

An IBA Guide to

# International Trade Agreements for IBA Member Bars



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The International Bar Association (IBA), established in 1947, is the world's leading international organisation of legal practitioners, bar associations, law societies, law firms and in-house legal teams. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 lawyers, 190 bar associations and law societies and 200 group member law firms, spanning over 170 countries. The IBA is headquartered in London, with offices in São Paulo, Seoul, The Hague and Washington, DC.

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# Introduction

This guide is designed to assist International Bar Association (IBA) Member Bars in understanding and responding to the changing approach to international treaties governing trade in legal services. It builds on and updates the General Agreement on Trade in Services (GATS) Handbook, which the IBA published in 2003 (revised in 2013). The original handbook was designed to help IBA Member Bars deal with a specific set of negotiations taking place in the World Trade Organization (WTO) at the time, known as the Doha Round of negotiations, which were expected to have significant implications for trade in services, including legal services. The 2013 edition incorporated some additional material, but was essentially an update of the 2003 version. This new guide to International Trade Agreements incorporates all the key material on the WTO GATS from these handbooks, with updates to reflect the very different environment for international trade in legal services that has emerged over the past decade.

There has been a significant shift in the international trade landscape since 2013. While the GATS remains the starting point for trade in legal services, there have been a host of developments both inside and outside the WTO that apply in different ways to different countries. This makes it more difficult for IBA Member Bars to follow what is happening, and readily to see the significance of the international trade agreements that their own governments may have signed. This guide is designed to fill the information gap, and to provide practical assistance to help Bars respond to their own national situation in a timely and appropriate way.

## References to Bars

Although this guide will use terms such as ‘IBA Member Bars’ and ‘Bars’, it recognises that Bars come in many shapes and sizes. For example, some IBA Member Bars are regulatory bodies, some are representational entities, and some are a combination. Some Bars cover the entire country, whereas other Bars cover a ‘subnational’ region, as the WTO might describe it. (Many of these differences are described in the 2016 IBA document titled *Findings from the Directory of Regulators of the Legal Profession.*)<sup>1</sup> This guide also recognises that legal services regulators come in many shapes and sizes, that not all regulators are IBA Member Bars, and that legal service stakeholders include clients and the public, among others. The guide is intended to be useful for all those who are interested in the treatment of legal services in international trade agreements. For the sake of simplicity, however, the guide will refer to ‘Bars’ when noting topics of interest related to legal services and international trade agreements.

## Why are the topics in this guide important for Bars?

Trade in legal services is important to Bars, whether their interests lie predominantly in regulatory or representational questions, as listed below:

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1 Findings from the Directory of Regulators of the Legal Profession (IBA, 2016) <https://perma.cc/DXT9-Q72X> accessed 5 May 2023.



### *Regulatory questions*

- At what point would foreign lawyers practising in our jurisdiction have consequences for our own domestic legislative or regulatory arrangements?
- If new trade negotiations affecting legal services are proposed with one or more other countries, what would our Bar's position be and why?
- If a new trade agreement is likely to change the status quo, what new regulatory arrangements might need to be introduced?
- What risks and/or opportunities might other issues being discussed in prospective trade agreements present to our Bar? (eg, conditions on e-commerce trade?)

### *Representational questions*

- What might be the implications of greater foreign competition in our market and how could we mitigate any risks for our members?
- Do we want to encourage greater collaboration between our lawyers and foreign lawyers, and if so, should this be governed by any conditionality or limitations?
- Do we want to facilitate members of our Bar working in other jurisdictions, either on a cross-border basis or by establishing an office elsewhere?
- Do we want to make it easier for our members to cross-qualify into neighbouring or partner jurisdictions?

- What might be the accompanying trade conditions required to turn our jurisdiction into a regional hub for specific areas of legal business or dispute resolution?

Determining the answers to these questions and conveying positions effectively to national trade negotiators will require some understanding of international trade treaty commitments and how they apply to legal services.

