAPTER 161)[207] (hereinafter 'act') and Legal Profession (International Services) Rules 2008[208] (hereinafter 'rules'). The provision of the act and rules can be discussed under the following heads.

Form of practice

The Singaporean law allows foreign lawyers and legal firms to practice in Singapore in any one of the four forms.

- Joint law Venture
- Formal Law Alliance
- Qualifying Law Practice
- Licensed Law Practice

The establishment and practice of the law (Singapore as well as foreign) is dependant on the terms and conditions as are prescribed or may be prescribed by the attorney general. The act further provides for the registration of foreign lawyers for the practice of Singapore law or foreign law in the above four forms on terms and conditions as are prescribed or may be prescribed by the attorney general.

Qualification requirements

For the practice of foreign law in a joint law venture, Singaporean legal practice or foreign law practice, the person has to be a director, partner or employee of such law practice or joint venture or the Singapore law practice.[209]

For the practice of Singaporean law in joint law venture or qualifying legal practice, the applicant needs to possess a degree from an institute of higher learning specified in the

[207] The act is available at http://statutes.agc.gov.sg/, last accessed 2nd May, 2009
[208] The rules are available at http://statutes.agc.gov.sg/, last accessed 2nd May, 2009
[209] Section 18 of the Legal Profession (International Services) Rules 2008

schedules[210] or from an institute as is acceptable to the attorney general.[211] He needs to possess five years of relevant experience or expertise in Tier 1 or Tier 2 banking, finance and corporate work in any foreign law.[212] Further he is required to attend such courses of education or instruction as may be required by the Attorney-General. He also needs to have taken and passed the qualifying examination[213] and such other examinations as the Attorney-General may require.[214]

Areas of practice

A foreign lawyer practicing foreign law in a joint law venture, Singaporean legal practice or foreign law practice, may practice foreign law in or from Singapore.[215] A foreign lawyer practicing Singapore law in a Joint Law Venture or a Qualifying Foreign Law Practice can practice in areas of banking law; finance law and corporate law.[216] A foreign lawyer registered to practice Singapore law in a Singapore law practice can practice in either or both Tier 1 or Tier 2 banking, finance and corporate work.[217] However, a foreign lawyer cannot appear before a tribunal or court.[218]

Insurance and indemnity

The joint law venture, Singaporean law practice or foreign law practice, where the foreign lawyer is registered to practice foreign law is required to maintain throughout the period of registration of the foreign lawyer one or more insurance policies providing indemnity against loss arising from claims in respect of civil liability in connection with his practice in the Joint Law Venture, foreign law practice or Singapore law practice. This indemnity would be for at least the amount required under any of the rules made pursuant to section 75A of the Act in respect of solicitors or any such amount as specified by the attorney-general.[219] The rules as to the amount of indemnity are the same where

[210] Section 22 (b) (iii) (A) of the Legal Profession (International Services) Rules 2008
[211] Section 22 (b) (iii) (A) of the Legal Profession (International Services) Rules 2008
[212] Section 22 (b) (iii) (B) of the Legal Profession (International Services) Rules 2008
[213] Section 22 (viii) of the Legal Profession (International Services) Rules 2008
[214] Section 22 (ix) of the Legal Profession (International Services) Rules 2008
[215] Section 19 of the Legal Profession (International Services) Rules 2008
[216] Section 21 of the Legal Profession (International Services) Rules 2008
[217] Section 23(1) of the Legal Profession (International Services) Rules 2008
[218] Section 23 (2) of the Legal Profession (International Services) Rules 2008
[219] Sections 19 (2) and 21(3) of the Legal Profession (International Services) Rules 2008

the foreign lawyer is registered for the practice of Singaporean law.[220] For qualifying law practices and licensed law practices, the minimum amount of insurance that is required is the amount required for the Singapore law practices under Article 75A of the act.[221]

Ethical and advertisement rules[222]

Foreign lawyers practicing Singapore law in , Joint Law, Qualifying Law Practice and Licensed Law Practice have to comply with the Legal Profession (Professional Conduct) Rules (R 1)[223]; the Legal Profession (Publicity) Rules (R 13)[224].

Equity and partnership restrictions

The rules provide for equity restrictions for joint law ventures and law alliances. The foreign and the Singapore law practice in a joint law venture have to have at least five lawyers[225] resident in Singapore[226] (for foreign law practices). Out of these at least two lawyers of the foreign law practice need to be partners of the firm[227] and if the venture has been constituted as a corporation then directors of the corporation.[228] At no point of time, should the number of foreign directors or partners in a law firm or corporation shall exceed the number of partners or directors of the Singapore law firms.[229] The above rules apply to law alliances also.[230] Besides this in the case of transfer of profits from the Singapore law practice to the foreign law practice, the total amount transferred shall at no time exceed 49 percent of the total profits earned by the Singapore law practice during a financial year.[231] The rules also provide the provision that the Singapore solicitor can be partner or director of the Singapore law practice and

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[220] Section 23(3) of the Legal Profession (International Services) Rules 2008
[221] Sections 11(5) and 14 (7) of the Legal Profession (International Services) Rules 2008
[222] Sections 6, 12, 15 and 26 of the Legal Profession (International Services) Rules 2008
[223] Available at http://www.lawsociety.org.sg/public/you_and_your_lawyer/pdf/Professional_Conduct_Rules_2006.pdf, accessed 11 July 2009
[224] Available at http://www.lawsociety.org.sg/running_practice/practising_cert/pdf/Legal%20Profession%20(Group%20Practice)%20Rules.pdf, accessed 11 July, 2009
[225] Sections 4 (2) (b) and 4 (2) (d) of the Legal Profession (International Services) Rules 2008
[226] Section 4 (2) (b) of the Legal Profession (International Services) Rules 2008
[227] Section 4 (2) (c) of the Legal Profession (International Services) Rules 2008
[228] Section 4 (2) (c) of the Legal Profession (International Services) Rules 2008
[229] Section 4 (2) (f) and Section 4 (2) (g) of the Legal Profession (International Services) Rules 2008
[230] Section 8 (1) of the Legal Profession (International Services) Rules 2008
[231] Section 5 (7) of the Legal Profession (International Services) Rules 2008

the joint law venture or foreign law practice[232], but a foreign lawyer cannot be a partner or director of foreign law practice and that of the Singapore law practice or joint law venture simultaneously.[233]

Residency requirements

In the case of joint law ventures and law alliances, the number of foreign lawyers resident in Singapore should be a minimum of five.[234]

The United States of America

USA is a federal state with the constituent states making their own laws. American Bar Association came out with model rules on the licensing and practice of foreign legal consultants. The purpose of the rules was to guide the legislatures in different states towards the enactment of the laws for regulating the practice by foreign lawyers in their jurisdictions. The laws that the states in America have enacted, to a great extent follow the provisions suggested by the model laws

Requirement for registration as foreign legal practitioner in USA[235]

For registration it is required that the member seeking registration

- is and has been a member of good standing of a recognised legal profession in a foreign country. The members of such legal profession are admitted as members or counsellors at law, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority
- (optional) for at least five years before the application has been a member in good standing of such legal profession and has been lawfully engaged in the practice of
- possesses the good moral character

[232] Section 5 (8) of the Legal Profession (International Services) Rules 2008
[233] Section 5 (9) of the Legal Profession (International Services) Rules 2008
[234] Sections 4 (2) (b) and 8 (1) (b) of the Legal Profession (International Services) Rules 2008
[235] Section 1 of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants

- intends to practice as a foreign legal consultant in this jurisdiction and to maintain an office in this jurisdiction for that purpose

Scope of practice[236]