This guide provides some assistance on how to approach this challenge. As you might imagine, giving someone an ‘instant education’ in trade law as applied to legal services does not make for fast or easy reading. Therefore, the guide has four parts.

**Part I** provides a high-level policy context and overview of key trade in legal services concepts as a starting point. This section also contains some practical tips on how Bars can engage with policy-makers on trade in legal services issues.

**Part II** sets out the international trade legal framework that governs trade in legal services for all WTO members.

**Part III** provides key scenarios in which Bars might find themselves in relation to international trade in legal services negotiations, notably bilateral or regional trade agreements (RTAs), and provides guidance on the key differences in process and approach that might characterise these different scenarios.

**Part IV** summarises how the IBA has been assisting its Member Bars, and will continue to do so, on trade in legal services matters. It also provides links to IBA resources.

# Part I. Context and high-level overview

Services are the hidden glue holding economies together. They account for 65 per cent of the world's economic activity,<sup>2</sup> nearly half of the world's employment and nearly a quarter of the world's trade. Legal services account for between one to two per cent of all economic activity in developed economies.

Although the formal legal services economy may be smaller in developing countries, the growth and development of this sector plays a vital role in the creation of higher value – added economic activity that can support more jobs and higher incomes for all citizens.

The global value of the legal services sector is estimated to be around \$950bn,<sup>3</sup> (2022 figures), but even this is a gross underestimate of the value of lawyers' and legal services activities. The value of the legal services economy is not simply represented by services that are directly purchased by clients, such as assistance in drawing up a business contract or being represented in court. Legal services have a role to play across the whole supply chain, and their value is embodied in the sale of goods, in investment agreements, in intellectual property protection and the value of property. An increase in trade and economic activity more generally is therefore likely (but not guaranteed) to increase the demand for legal services. Even in cases in which legal services are not explicitly included in

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2 Defined as gross value added or GVA.

3 See, eg. *Legal Services Market Size & Growth Analysis Report, 2022–2030* (Grand View Research) <https://perma.cc/9Z59-S6MM> accessed 12 April 2023.

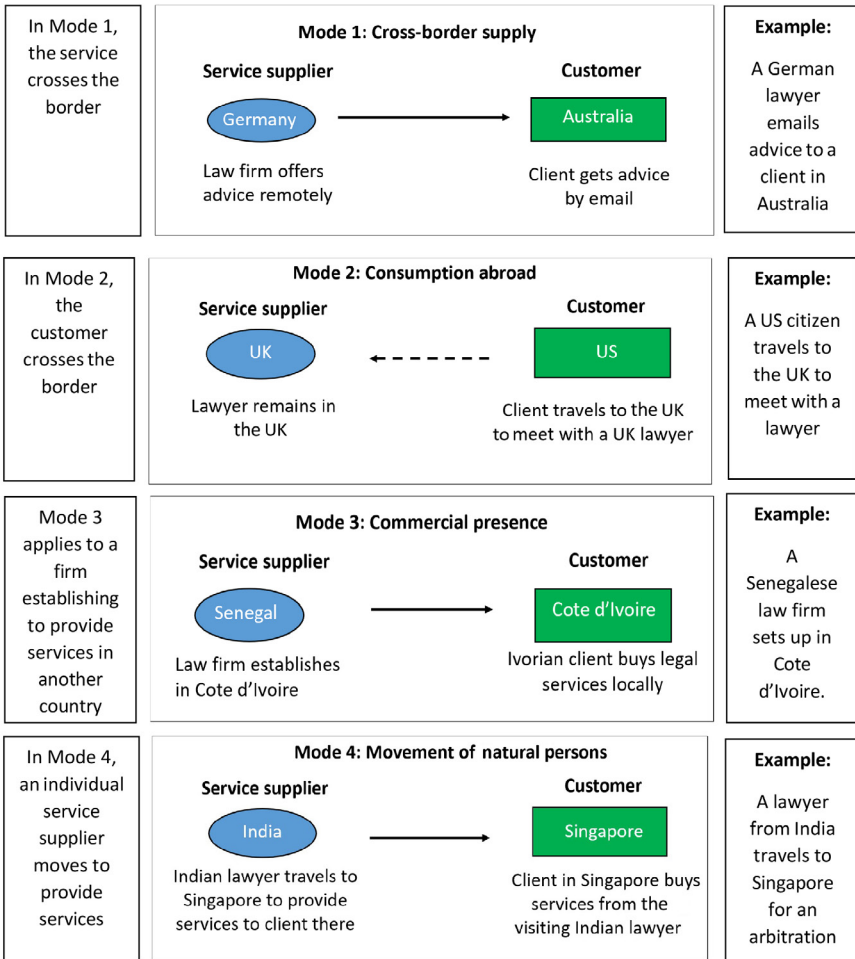
trade agreements, the fact that other sectors of the national economy are affected has implications for Bars and their members.

Historically, services were more difficult to trade than goods. Because of their intangible nature, they are difficult to store and are often consumed face-to-face in a direct exchange between the supplier and consumer. The advent of the internet, however, has changed this picture. Services can now be consumed and enjoyed in different ways, either remotely or face-to-face. This has generated new interest in the role that trade in services can play, and expanded the potential opportunities for lawyers.

## **How does trade in legal services take place?**

Unlike trade in goods, which involves the physical carriage of products to the border where customs checks and the imposition of tariffs may take place, trade in services, such as legal services, can happen in four ways. These are classified as ‘modes of service supply’ and outlined in the first article of the GATS (see Figure 1).

**Figure 1: How legal services are traded**



## **More about the modes of supply**

### **Developments in cross-border supply of legal services (Mode 1)**

The four modes of supply set out in the GATS were described at a time when digital services were in their infancy and the paradigm that came to mind was of an actual person crossing a border. The internet and email existed, but the WTO agreements were signed before there were robust search engines, PDF documents or widespread webmail applications. Contrast that situation with today.

One of the features of the current delivery of legal services is that many of its parts can be separated and conducted remotely – even court hearings, a development which became more widespread during the coronavirus pandemic of 2020–2021.

As a result, Mode 1 (the service itself – or portions of the service – crossing the border) has undoubtedly increased because that is the way in which digital services operate. The rise of e-commerce to deliver legal services has also affected the other modes of supply. For example, is Mode 1 or Mode 2 involved if a client in one country downloads a file posted by the lawyer to a secure dropbox hosted in the lawyer’s host country?

The increased use of digital Modes 1 and 2 legal services trade has created challenges. For example, when countries made their Mode 1 and Mode 2 commitments, they may not have anticipated digital trade. The delivery of legal services through Modes 1 and 2 creates challenges for regulators since, in general, the regulation of lawyers

has focused on physical presence. Digital services trade also raises issues around data flows, and the growing body of international legislation relating to data protection, data storage and use. These issues are dealt with separately in trade negotiations.

Therefore, it is important for regulators to be aware of the potential implications for legal services regulation of wider decision-making in these areas.

A further complicating factor is that the pandemic has led to a growth in the provision of cross-border legal services, through the apparent growth in digital nomads, who may be lawyers no longer living in their home state but providing legal services back into their home state. Providing digital legal services back to a home state from a base outside the home state is a reversal of the type of cross-border legal services originally envisaged. Digital nomadism may become a growing phenomenon among groups of people providing legal services whose work does not require them to be located in a particular place.

These developments may pose a challenge for the regulation of lawyers (and for trade commitments that have to reflect the state of regulation). Professional indemnity insurance coverage, consumer protection and redress are all issues that are challenged by these developments and lie beyond the remit of this guide, but data issues are considered in more detail in Part III.