The foreign lawyer is prohibited from

- appearing on behalf of another person in any court or magistrate or judicial officer except as per hac vice
- preparing any instrument effecting transfer or registration of title of real estate located in USA
- preparing a will or trust instrument effecting the disposition on death of any property located or owned by a resident of USA
- preparing any instrument relating to the administration of decedant's estate in the USA
- preparing any instrument in respect of martial or parental relations, rights or duties of residents of the USA or care and custody of the children of such residents
- carrying of practice under or utilising in connection with such practice any name, title or designation other than one or more of the following
    - foreign consultants own name
    - the name of the law firm with which the foreign legal consultant is affiliate
    - foreign legal consultants authorised title in the foreign country of his/her admission to practice which may be used in conjunction with the name of that country.
    - the title "foreign legal consultant" which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice

[236] Section 3 of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants

Restriction with respect to multijurisdiction practice[237]

A person licensed to practice in one jurisdiction shall not be entitled to establish an office or otherwise engage in a systematic and continuous practice in other jurisdiction

Ethical/Professional rules[238]

The Foreign Legal Consultant is subject to the same rights and obligations set forth in the rules/code of professional conduct/responsibility among from other condition and requirements that apply to a member of the bar of this jurisdiction under the rules of court governing the members of the bar including ethics

Forms of practice[239]

The foreign lawyer under the model rules can practice under the employment of a member of the bar, or of a partnership or a professional corporation. The member can also practice as a partner of a firm or as a shareholder of a professional corporation. Further he can also employ the members of the bar. Thus the model rules allow flexibility to a foreign member to practice in America.

Insurance and indemnity[240]

Every lawyer seeking registration has to submit an undertaking or appropriate evidence of professional liability insurance, in an amount as the court may prescribe, to assure the foreign legal consultant's proper professional conduct and responsibility

[237] Section 4 of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants
[238] Section 6 of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants
[239] Section 5(b) of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants
[240] Section 6(a)(ii)(b) of ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants

An Analysis of the Laws of Various Countries

Table 7 : Analysis of the laws of countries with respect to restrictions on practice

S.no	Country	Restrictions on practice
1.	Australia	The person has to be an Australian registered foreign lawyer or an Australian legal practitioner. An Australian registered foreign lawyer is allowed to practice the law of those foreign jurisdictions in which the lawyer is qualified without having to satisfy admission requirements
2.	Brunei	Only citizens of Brunei or its permanent residents Lawyers from countries England, Northern Ireland, Scotland, Singapore or in any part of Malaysia and Australia subject to 7 years practice experience. Provisional admission to lawyers from Malaysia, Singapore or Hong Kong or in any other commonwealth country in respect of 2 cases and possessing special skills and qualifications not available in Brunei. Protection of the interests of the domestic lawyers – where a determination has been made that there are sufficient number of lawyers practicing in Brunei, admission of persons of other nationalities other than Brunei, shall be prohibited and the names of person who are not ordinarily resident shall be struck of the rolls.
3.	China	Nothing specific. Foreign lawyers are permitted to practice law in the Chinese territory
4.	Japan	Allows the entry of foreign lawyers
5.	Singapore	Foreign lawyers are permitted to practice in Singapore and the nationality of the lawyers that are permitted to practice is governed by the multilateral and bilateral trade agreements into which the country enters. The law is an enabling provision
6.	USA	The person should be a member of recognised legal profession in a foreign country and admitted as legal counsellor in that country. He should be subject to the regulations and discipline by a duly constituted body

Table 8: Analysis of the laws of countries with respect to Residency requirements

S. no	Country	Residency requirements
1.	Australia	No general residency requirements. May be there with state laws
2.	Brunei	a. should be a permanent resident b. If the person is not a permanent resident, he should be in active practice for 7 years in UK, Singapore, Malaysia and Australia or any territory designated by the attorney general.
3.	China	6 months residency requirements
4.	Japan	180 days, can be reduced under exceptional circumstances
5.	Singapore	Residency requirements for lawyers wanting to establish practice as a joint law venture of formal law alliance
6.	USA	No general residency requirements. May be there with state laws

Table 9: Analysis of the laws of countries with respect to Practice Areas

S. no	Country	Practice Areas
1.	Australia	The areas open to foreign lawyers are – Law of the foreign country, arbitration/conciliation/mediation proceedings/ legal proceedings before bodies other than the courts in which the knowledge of the foreign law is essential The Australian registered foreign lawyer **cannot approach** any court and cannot practice Australian law in Australia unless it is incidental to the practice of foreign law and the advice is based on the advice given by an Australian legal practitioner
2.	Brunei	The practice areas in Brunei are divided into Civil Law areas and Syariah Law areas. While the requirements for practice in civil law areas are lenient, the requirements for practice in Syaraiah law are quite onerous. The Brunei law doesn't prohibits anyone who has been admitted as a lawyer from practicing in any area, but it imposes a limitation on those who have been given a provisional admission that they should bring in special expertise that is not available with the Brunei lawyer
3.	China	Law related to home country and law related to International convention and/or international practice
4.	Japan	The practice areas **not open** to FLCs are Giving representation services regarding procedures before a court/public prosecutor's office and other public agency in Japan. Practicing as a defence counsel in a criminal case Activities as an attendant in a juvenile protection case Legal assistance in the case of extradition Cannot give advice on third country law Cannot give procedural document of a court Cannot render notarial services Cannot deal in real property located in Japan or industrial property However an FLC can give advice on the following matters in joint association or on written advice from an attorney at law Preparation of legal documents – in cases other than those involving property located in Japan or industrial property rights. Preparation of document concerning family relation/or gift of an asset or estate in which Japanese national is involved He can advice on third country law on the written advice of the lawyer of that country and he can handle cases of international arbitration
5.	Singapore	These areas are **excluded** from the scope of practice of a foreign lawyer 1. Constitutional and administrative law; 2. Conveyancing; 3. Criminal law; 4. Family law;

		5. Succession law, including matters relating to wills, intestate succession and probate and administration; 6. Trust law, in any case where the settler is an individual; 7. Appearing or pleading in any court of justice in Singapore, subject to the exception that such appearance may be permitted by the act or the rules. 8. Appearing in any hearing before a quasi-judicial or regulatory body, authority or tribunal in Singapore subject to the exception that such appearance may be permitted by the act or the rules. However, the restriction on Practice in constitutional and administrative law, coveyancing and criminal law does not applies to where the main purpose of such practice is to advice a business entity on corporate law or commercial Law
6.	USA	Appearing on behalf of other person in court/magistrate/ judicial officer except as per hac vice A foreign lawyer in USA is **prohibited** from dealing in real estate/property located or owned by a resident of USA such as transfer or registration of the title of the real estate or preparing a will or trust instrument or preparing an instrument relating to the administration of the deceased estate He is also **prohibited** from preparing any instrument in respect of martial/parental relations/rights or duties of residents of USA or care and custody of the children of such residents

Table 10: Analysis of the laws of countries with respect to Form of Legal Organisation

S. no	Country	Form of legal organisation
1.	Australia	On his or her own account In partnership with one or more Australian registered foreign lawyers and/or one or more Australian legal practitioners As a director or employee of an incorporated legal practice or as a partner or an employee of a multi-disciplinary partnership. As an employee of an Australian legal practitioner or law firm As an employee of an Australian registered foreign lawyer
2.	Brunei	Individually As a partnership firm As an employee in the partnership firm Under an advocate
3.	China	Representative office of foreign law firms
4.	Japan	Registered foreign lawyer or under the employment of registered foreign lawyer or under the employment of attorney at law or under the employment of legal professional corporation
5.	Singapore	Joint law venture Formal law alliance Qualified Foreign Law Practice Licensed Foreign Law Practice
6.	USA	Sole practitioner, partnership firm, law corporation

Table 11: Analysis of the laws of countries with respect to Professional Indemnity Insurance

S. no	Country	Professional Indemnity Insurance
1.	Australia	The lawyer has to take a professional indemnity insurance to the extent of $ 1.5 million and if the indemnity insurance is below this value, he has to provide a disclosure statement to the client
2.	Brunei	NA
3.	China	The Chinese law requires that the foreign law firms have to undertake civil liability for the activities of their representative offices or their representatives
4.	Japan	Should be having the ability to compensate for the damage he may cause
5.	Singapore	The lawyers are liable for their acts. The legal vehicles through which the lawyers practice are required to take indemnity insurance.
6.	USA	As the court may decide