## Issues arising when individuals move across borders to consume or supply legal services (Modes 2 and 4)

Trade in Modes 2 and 4 involve the physical movement of individuals (natural persons) across borders. Mode 2 is travel by the customer or client and Mode 4 is travel by the service supplier or lawyer. For trade in services purposes, this movement of people relates only to travel for the purposes of providing or obtaining legal services (ie, travel that involves the generation of revenue) and explicitly excludes permanent migration, or travel for personal or tourist reasons.

Although many trade agreements do not address immigration and visa issues, some trade agreements may include commitments about the number of legal services visas available. But even if a trade agreement does not address the issue, it may contain language that reminds one of language that might be used for different visa categories. This language is helpful in understanding how Mode 4 works. Although governments have their own way of defining the categories of business travel that might be involved when a natural person crosses a border to supply services, the language below is commonly used to describe a country's Mode 4 commitments (often found in the 'horizontal commitments' section of a country's international trade agreements – see Part II below for more detail):

- **Intra-corporate transferees:** These are individuals who already work for their employer and are being transferred from their home location abroad into another country (eg, a lawyer seconded to an office of the law firm in another country).



- **Contractual service suppliers:** These are individuals who are working for an organisation that has a contract from a client in the country to which they are travelling (eg, a lawyer from a law firm that won a mandate from a client in another country).
- **Individual service suppliers:** These are individual lawyers who have won a contract in their own right, as opposed to their firm, to provide services in another country.
- **Business visitors:** These are individuals who are visiting temporarily for less than a specified number of days (maximum is usually 90 per visit) to carry out non-remunerative business activities (eg, participation in business development activities and IBA conferences).

## Issues relating to the establishment of foreign firms (Mode 3)

Whereas Modes 2 and 4 focus on the movement of individuals (natural persons), Mode 3 focuses on the ability of a *firm* to establish a commercial presence in another country. In other words, it applies to a law firm that wants to set up an office in another country. Mode 3 commitments do not address the issue of which individuals will staff that foreign office. For example, a WTO member might allow a foreign law firm to establish a branch office, but require that the lawyers who staff that foreign law firm office be licensed by that member state. In other words, it will be Mode 4, not Mode 3, that says whether foreign-licensed *lawyers*, as opposed to foreign *law firms*, can practise in the WTO member state.

## A new Mode 5?

Although not officially recognised, mention is sometimes made by trade commentators to ‘Mode 5 services’. This refers to the services content embodied in goods exports. Typical Mode 5 services include, inter alia, software services that might be incorporated as part of manufactured products. Developments in technology are raising the prospect that Mode 5 services may become relevant to legal services, for example, in the form of legal contracts that are executed in response to specific events and recorded on a blockchain. For the time being, however, trade agreements are generally explicitly or implicitly framed in terms of Modes 1–4.

## The WTO and the GATS

Trade in services, such as legal services, were not included in global international agreements until 1994 with the conclusion of the Treaty of Marrakesh and the creation of the WTO. The WTO Treaty is made up of a series of agreements covering different aspects of trade, and one of these is the GATS (see Figure 2).



**Figure 2: The WTO agreements**

*Contents*

Final Act

Annex 1A: Agreements on Trade in Goods

## Annex 1B: General Agreement on Trade in Services (GATS)

Annex 1C: Agreement on Trade-Related Intellectual Property Rights  
Annex 2: Dispute Settlement Understanding

Annex 3: Trade Policy Review Mechanism

Annex 4: Plurilateral Trade Agreements; Ministerial Decisions and Declarations

Alongside the other WTO agreements, the GATS became effective on 1 January 1995 and applies to all WTO member states. As at 1 January 2023, there are 164 member countries of the WTO and a further 24 currently negotiating accession.<sup>4</sup> The GATS is highly relevant for IBA Member Bars because most IBA Member Bars are located in countries that have agreed to be bound by the GATS – or that are in the process of accession to it.

### What is covered by the GATS?

The provisions of the GATS apply to 'measures affecting trade in services' (Article I (1))

*Explicitly excluded* from some or all GATS provisions are:

- services in the exercise of governmental authority (eg, public order) (Article I (3)(b));
- government procurement (Article XIII); and
- protection of human health, privacy and other items listed in Article XIV.

## What is in the GATS?

The GATS contains a core set of rules that apply to all WTO members – these are known as the general obligations of the GATS and are designed to ensure that services trade is conducted in ways that serve

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4 'Members and Observers of the WTO' (WTO) <https://perma.cc/NYN8-YM7S> accessed 12 April 2023.

global growth and prosperity, and above all, avoids the risks of trade wars and protectionism. The general obligations of the GATS are:

- **Most favoured nation treatment (MFN)** (Article II): This is a fundamental principle of the GATS. It requires a WTO member to extend the best treatment that it offers to foreign providers from a specific country supplying specific services to those from any other WTO member country under the same terms and conditions. The limited exceptions to this general rule are described in more detail later in this guide.
- **Transparency:** Any general measures that affect trade in services must be made clear to foreign service suppliers through publications, info-points and so on. See Article III.
- **Domestic regulation procedures:** Although most of GATS Article VI applies only to service sectors that a country places on its Schedule, Article VI (2) requires WTO members to provide procedures that provide, inter alia, for the prompt review of decisions affecting trade in services.

On top of these general obligations, there is an expectation that WTO members will open at least some of their services sectors (or subsectors) to foreign suppliers. These sector-specific commitments, along with ‘horizontal’ commitments that apply to all service sectors, are placed in a document called the country’s schedule of specific commitments. The sector-specific commitments cover what a WTO member has agreed to offer to other WTO members by way of access to its domestic market for particular service sectors or subsectors. Part II of this Guide provides additional detail.

All of these general obligation provisions sit within the GATS governance framework, which sets out:

- what happens if there is a services trade dispute between WTO members (Article XXIII);
- how further evolution of the WTO services trade system is to be negotiated and agreed (Article VI (4) and XIX); and
- what happens when WTO members want, for example, to make deeper bilateral or regional trade deals with their neighbours (Article V). (See the section immediately below.)

## **How do regional trade agreements fit with the WTO?**

The WTO does not prevent its members from being party to bilateral or regional agreements, which can offer deeper, preferential access to specific countries, despite the MFN obligation of WTO membership. There are two principal mechanisms in the GATS that permit members to derogate from their MFN obligations:

### **Through the negotiation of MFN exemptions on accession to the WTO**

These exemptions must be approved by all other WTO members and often relate to existing arrangements that cannot easily be turned into multilateral commitments. For example, many countries maintain MFN exemptions allowing them to honour longstanding reciprocal commitments (eg, preferential access for natural persons from certain partner countries). These exemptions are intended to

be temporary, and the GATS indicated that they should be phased out after ten years, though in practice, this has not yet happened.