Table 12:Analysis of the laws of countries with respect to Qualification requirements

S. no	Country	Qualification requirements
1.	Australia	The Foreign lawyer must be entitled to practice law in foreign jurisdiction He should be registered with the registration authority of that country He should be a fit and proper person to be registered as Australian registered foreign lawyer
2.	Brunei	With respect to civil courts practice lawyers who are in active practice for 7 years in United Kingdom, Singapore, Malaysia, Australian State or territory or part of the country or territory in the commonwealth. With respect to Syariah courts the requirements are much stricter
3.	China	The registered law firm having representative office should have a lawful practice in home country The representative or representative office should not have been punished for violation of lawyers' professional ethics or practice disciplines The representative of the representative office should be registered with the professional association of the country where they are practicing Experience for a representative – 2 years practice experience outside China

		Experience for the head of the representative office – 3 years practice experience outside China
4.	Japan	He should possess the necessary qualifications to become a foreign lawyer in the state of acquisition of qualification He should have been subjected to disciplinary proceedings He should not have been declared bankrupt He should have a plan, residence and financial basis for performing duties properly
5.	Singapore	5 years practice experience
6.	USA	The lawyer should be a member of the recognised legal profession of the foreign country Should have 5 years practice experience Should have a good moral character

Table 13: Analysis of the laws of countries with respect to Appearance in courts

S. no	Country	Appearance in courts
1.	Australia	Cannot appear in any court (except on his or her own behalf)
2.	Brunei	No prohibition
3.	China	No restriction (Chinese law practice is not allowed)
4.	Japan	Cannot give representation services regarding procedure before a court/public prosecutors office or public agency in Japan
5.	Singapore	No prohibition with respect to the areas in which foreign legal practice is allowed
6.	USA	Cannot appear on behalf of another person in any court or magistrate or judicial officer except as per hac vice

Table 14:Analysis of the laws of countries with respect to Right to use home firm's name

S. no	Country	Right to use firms name
1.	Australia	The foreign lawyer can use the firm's name
2.	Brunei	There appears to be no restriction on the right to use the firm's name as such
3.	China	Since China allows representative offices, it automatically follows that there is no restriction on the use of firm's name. However, the organisation or individual cannot conduct legal activities within the territory of China as a consulting firm or by any other names

4.	Japan	The foreign lawyer has to use the title of Gaikakuo-Jimuo-Bengoshi (registered foreign lawyer) and append to such title the name of the state of primary qualification The name of the registered foreign lawyer shall not include the name of any professional or organisation. This provision is subject to the exception that the lawyers may use the name of the juridical partnership or any other business entity of his/her state of primary qualification Cannot establish more than one office and that office has to be established in the district in which he operates.
5.	Singapore	There appears to be no restrictions on the right to use the firm's name
6.	USA	Allowed to use the firms name in conjugation with the name of the country. The foreign lawyer cannot establish multijurisdictional practices

Table 15: Analysis of the laws of countries with respect to Professional ethical and practice standards

S. no	Country	Professional ethical and practice standards
1.	Australia	The same ethical and practice standards apply to the foreign lawyers as are applicable to the Australian lawyers
2.	Brunei	Not available
3.	China	The same laws and rules as are applicable to the Chinese lawyers
4.	Japan	Certain sections of the attorney act are applicable to foreign lawyers. Thus in the matter of ethics, they are treated differently from the foreign lawyers
5.	Singapore	Ethical standards same as that for Singapore solicitors
6.	USA	The same laws and rules that are applicable to the member of the bar of the relevant jurisdiction

2. Conclusion

The chapter sought to analyse the laws of a few selected countries that have allowed the foreign legal professionals to practice in their jurisdictions. The selection of the countries was based on the status of development of a particular country. The laws of China was included in the analysis as it was a special case, since China was a late entrant to the

WTO and had to liberalise sectors of its economy under pressure from the other members. The laws of the countries were analysed on the following parameters

a. Restrictions on practice
b. Residency requirements
c. Practice areas
d. Form of Legal Organisation
e. Professional Indemnity
f. Qualification requirements
g. Appearance in courts
h. Right to use home firm's name
i. Professional ethical and practice standards

The conclusions that emerge from the analysis of the laws of different countries are again grouped under the relevant parameters on which the laws were being analysed

Restrictions on practice

The countries that have entered GATS commitments have allowed lawyers to practice in their respective jurisdiction, while the countries that have not entered GATS commitments have adopted the route of allowing lawyers from those countries with whom they have a tie up with in form of trade agreement (Singapore) or where they feel that the lawyers of that particular state can understand the law of their jurisdiction, either on account of historical association or cultural association (Brunei)

Residency requirements

In general residency requirements have been imposed for the practice of law in the particular jurisdiction.

Practice areas

In general the laws allow a foreign lawyer to deal with International Law; Arbitration and alternative dispute resolution mechanisms; third country law and business and corporate laws. They are specifically excluded from practicing in any area which concerns domestic law.

Form of legal organisation

The form of organisation is generally sole proprietorship or as an employee of a lawyer or as a partner in firm. However, law corporations are also making an appearance.

Professional indemnity

All jurisdictions require professional indemnity insurance from the foreign lawyer

Qualification requirements

The general requirement is that the lawyer should be a member of a recognised professional body in his home state and should be morally upright. The relevant experience of practice in his home state varies from 2 years to 5 years.

Appearance in courts

Nearly all jurisdictions prohibit appearance of the lawyer in courts and tribunals, in case of domestic law.

Right to use home firm's name

In general, with some restrictions, the lawyer's have been allowed to use the name of home state firm.

Professional ethical and practice standards

Nearly all states examined apply the same ethical and practice standards as are applicable to their own domestic lawyers.

Looking at the regulations in various countries one can safely postulate that the above are the minimum general requirements that a state should enact while permitting foreign lawyers in their jurisdictions. Stringent requirements can be enforced, based on the specific needs of the state. An interesting feature that appeared from the study was the states that have not entered legal services commitments under GATS had much more detailed laws with many more restrictions built into it.

CHAPTER VI

LEGAL SERVICES LIBERALISATION IN INDIA

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The liberalisation of legal services has to be viewed in the light of the role of the law in shaping the polity and culture of a nation. According to Savingy law is necessarily a collective heritage of the people, continuously evolving through the transformative modes of lived experiences.

> [L]ike, language, law is necessarily a collective heritage of people, embodied in the lived, and therefore, transformative mode of experience (Baxi, 2003)

Modern law in India took its roots in the colonial world and lacked any roots in the legal traditions of the pre-colonial world.

> Law is always seen as a conquest by other means. The significance of law is that it reinvents communitarian legal traditions and puts them to work towards the ends of administration and adjudication. This expropriation of law then results in a hybrid legality combining the elements from the domestic as well as the foreign legal systems and this in turn reconstitutes public memory as well as colonises the normative means of production of law and crucially the very structures of time and space (Baxi 2003: 59).

The propagation and imposition of laws was regarded to have a value that had transcendental value beyond the limits of civilization. The perceived (albeit mistaken) impact of the superior nature of the legal system of the west was such that E. P. Thompson remarked that 'even if the 'rules and rhetoric' of modern law were a mask of imperial power, it was mask which Gandhi and Nehru were to borrow, at the head of half a million masked supporters. (Thompson 1975). However, though mistaken it might be, but it nevertheless stated in clear terms the significance of impact of the western legal system on the countries of their imposition.

In the post-colonial world legal services and legal profession becomes the vehicle for shaping laws to meet the needs of the Indian people. But the new transnationalised legal framework would cut the law and the legal profession from the cultural ties of the locality (Arup 2000:144). The entry of foreign lawyers would lead to a dilution in

sovereignty of the state, with the ability of the state to regulate the economy, the law and the legal profession seriously constrained (Dezalay and Garth 1996). Lawyers are carriers of ideas and practices; they are indispensable in the political activities, whether such activities relates to the state structures, international organisations or international negotiations. The community of lawyers are makers of communities and societies'; strengthening them therefore poses challenges to the post colonial state. (Arup 2000).

Globalisation of Legal Services and its Impact on the Structure of Legal Profession

The internationalisation of trade has undermined the traditional vision of legal profession by bringing in the commercial aspects into the practice of law (Gromek-Broc 2007). The traditional nature of legal practice consisting of small offices and individual members has undergone a change with business and corporate law taking ascendancy. This fact is best highlighted by the experience of Europe, where legal practitioner's status was inferior to that of academicians and judges. The globalisation and consequent commercialisation of legal practice brought the culture of America where the business lawyer stayed at the top of the hierarchy.

> The phenomenon of globalisation has gradually permeated into the European legal profession mingled with rising dominance of the American model. The legal profession worldwide became contaminated by the American paradigm of lawyering, its way of organising and structuring the profession, the role of lawyers and expansion of legal services (Gromek-Broc 2007)

Internationalisation of legal services thus resulted in the change in the structure of organisation of the law firms in Europe. The profession in Europe reorganised itself replacing the small offices with a hybrid structure which combined aspects of American practice with that of European practice.

Politics of Globalisation and Legal Services

The politics of globalisation is best recounted by Stiglitz. In his view multinationals companies and by extension the developed countries are reaping the benefits of globalisation and the developing countries are nowhere the beneficiaries of

globalisation (Stiglitz 2002). The phenomenon of globalisation is being promoted by the commercial and economic interests of the multinational companies. The commercial field which is less dependant on state authority than the traditional legal fields has resulted in the rise of special dispute settlement mechanisms such as commercial tribunal and special commercial courts, due to the pressure of corporates for specialised and better legal services (Dezalay and Garth 1996). This has then resulted in the extraction of the law out of the competence of the national law courts into a neutral territory and is thus bringing about change in law which is beyond the influence of national laws. An additional aspect with regard to the global law firms is that they are established in the industrialised countries and hence are able to impose the ideas and dominance on the post-colonial world (Cone 2003). Legal services thus may serve to do what the direct imposition of laws by foreign countries did in the colonial times. They may bring about resurgence in liberal imperialism (Randall 2008). Thus it can be said that the entry of foreign legal services are harbingers of new imperialism, which would be established in the form of generic type of business law, affecting the sovereignty of the nation. It would have its effect on the interpretation and the formation of new types of laws and on the structure of the legal services as happened in Europe.

Liberalisation of Legal Services in India – A Need for Debate

In this backdrop one can understand that the opening up of the legal services sector in India has been a vexed issue. Indeed the Union minister for law Mr. Ram Jethmalani was deprived of his membership of the Supreme Court Bar Association (Venkataraman 1999) in 1999, for advocating the issue of liberalisation of legal services in India. The Bar Council of India of India had been opposing the liberalisation of legal services[241] and the members of the Bar had been at the forefront in restricting any attempts towards liberalisation (Nayak 2007)

[241]The Bar Council of India in its Proceeding of the Consultative Conference held at Kochi on 17th and 18th of November, 2007, resolved to affirm the resolution of the Bar Council of India No. 17/2006 dated 12.2.2006 and further resolves to request the Government of India not to open up Indian Legal profession to foreign lawyers or foreign law firms at this juncture and not to permit the entry of foreign lawyers or foreign law firms into India for function or practice in any form in India as advocates, lawyers or solicitors.

Lately, however it appears that there has been a change in the stance with some sections of the legal community advocating the opening up of the legal services sector in India. The Hon'ble Chief Justice of India Justice K. G. Balakrishnan appeared to approve the liberalisation of legal service sector in India allowing the entry of foreign legal professionals into the country subject to reciprocity provisions (PTI 2005). The commerce ministry on the other hand has also stated that there have been changes in the opinion of the legal professionals with the Indian legal fraternity and are now more open to the issue of liberalisation of legal services (PTI 2005).

Meanwhile there has been pressure from the certain countries notably USA (Centad 2007), Australia (ILSAC 2008), and EU (European Parliament 2009) asking India to open up its legal services sector to foreign legal professionals. All three countries have asked India to consider the prospects of free trade agreements for the purpose of opening up of legal services in India.

In the light of the above developments it becomes pertinent to consider the position of India with respect to the issue of liberalisation of legal services. The chapter offers to deal with the entire gamut of issues dealing with the liberalisation of legal services in India. Section one of the chapter takes a look at the development of the issue of the liberalisation of legal services in India in terms of reasons for opposition to the issue of liberalisation. It highlights the reasons for the growing interest of the countries in the liberalisation of legal services sector in India, keeping in view the volume of legal services trade that is being transacted in the economy. It also takes a look at the presence of foreign law firms in India and the state of the Indian conditions as regarding its readiness to open up for liberalisation. Section two presents an analysis of the laws prevailing in India which regulate the various aspects of practice by a legal professional. The final section is the concluding section

1. Legal Services Liberalisation - A Controversial Issue

The legal services market in India experienced a boom following the liberalisation of Indian economy in 1991-92. Prior to that there were only a few firms specialising in corporate matters but after the liberalisation policy change, a phenomenal growth was witnessed in the firms specialising in corporate practice. The opening up of the economy forced the Indian legal profession to adapt itself to the changed market reality and the profession responded by diversifying its repertoire so as to able to serve its corporate clients. As of today it is regarded that the Indian legal profession and professionals are fully able and competent to meet the demands of a rapidly growing economy (Dasgupta and Ranjan 2006).

However, the opening up of the economy brought another factor into contention and that was the demand from foreign states for India to open up its legal services sector. This demand was motivated by the fact that the legal services, being producer or intermediate services, provide the necessary confidence to the foreign investor for investing in a foreign market; yet it had an element of market economics into consideration also. The Indian legal market is characterised by rapidly growing economy with increasing presence of transnational corporations and highly talented and relatively cheap professionals. The presence of transnational corporation generates low volume but high value cases. The availability of cheap work force for servicing the matters of the transnational corporation translates into huge profits for the foreign law firms. This is one of the reasons behind the demand of liberalisation of legal services in India.

The Indian legal professionals through their regulatory organisation – The Bar Council of India have been firmly against the liberalisation of legal services sector in any form (BCI 2006, 2007). The extent of resistance to the liberalisation had been such that the Supreme Court Advocates association removed in 1999 from its membership the then Union law minister of India Shri Ram Jethmalani, for advocating the liberalisation of legal services (Venkataraman 1999). The Bar Council of India has brought two resolutions firmly opposing the entry of foreign legal professional in India, except on the

conditions of reciprocity[242]. The primary reason outlined has been that it would affect the livelihood of the legal professionals in India. The second reason forwarded has been that the country being a developing country, where the masses are largely impoverished legal services have a responsibility of providing relief to the masses and in that sense it is a noble service. Entry of foreign lawyers and opening up of legal services would render the service as a commercial one which is antithetical to its present character. There are of course other arguments like the unique character of the legal service representing the national character of the laws of the country, the organisation of the legal firms in manner which would not allow them to compete with the large firms of the west, but they are largely secondary to the main argument that the opening up of legal services would have a detrimental impact on the legal professionals and the country as a whole.

However in recent times, the country seems to be debating on the advisability of opening up of the legal services sector. The statement of the Chief Justice of India and the resolution of the Bar Council of India highlight the contours of the debate. In this light it can well be said that the legal professionals in India have left their reluctance at the opening of legal services and are willing to consider the liberalisation of services with an open mind.