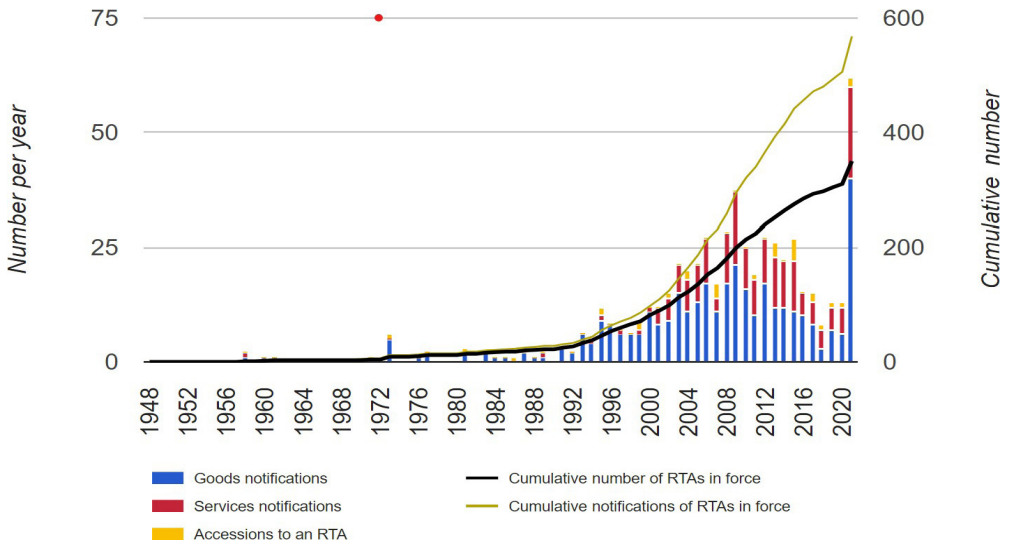
## **Through a GATS Article V process**

This allows WTO members to join together bilaterally or on a plurilateral basis to negotiate a substantially deeper economic or trading relationship. Preferential access may be offered only to those members of the economic integration agreement, although such agreements must not undermine the access provided for in GATS schedules. If it does, other WTO members may be entitled to ask for compensation.

## **How is the global environment for international trade agreements changing?**

Although the WTO Treaty foresaw potential interest from members in supplementing WTO membership with deeper bilateral relationships, the number and depth of such relationships has grown exponentially over the past two decades. Figure 3 illustrates the significant growth, not just in bilateral and RTAs overall, but more significantly, in the inclusion of services in such agreements (shown by the red segment of the columns). There are more ‘cumulative notifications’ than ‘cumulative number in force’ for RTAs because there are multiple individual country members of an RTA.

**Figure 3: Bilateral and RTAs currently in force (1948–2021)**



Source: WTO

The growing interest in bilateral and RTAs has its origins in a number of important trends and developments.

## Lack of progress in advancing the services liberalisation agenda at the WTO

The GATS envisaged that negotiations at the WTO would be ongoing and ‘progressive’. However, efforts to liberalise trade in services further through the Doha Round, which was launched in 2001 to follow up on the Marrakesh Treaty, floundered. The main reason for this lay not in a lack of willingness to consider further liberalising moves on services, but rather because WTO negotiations were traditionally approached as ‘single undertakings’, which required agreement on all issues – including controversial ones, such as further cuts in agricultural subsidies. Once it became clear

that little progress was likely to be possible in a WTO multilateral forum, attention turned to other mechanisms (considered in more detail in Part III).

## **Growing recognition of the role of services in supporting all trade**

Pioneering work by the World Bank, WTO and Organisation for Economic Co-operation and Development (OECD) has illustrated how important services like legal services are to the functioning of economies. This has created greater interest among countries, including developing countries, to using trade policy to foster the development of their homegrown services sectors.

## **Deeper regional integration**

Above all, there has been a growing drive among both developed and developing countries to reap additional benefits from deeper integration, especially with neighbouring economies, in recognition of the advantages that greater economies of scale may bring. For example, in Asia, recent years have seen the deepening of the Association of Southeast Asian Nations (ASEAN),<sup>5</sup> the formation of the Regional Comprehensive Economic Partnership (RCEP)<sup>6</sup> and the general growth in services trade interest in South Asia. Africa has seen the East African Community (EAC)<sup>7</sup> and the Southern

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5 Ten member countries in Southeast Asia: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

6 The Regional Comprehensive Economic Partnership Agreement currently has 15 member countries and includes the ASEAN members plus China, Japan, South Korea, Australia and New Zealand.

7 Seven countries in the Great Lakes region of East Africa: the Democratic Republic of the Congo, the United Republic of Tanzania, and the Republics of Kenya, Burundi, Rwanda, South Sudan and Uganda.



African Development Community (SADC)<sup>8</sup> negotiate liberalisation of services. In addition, the West African Monetary and Economic Union (UEMOA)<sup>9</sup> has led to significant services integration in its single market, and the African Continental Free Trade Area (AfCFTA)<sup>10</sup> covering 54 member countries looks set to launch continent-wide negotiations. In Europe, the European Union has expanded significantly since the GATS took effect in 1995.