Volume of Trade in Legal Services in India

The data gleaned from the trade statistics of countries reveal that trade in legal services in India is growing[243]. There has been phenomenal growth in the outsourcing of legal services to India and reports point towards an increase in this trend (Bhattacharya 2007). This trend has been witnessed because of the strengths of the Indian legal system lies in its structure of the legal system based on British Common Law, the high versatile talent available with the country at a fraction of costs available elsewhere and the high

[242] Section 47 of the Advocates Act, 1961. It provides for the entry of foreign legal professional in India and not the liberalisation of legal services as such.

[243] The Import and Export data of legal services of India for 2004 was $73,000,000 and $257,000,000 respectively, while for the 2005 it was $94,000,000 and $390,000,000 dollars respectively. (Data sourced from United Nations Trade Statistics Division)

response time for the tasks outsourced, because of the difference in the time zones (Dasgupta and Ranjan 2006)

Looking at the present data on trade in legal services and the opinion of the members of the legal profession, it can be stated that the time is ripe to consider the liberalisation of legal services in India. This then posits an important question – whether the conditions in India are suitable for the liberalisation of legal services market? Answer to this question is dependant upon the analysis of the present status of the penetration of the Indian market by the foreign law firms and the conditions of the Indian legal firms as compared to the foreign law firms that would enter the Indian market subsequent to liberalisation.

Foreign Legal Firms in India

The Indian laws at present prohibit the establishment of foreign legal firms in India. As a result there are legal firms that are operating in India through different devices. These several devices are Informal ties with the Indian law firms[244], engaging themselves in advisory capacity in the Indian market[245], working out of regional offices[246] and signing memorandum of understanding (MOUs) with the Indian law firms[247]. There is only one UK law firm[248] that has maintained a liaison office in New Delhi since 1994 and they too operate under the device of providing advisory services and information on the current developments in India.

[244] These examples are Jones Day with P&A Law Offices (New Delhi) and White and Case LLP with Mumbai's India Law Services (Dasgupta and Ranjan 2006)

[245] Mark Moseley, specialist with CMS Cameron McKenna's in restructuring electricity markets, is currently advising the Karnataka State government on the State owned electricity distribution system while London based Linklaters India Core team is currently advising private sponsors in relation to the development of Bangalore International Airport. (Dasgupta and Ranjan 2006)

[246] Several law firms are operating through their regional offices in Singapore, Hong Kong and Dubai(Dasgupta and Ranjan 2006)

[247] There has been a surge among Indian law firms to enter into Memorandum of Understanding with foreign law firms. (Dasgupta and Ranjan 2006)

[248] Ashurst is the only Law firm to have a liaison office in New Delhi, established in 1994(Dasgupta and Ranjan 2006)

Thus it becomes evident that the foreign legal firms cannot have a presence in India legally but nevertheless they have a thriving legal business through other devices. This in itself shows the importance of the legal market in India which the foreign legal firms would like to harvest. The legal firms through lobbying with the governments of their countries are bringing pressure on the government of India to open up the legal services sector. In the above regard it becomes pertinent then to analyse the status of domestic legal firms as regards their capacity to hold their own in a liberalised set up

Position of the Domestic Legal Firms

The position of the domestic legal firms in India is presently extremely constrained when it comes to competing with the foreign legal firms. An analogy could be drawn as having one hand tied behind their backs and being asked to face the onslaught of fully prepared enemy. At the outset the Indian legal firms suffer from the restriction limiting the number of partners in a partnership firm. This restriction evolved from the need of having personal unlimited liability of a partnership firm in the case of professional misconduct. On the other hand the foreign legal firms are under no such constraint. They have deep pockets largely because of the size of their set-up and are professionally managed. The second most important constraint that the firms face is the restrictions on advertisement. This restriction prevents the firms from advertising their services and thus will lose out valuable clients to foreign law firms who shall not be constrained by such requirements. One of the biggest reasons for the failure of domestic accountancy firms in India was that they were regulated by the ethical rules of practice while the foreign entrants were free from such constraints and were able to advertise freely (CAAC 2003).

In the light of the above discussion it becomes clear that the Indian legal firms are not yet ready for liberalisation. The laws regulating the practice of the Indian professionals need to be amended before allowing the foreign legal firms in India and adequate time should be allowed to the domestic law firms to adapt to the new laws before the liberalisation of the legal services sector in the country.

The next section in continuity discusses the experience of the accountancy sector in India which was hastily liberalised. The experience of the accountancy sector is being discussed so as to be able to provide suggestions that will skip clear of the mistakes committed in the liberalisation of accountancy services in India.

Lessons from the Liberalisation of the Accountancy Services

A comparative study of the accounting sector is in order to understand the impact of liberalisation of legal services in India. The liberalisation of the accounting sector suggests that the entry of the foreign firms into India, skewed the field in favour of foreign accounting firms and inhibited the growth of the domestic accounting firms so much so that the even after a decade there are no domestic accounting firms in India with a pan Indian presence. On the other hand, the developed world, erected barriers and regulated the entry of the accounting firms through the GATT/WTO route. This weakened the accountancy profession in India considerably (Venkatesh 2006).

The accountancy profession was structured around the small and medium enterprises and while liberalisation allowed the industries to develop, it did not allow the accountancy profession to come to the same level, with the result that the accountancy profession was swamped by the foreign accountancy firms. Due to the networking and brand value they were able to garner the market and this led to the loss of the consultancy market for the domestic accountancy firms. On the other hand the domestic accountancy firms were constrained by the ethical rules, while the foreign accountancy firms were free from the ethical rules and hence they were able to capture a greater share of the market leading to the stymieing of the domestic accountancy firms.

Legal services in many respects are similar to the accountancy services such as regulation of the legal professionals, the firm structure, and the ethical rules governing the practice of legal services. It is pertinent at this stage of draw from the experience of the liberalisation of the accountancy services and approaches the question of liberalisation of the legal services accordingly.

The basic reasons as to why the accountancy services suffered due to the liberalisation was while the domestic firms operated under the strict ethical consideration of ICFAI, the foreign firms had no such compulsions. Though they were technically not allowed to practice and were only permitted to engage in consultancy, by surrogate arrangement with the local accountancy firms, they engaged themselves in practice also. Since they were technically not a practicing accountancy firms, they were free from the ethical rules of the ICFAI and hence were able to freely advice their services, thus adversely affecting the domestic accountancy firms. The other feature of the foreign accountancy firms that worked against the domestic accountancy firms was the brand value of the foreign accountancy firms, which they leveraged to push the Indian accountancy firms out of the market (CAAC 2003).

These issues have to be guarded against in the liberalisation of the Legal services in India. It is necessary that conclusions be drawn from the experience of the accountancy firms and the conditions should be imposed on the foreign legal firms that should allow the legal firms in India to develop.

2. Laws Regulating the Practice of Legal Profession in India

The laws that regulate the practice of legal profession in India are as under:

1. The Advocates Act (Act no. 25 of 1961)
2. Bar Council of India rules (Under the Advocates Act, 1961)
3. Partnership Act (Act no. 09 of 1932)
4. Companies Act (Act no. 01 of 1956)
5. Limited Liability Partnership Act, 2008 (Act no. 06 of 2009)

While the first two legislations – the act and the rules provide for the guidelines for the practice of law in India, the last two laws put restriction upon the practice of the mode of practice. The last legislation, 'The Limited Liability Partnership Act', came into force in April, 2009 it provides for the multidisciplinary practice. It liberalises the rules for

liability as to professionals and was in response to the long felt need of the legal professionals that a limited liability partnership act is needed.

These laws provide for the following restrictions on the practice of legal profession in India.

i. ***In India only natural persons are allowed to practice.***

This emerges from the reading of the section 24 (1)(a) of the Advocates Act that provides that only a natural person who is a citizen of India can provide the service and only in his individual capacity.

ii. ***Degree in Law to be recognised by the Bar Council of India***

The Advocates Act under section 24 (1) (c) provides that only those persons who have passed the law examination from a University recognised by the Bar Council of India are entitled to be registered as advocates in India. Where the degree is from a foreign university recognised by the Bar Council of India, the person is entitled to practice as an advocate in India (Section 24 (1) (iv)). As regards foreign nationals who have been granted a degree by a University recognised by the Bar Council of India this section is further subject to provision of reciprocity in section 47 of the Advocates Act. It is further supported by rule 6 of the resolution no 6/1997 of the Bar Council of India, which says "Subject to the provisions of the Advocates Act, 1961, a foreign national who has obtained a degree in law from any institution/University recognised by the Bar Council of India and who is otherwise duly qualified to practice law in his own country would be allowed to be enrolled and/or allowed to practice law in India provided that a citizen of India, duly qualified, is permitted to practice law in that country" (ICRIER 1999, Hirani 2007)

iii. ***Only advocates have a right to practice law***

Article 19 of the Constitution of India provides that ' a law laying down professional or technical qualifications necessary for practicing any specific profession or carrying on any occupation, trade or business, which requires specialised knowledge is not against fundamental rights to freedom of trade and occupation, provided such restrictions are attached to safeguard the interests of the general public. Thus under the Advocates Act, enacted to regulate the practice of legal profession in India (The Advocates Act, 1961, statement of purpose), only advocates have a right to practice law (Section 29 of the Advocates Act), before any court of India including the Supreme Court of India, before any tribunal or person legally authorised to take evidence; and before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice (Section 30 of the Advocates Act). This provision is further reinforced by Section 33 of the same act which provides that only persons registered as advocates are entitled to practice. Section 45 of the Advocates Act provides for a six month imprisonment to be imposed on persons for illegally practicing in courts and before other authorities. Thus the definition of advocate and other attendant provisions precludes practice by a foreign legal professional. However 'counselling' and 'advice' as professional activities have not been made the sole reserve of advocates. Section 33 of The Advocates Act, 1961 itself allows 'any other law' to allow such practice. Under Section 288 of the Income Tax Act, accounting professionals have been authorised to practice tax law in any court or before any authority in India.

iv. ***Partnership restrictions***

a. As to multidisciplinary practices – No advocate in India can enter into a partnership or any other arrangement with a non-advocate (Rule 2 of Chapter III under section 49 (1)(ah) of the Advocates Act, 1961)
b. As to number of partners – the number of partners in a legal firm have been restricted to a maximum of 20 (The companies act, 1956 under section 11

provides that partnership with more than 20 partners have to be registered as a company in India)

v. ***Employment of foreign lawyers***

The Foreign lawyers can only be appointed as employees or consultants only. They cannot be appointed partners in law firms and also cannot sign any legal document or argue in a court of law (Foreign Exchange Management Act, 1999)

vi. ***Permission from RBI for acquiring foreign exchange***

Any foreigner who is allowed to practice law in India has to secure permission from the RBI if the person desires to acquire foreign exchange and remit the same outside India[249]

vii. ***Other regulations***

a. Unlimited Liability – In India, the liability in partnership is unlimited,
b. Joint venture involving revenue sharing between foreign law firms and local law firms is not possible. The Advocates Act, 1961 prohibits any joint venture with a foreign lawyer who is not registered as an advocate in India under the Advocates Act, 1961
c. Indian law firms and lawyers are not allowed to advertise (Rule 36, in Section IV, Chapter II, Part VI of the Bar Council of India)

The Impact of the Restrictions on the Competitiveness of the Indian Law Firms

The Law firms in India are family controlled organisations offering little incentive of growth to young brilliant lawyers. The limitation on the number of partners in law

[249] Foreign Exchange Management Act, 1999, (Act No. 42 of 1999) requires that a foreign resident and a foreign national (such as foreign law firm) will have to take permission from the RBI before carrying on any business in India. This will include establishing a branch office in India. Even if a foreigner is allowed certificate of practice of law in India, the person has to secure permission of the RBI if he/she desires to acquire foreign exchange and remit the same outside India.

firms prevents them from acquiring size thus making them inherently uncompetitive against the large law firms in the western countries.

The impact of unlimited liability in a partnership has handicapped the Indian law firms and has devoid them of a level playing field in the international arena, where the international law firms are organised under a limited liability framework.

The restriction on multidisciplinary partnerships has again made the Indian firms handicapped as against the foreign MDPs, for the Foreign MDPs are able to provide a host of services and expertise under one roof, thus attracting clients. The lack of High value clients prevents the growth of the Indian law firms.

Another area where the Indian lawyers and firms are rendered handicapped when competing with foreign lawyers is in the area of advertising. While the foreign law firms have got the benefit of advertising their services, the Indian law firms are not able to advertise, because of the provision of the Advocates act, which is based on the philosophy that law is not a business but a noble profession (Sahai and Bharihoke 2006). It is to be noted however, that the embargo on advertisement has undergone a complete transformation in the county of its origin. The English law firms are now free to advertise.

Position of Foreign Lawyers in India

Section 30 of the advocates act provides for the Rights of advocates to practice, and provides that Subject to the provisions of this act every Advocate whose name is entered in the state roll shall be entitled as of right to practice throughout the territories to which this Act extends and that includes the Supreme Court of India, any tribunal or person legally authorised to take evidence and any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice. Section 47 empowers the Bar Council of India to prescribe conditions for recognition of foreign qualifications in law.

From a reading of the above-mentioned sections, it follows that the right to practice law as envisaged under section 29 has only been conferred on advocates described under section 30 of the Act. So an Indian national enrolled in the Bar Council of India has a right to practice law in India. A foreign national, can practice law in India if and only if Indian nationals are permitted to practice law in their country. This is referred to as reciprocal arrangement and it extends the scope of the section to include nationals of other countries. Also a foreign national should have obtained a degree in law by a college recognized by the Bar. He would then be eligible to enrol to the Bar.

Hence a foreigner as per the above rule is allowed to practice in India, provided:

a. The qualifications are recognized by the Bar Council of India and
b. Indian Advocates are permitted to practice in the Country of the foreigner.

Limited Liability Partnership Act 2008

The limited liability partnership act came into force on 1st of April, 2009 and it has fulfilled the long felt need of the professionals, regarding the existence of a mechanism through which they would be able to provide one stop services to the clients and thus would be able to compete with the foreign firms. An LLP is a hybrid of existing partnership firms and full fledged companies. A minimum of two partners are required with no upper limit to the number of partners.

Under the LLP structure, the liability of a partner is limited to his stake and no partner is liable on account of independent or unauthorised acts of other partners. Individual partners are thus shielded from the wrongful acts of other partners. In the traditional firms, every partner was liable, jointly with all other partners and also severally, for all acts of the firm done while he is a partner, irrespective of his stake

Since the partnership involved complete liability upon all the partners, the partnerships firms evolved into family owned business, due to the lack of trust on outsiders. LLP model will change the scene because the liability is no longer unlimited

India's Commitments as regards Legal Services under GATS and RTA/FTA

India has not entered any commitments as regards legal services under the GATS, neither it has entered any legal services commitments under the several free trade agreements with other countries. Out of the several FTA/RTA that India has concluded[250] or is in the process of concluding, only one that is the CECA between the republic of India and Singapore provides for trade in services and even in the CECA, India's Schedule of commitments, no commitments have been entered as regards the legal services. On the other hand in the CCEA, Singapore has left its commitments unbound with respect to the modes 1, 3 and 4 under both the national treatment and market access heads. While with respect to mode 2 under the national treatment and market access heads it has provided commitments as none.