The inclusion of services in trade agreements is not the only significant shift in trade policy that the latest generation of bilateral and regional trade treaties has created. New-style agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>11</sup> and RCEP, contain a wide range of chapters, which often go beyond traditional trade policy to cover more general cooperation.

Adopting new-style agreements has two important consequences of which IBA Member Bars should be aware:

- First, recent agreements demonstrate that new ideas on trade policy and cooperation can be imported from various sources, and these may have implications for the way in which services liberalisation is approached:

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8 A Regional Economic Community comprising 16 member states: Angola, Botswana, Comoros, the Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe.

9 The seven member states are Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo.

10 AfCFTA brings together the 55 countries of the African Union (AU) and eight Regional Economic Communities (RECs).

11 CPTPP is a free trade agreement between 11 countries around the Pacific Rim: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

- some bilateral and RTAs incorporate issues that have been discussed within the WTO at committee level, but have not been able to generate a sufficient consensus in that forum to produce multilateral agreement;
  - ideas from other multilateral organisations, such as the World Intellectual Property Organization (WIPO), World Customs Organization (WCO), or OECD may be reflected in trade agreements; and
  - more controversial positions that are championed by a particularly large trade partner (eg, as the EU or US) but not supported elsewhere may be included and mainstreamed across their agreements as a way of building momentum around a particular approach (eg, data protection or government procurement).
- Second, recent agreements reflect changes in the dynamic of a trade negotiation. No longer is this solely about access to a partner's market. Issues such as sustainable development, cooperation in multilateral fora and access to cooperation funding create potential benefits in trade relationships for partners that might otherwise have had less to gain from negotiations with larger developed countries. This approach opens up new avenues of opportunity (and possibly risk), of which Bars should be aware.

Despite the novelties of the latest generation of trade agreements, it is important to remember that the core trade provisions in bilateral and regional agreements will necessarily build on the foundations of the WTO and GATS, at least in all cases in which the signatories are one of the 160+ members of the WTO.

## How does trade in legal services relate to this picture and how can Bars influence it?

As already mentioned, the legal services sector clearly falls into the category of services covered by the GATS. How they are covered and what this means in practice is set out later in this guide but, first, it is worth considering the role that Bars can play in the process of negotiating and managing trade agreements. Although international trade agreements are government-to-government agreements and typically negotiated by government officials, Bars should keep the following in mind:

- IBA Member Bars and other legal services stakeholders have an important role to play in advising governments about the terms of any international trade agreements being negotiated to ensure that national interests are protected and dispute clauses are fair and usable. Lawyers will often be needed to implement international treaty agreements in local law and to help businesses respond to them.
- Trade agreements may include specific commitments on legal services that affect the rights of a signatory country's lawyers to practise in the jurisdictions of other treaty partners, as well as the rights of foreign lawyers to practise locally in the signatory country. (In other words, trade agreements may address both 'inbound' and 'outbound' lawyers and law firms.)
- The new generation of trade and cooperation agreements, which has emerged in recent years, is much broader-based than previously. These agreements tend to involve much deeper cooperation in areas like competition policy, procurement and gender-based

rights, as well as familiar trade topics. As a result, lawyers who are not engaged in work relating to trade and commerce may nonetheless find that international trade and cooperation agreements have implications for their work and their clients.

## **How can an IBA Member Bar influence the negotiating proposals by its country's trade representatives?**

Engaging with government departments is not always easy, but there has been growing recognition since the mid-1990s by international organisations and government trade departments that engagement with Bars, regulators, civil society and the private sector is essential to maintain the democratic legitimacy of trade agreements. External engagement, sensitisation and consultation have become important components of the trade negotiating process.