Of the several other agreements or discussions that India is conducting with other states[251], only the India EU Strategic Joint Action Plan, India New Zealand Joint Study Group, Indo -EU FTA and the India US Trade Policy Forum Joint Statement have a

[250] List of concluded agreements

1. Agreement on South Asia Free Trade Area – SAFTA
2. Asia Pacific Trade Agreement APTA
3. CECA between the Republic of India and the Republic of Singapore
4. Global system of Trade Preference
5. India Chile PTA
6. India Afghanistan PTA
7. India Bhutan Trade Agreement
8. India Mercosur PTA
9. India Nepal Trade Treaty
10. India Srilanka FTA

[251] The on going negotiations on FTA's between India and other countries

1. Framework Agreement with ASEAN
2. Framework Agreement with Chile
3. Framework Agreement with GCC states
4. Framework Agreement with Thailand
5. India EU Trade and Investment Agreement TIA
6. India US Trade Policy Forum Joint Statement
7. India Bangladesh Trade Agreement
8. India Ceylon Trade Agreement
9. India EU Strategic Joint Action Plan
10. India Korea Joint Study Group
11. India Korea Trade Agreement
12. India Maldives Trade Agreement
13. India Mongolia Trade Agreement
14. India New Zealand Joint Study Group

mention about trade in services. Of this Indo – EU FTA has a mention about the trade in Legal services.

3. Conclusion

The purpose of this chapter was to analyse the laws of India dealing with the regulation of legal profession in India and also provide an inkling of the environment in which the liberalisation of legal services is being discussed. The chapter dealt with the experience of the accountancy sector, which was hastily liberalised and took a look at the several free trade agreements India has entered into with foreign countries to get the inkling of the environment. It proceeded to find out the relevant laws that regulate the practice of legal profession in India and tried to analyse the laws as affecting the entry of foreign legal professionals. The next chapter will discuss the recommendations and the necessary changes that may be needed in the above laws and would be based on the conclusion drawn from the above six chapter.

CHAPTER VII
CONCLUSION

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A fundamental factor that differentiates legal profession from other profession is its centrality to the governance of public and private life, which then implies that distinctive national characteristics are embedded into it (Morgan and Quack 2006: 404). At the same time globalisation of an economy can be achieved through the agency of law and for which the liberalisation of legal services is a necessary factor.

What is required, therefore, is that a harmonious balance be attained between the liberalisation of legal services and at the same time sustaining the national character of the law. Although the objective of sustaining the national character of the law is more inward looking and conservative in attitude but it has to be harmonised with the other, which consists of exploratory aptitude and seeks to provide a framework for the conduct of international economic relations. There have been opinions that suggest that the chief clientele of foreign legal firms would be transnational corporations (WTO Background Note 1998). But no empirical evidence has been advanced that provides support to that contention and would suggest that domestic corporate persons would not be clients to such foreign law firms (Dasgupta and Ranjan 2006: 209). However, it can be said that the foreign legal firms would be more interested in the high value corporate practice than in the practice of the local laws of the host State (WTO 1998; Vagts 2001: 35).

A watertight compartmentalisation would be an ideal where the domestic legal system remains completely separated from the contours of liberalisation of legal services. This is however not possible in reality, as the fields of law are not separate and thus the endeavour should be made to provide an interface which simultaneously safeguards the range of interests. This dissertation in chapter II evaluated the entire spectrum of legal services, including the type of restrictions and their rationale, in chapter III it analysed the liberalisation under the WTO/GATS framework while in chapter IV, it focussed itself

towards the analysis of the regional trade agreements and the free trade agreements as a mode of liberalisation of legal services. Chapter V of the dissertation dealt with the legal framework of the other countries as regards the entry of foreign legal professionals in their jurisdiction. In chapter VI, the present legal position of India was analysed and In the light of this requirement the following aspects have to be kept in view while liberalising legal services:

1. The country is under immense pressure from the developed countries regarding the liberalisation and opening up of the legal services sector and they seek the multilateral (GATS) or the bilateral/regional/free trading agreements route for liberalisation. However in the course of negotiations India has to keep the obligations attached to a particular route in mind before committing the sector to liberalisation through that route. The special nature of legal services and the fact that legal services are intermediate services, serving to provide confidence to investors, rather than being a major exchange earner in its own right, implies that legal services should not be made a part of usual bartering of sectors for liberalisation.
2. Liberalisation of legal services is likely to help the economy in attracting investment, but on the other hand, there are attendant pitfalls also in the liberalisation, which have to be guarded against. In the light of the above, the country should give a hard look to the option of autonomous liberalisation which would allow the country to escape from any binding legal commitments and would give the flexibility of modifying the entry of foreign legal professionals as suited to our domestic requirements.
3. A third factor that has to be borne in mind is preventing the swamping of Indian legal services market by foreign firms and also encouraging the global exposure for Indian legal professionals. Laws need to be changed for the entry of foreign legal professionals into India, but such change has to keep in view the interests of Indian citizens as to their access to quality legal services with side by side

encouraging Indian legal professionals becoming competent enough to compete with the best in the global market[252].

4. Investment flows into the country from certain economies (DIPP 2009) and similarly investment from India is moving into certain economies (IndiaPRwire 2007). However 'investment in' is expected to be more than 'investment out' (UNCTAD 2008)[253] (Dasgupta and Ranjan 2006: 246). Since the rationale of legal services liberalisation is encouraging investment and providing assistance to investors abroad, a whole-sole general liberalisation of legal services is not essential. The method should be to enter negotiations with those countries from where the investment is coming in or going out or modifying laws in a manner that the qualification of only those countries are recognised which are important for investment 'in and out'. Secondly, the requirement of reciprocity should be insisted upon unless the one directional entry of foreign legal professional of that particular country is in the interest of the country
5. Lastly, after amending the laws sufficient time should be allowed for the legal firms and professionals in our country to adapt to the changed circumstances, lest we witness the same fate with legal services as befell the accountancy services[254]

Keeping the above features in mind, the following recommendations are offered

1. Foreign law firms should be allowed into the practice of 'Home country law' and 'International law'. They should be barred from practicing 'Host country law', except where it is necessary for the practice of 'Home country law' or 'International Law', and that too should be under the written advice of a domestic

[252] The American corporate culture owes its origin to the presence of lawyers in the American society (Greenwood et al. 2006)

[253] Unctad Data for the year 2007 provides 'investment in' for India at $ 22950 million and 'investment out' at $ 13649 million.

[254] The accountancy services were liberalised without giving time to the domestic accountancy firms to adjust to the changed reality, with the result that the domestic accountancy firms were left with no option but to merge with the foreign accountancy firms or work as their associates. The net result has been that there are left no pan-Indian accountancy firms in India; leave alone their presence on the global level.

lawyer. Further Notary services, Trust and Deed, transfer of land should have citizenship restrictions.

2. Practice in areas where International and domestic laws overlap and which have exigent public welfare implications such as IPR and extradition, should be under the supervision of a domestic lawyer
3. Practice in 'Third Country Laws' should be on the written advice of a lawyer eligible to practice law in that particular country
4. The foreign legal consultant should have sufficient practicing experience in his home country for him to register as a foreign legal consultant in India.
5. Services of the foreign law firms should be limited to advisory services and alternate dispute resolution (arbitration, conciliation and negotiation) that too in conjugation with Indian counterparts who themselves must meet certain threshold of practice requirements in reference to minimum years of practice and financial capability (Dasgupta and Ranjan 2006 : 245)
6. Foreign law firms should not be allowed to have any 'representational services' in courts and tribunals in India. Administration of legal system is a part of the national culture; it should be firmly in the hands of national lawyers. For litigation purposes, foreign law firms should hire services of litigation lawyers in India. (Dasgupta and Ranjan 2006: 245)
7. Foreign law firms should be subject to the ethics and disciplinary rules of the Bar Council of India. (Dasgupta and Ranjan 2006: 245)
8. Ideally the foreign legal consultant should be allowed to practice under any of the legal devices – sole proprietorship, partnership, partnership with Indian lawyers, limited liability partnerships. But in the initial stages only partnership arrangements with the Indian lawyers or under their employment should be permitted so as to ensure that there is always the supervisory overview of the Indian lawyer. This will also help the Indian lawyer to become acquainted with the requirements of foreign practice.
9. The concept of limited liability corporations shouldn't be introduced in India at this juncture as the nation is still debating whether the work of providing legal service is a profession or a business.

10. Professional indemnity insurance should be a mandatory condition for registration of foreign lawyer
11. The provisions of joint partnership should be such that the firm remains under the control of the Indian partners at all times. This could be done on the lines of Singapore law where there are strict restrictions as regards to the number of directors, investment in a firm, scope of practice and share in the profits.
12. Foreign firms should not be allowed to use their foreign firm names at least in the initial years unless the Indian firms acquire some experience of competition.
13. Residency requirements should be imposed on foreign legal firms and foreign lawyers and they should be required to maintain commercial presence. This provision should be mandatory for all except the 'fly in- fly out' lawyers. The status of the lawyer – whether a 'fly-in fly-out' or permanent should be on the basis of number of cases he handles in a six month period. This requirement is necessary for the effectively locating the presence of a lawyer for liability or otherwise.
14. Foreign lawyers can be a part of multi-disciplinary firms, but the multi-disciplinary foreign firms should not be allowed into India, in the initial stages, in order to provide opportunity to the Indian law firms to gain time and establish themselves.
15. Fee and advertising restrictions should remain with regard to the host country law, till the professionals have full debate over the nature of the legal profession and come to the conclusion – whether it is a noble profession or a business.
16. Strict reciprocity should be required when allowing foreign legal professionals to enter the country.

Unilateral or Autonomous Route should be preferred for Legal Services Liberalisation

The three routes of liberalisation that are available for the liberalisation are multilateral, bilateral and autonomous liberalisation routes. Multilateral liberalisation through the GATS framework or regional trading agreements involves negotiations for

reciprocal opening of the markets to goods and services. While the multilateral route of GATS or regional trading agreements does offers benefits in making large markets available for trade, it has also attendant drawbacks. The fundamental drawback for GATS is 'free rider' problems and with regional trading agreements, it proves to be extremely onerous negotiations. Also, another problem that surfaces with the multilateral trading agreements is that the commitments after being entered into become binding and cannot be derogated from. The procedure for modification of commitments in the GATS or even in regional trading agreements is quite difficult, which makes the withdrawal of commitments in case of a negative impact of those commitments quite difficult. Further, both the multilateral routes involve a bartering of sectors, where a sector, which is important for an economy, is bartered for a sector, which is not. This is the way, developing countries have been liberalising their economies by entering into agreements with developed countries. They seek preferential access for commodities while allowing their service sector to be opened up for developed countries. In this way, while the developing countries seek access for their manufacturing goods to the developed countries markets, they sell out their policy space for regulating the services sector in their economies.

The bilateral/FTA route of liberalisation again involves negotiating market access with other countries and again involves a scheme of bartering. Additionally, the countries with which one is entering into bilateral trading agreement is a factor to be taken into account Entering into services agreement with developing countries is of low worth and entering into agreement with developed countries may lead to swamping of the services market with deep penetration as a likely consequence. It is noteworthy to point out here, that major trading countries barring USA and Australia do not have a bilateral trading agreement between them and these countries include Australia, China, Japan, Canada, India and EU.

Entering into legal services liberalisation with developing countries is likely to produce little result as legal services being intermediate services, and not being a major export earner in their own right, are only relevant when coupled with clients investing in a country. Secondly, the Indian legal profession has existed in a protected environment

and hence may not be able to take up professional activities in developing countries where as it is opportunities for professional activities would be reduced due to the lack of investment from the country.

Entering in bilateral trading agreement with developed countries would put the Indian professionals in competition with highly competitive law firms of the west and the Indian legal professional would be competing for business in India rather than in other countries. Thus it would be a drawback in terms of benefits of liberalisation. Secondly, since the commitments entered would be legally binding, going back on them, if they are not in the interests of the nation would be not possible. With legal services, which have got implications beyond the immediate effect on the rank of India as an investment hot spot, this would be a very consternating development.

Autonomous liberalisation is beneficial where the country believes that it stands to benefit from liberalisation. Legal services' perfectly fits the bill. Legal services are producer or intermediate services, helping to provide confidence to the investor and not a major trade sector on its own, thus being a suitable candidate for liberalisation. Unilateral liberalisation allows one to determine the extent to which and the segments of legal services that may be liberalised. Further autonomous liberalisation is devoid of any possibility of legally binding commitments and thus where it appears that a particular liberalising move has not produced the intended benefits, one can easily backtrack. This flexibility would be an important safeguard in the case of legal services liberalisation as the character of legal services merits a very slow and step wise method of liberalisation, where evaluation is should be performed at every step of liberalisation.

The Changes Required to be made in the Present Laws

The present legal regime, which deals with the law relating to legal practitioners in the country, has been incorporated in the Advocates Act, 1961 (Act no. 25 of 1961) and the Bar Council of India Rules framed there under. The Advocates Act, 1961 also provides for the constitution of Bar Council and an All India Bar Council. Besides, two more enactments, such as, the Indian Partnership Act, 1932 (Act no. 09 of 1932) and the

Companies Act, 1956 (Act no. 01 of 1956) also have an important bearing upon the subject matter. Therefore, it is argued that the present legal regime regulating the legal practice in India should be modified in the following directions:-

First, the provisions of the Advocates Act, 1961 keeping in tune with the Indian Partnership Act, 1932 and the Companies Act, 1956 should be suitably modified and where need be, amended to make provision for the unlimited partnership with limited liability. However, the provision for unlimited liability with regard to the professional misdemeanour by the partner should always be there. Fortunately, this proposition has been accomplished through the agency of the Limited Liability Partnership Act, 2008 (Act no. 06 of 2009) which came into force on 1st April 2009.

Second, the Bar Council of India Rules, prohibiting the solicitation or advertisement of the concerned cases to be dealt by a legal practitioner, should be modified in order to provide them with an opportunity to advertise about the services rendered by them. However, there should be no whole sole liberty of advertisement as to affect the nobility and dignity of the profession. Legal practice and legal firms should be permitted to enjoy limited liberty to provide information regarding areas in which or in relation to which they offer their services. The extent of limitation or the extent of liberty would be dependent on the requirement of the circumstances. However, it is necessary that there should be no full fledged liberty of advertisement, it should be limited.

Third, after the legal practitioners of our country become familiar and gain sufficient experience with regard to the operation of the provisions of the Limited Liability Partnership Act, 2008 and become ready to enter into partnership with the foreign legal professionals or practitioners, which may be fixed at two years from the date of the implementation of the Act in question. Further, provisions should be made to permit the foreign legal professionals to practice in the selected areas only. This may be accomplished by making laws on the model of the law of Singapore. It should include the provisions regarding the following matters-

1. Qualification requirements – The foreign legal professionals should possess such qualifications as are required for their enrolment in their own country to practice law and in addition, it is suggested that they should also possess three years practicing experience as a legal practitioner in their country in the relevant areas. Further more, they should never have been subjected to disciplinary action within their own country and should neither be ever declared as bankrupt in a proceeding before a court.
2. Residency requirements – The foreign legal professionals should normally be required to stay in the country for a period of six months in each calendar year.
3. Partnership arrangements – The foreign lawyer, it is suggested should either enter into partnership with a local lawyer or work under his employment. In case of legal firms desirous of practicing in this country, an arrangement should be made whereby these firms could be enabled to enter into partnership with an Indian legal firm and it is also suggested that the directors of such partnership firms should not be less than three. A higher number of directors may be fixed with the number of Indian directors always greater than the number of foreign directors.
4. Professional indemnity requirements – The foreign lawyers should undertake a professional indemnity insurance which should be at least INR Ten million, for them being able to offer their services in India
5. Reciprocity requirements – While reciprocity requirements would be desirous, they should be imposed on a case-by-case basis, depending upon the benefits that can accrue from such liberalisation. Where it appears that the benefits accruing for the Indian economy are immediate, requirement of reciprocity from that country can be postponed for a year.

In conclusion, it can be said that autonomous liberalisation should be the mode adopted for the liberalisation of legal services and a step by step liberalisation of legal services should be pursued so as to maintain the integrity of the legal services and legal profession in India.

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