An IBA Member Bar needs to know three things in order to participate in the international trade negotiating process:

- First, it must find out which national entity, usually a trade ministry, handles international trade negotiations. The WTO website sets out a list of all WTO members and observer countries,<sup>12</sup> and many of these webpages list the government entity responsible for international trade negotiations.<sup>13</sup>
- Second, it must determine the best method to provide guidance and input to that entity. An exploratory meeting with the relevant officials, for each side to find out more about the other, will usually be the best way forward. Most countries will also undertake public consultations when specific negotiations are launched or on their

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<sup>12</sup> See <https://perma.cc/9HCU-HB3C> accessed 5 May 2023.

<sup>13</sup> See [www.wto.org/english/thewto\\_e/countries\\_e/united\\_kingdom\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/united_kingdom_e.htm) accessed 5 May 2023.

conclusion. How easy it is to provide input will depend on the type of negotiation, the stage it has reached and how willing the government is to engage. Once negotiations are underway, it is much harder for trade departments to be open about the content of discussions, but many will still want to sense-check specific issues. Another useful touchpoint for influencing the trade process may also be a committee in the national parliament or assembly that is scrutinising the trade negotiations. Each country has its own procedures and these are laid out in WTO national trade policy reviews, which summarise the trade policy formulation process.<sup>14</sup> These reviews take place every four years.

- Last, and most important, an IBA Member Bar should have a clear policy position or point of view that it wishes to convey to trade negotiators. This might fall into one or more of the following categories:
  - ensuring that trade negotiators understand how legal services are regulated within the country, who are the competent authorities, and from where their powers derive (eg, legislation, the courts and customary law etc);
  - ensuring that trade negotiators understand the implications for society at large and the local legal sector of any changes in access for foreign lawyers (the so-called ‘inbound’ issues); and
  - ensuring that trade negotiators understand the interests of the local legal sector, clients, and society in general, in gaining better access to the markets of trade partners or in other ways in which the sector might want to increase its international

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<sup>14</sup> See [www.wto.org/english/news\\_e/archive\\_e/tpr\\_arc\\_e.htm](http://www.wto.org/english/news_e/archive_e/tpr_arc_e.htm) accessed 5 May 2023.

engagement (eg, by working with Bars in other countries to provide better opportunities for lawyers to requalify in either direction, or developing efforts to become a regional hub for dispute resolution or a particular type of expertise (eg, Islamic Finance) (the so-called ‘outbound’ issues).

## **How others have done it**

In countries that have significant exports of legal services, the Bar may have a longstanding and regular relationship with its own government’s international trade negotiators, meeting them frequently for consultation. A relevant government official might be invited to Bar meetings to give talks on the current state of play of particular negotiations, and the Bar might also be involved in trade groups made up of professions and other businesses with similar export interests to form a lobby group. Even if a country does not have significant legal services exports, this guide recommends that Bars establish a relationship with the relevant government negotiators. As noted above, international trade agreements will have implications for ‘inbound legal services’, as well implications for a country’s ‘outbound’ lawyers and law firms.

The Bar may also find it helpful to seek out and participate in a bigger coalition. These may be sector-specific coalitions or geographically-based coalitions. Some examples include the European Services Forum<sup>15</sup> and, in the US, the Coalition of Service Industries.<sup>16</sup>

As Bars consider how best to communicate with government negotiators, they may realise that the best solution is to appoint one person, or even better, a committee, to look after international

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<sup>15</sup> See [www.esf.be](http://www.esf.be) accessed 5 May 2023.

<sup>16</sup> See <https://uscis.org> accessed 5 May 2023.

trade matters. The details are tricky and technical to master, and so it makes sense for at least one expert to master them and take charge on behalf of the Bar, through the appropriate governance structure. A committee in charge would ensure that continuity of expertise is guaranteed.

Although it is useful to have an individual or group with trade expertise within the Bar, many of the issues the Bar will need to decide will be policy issues on which there can be broad participation. The Bar's trade experts can act as translators and facilitators, ensuring that policy-makers understand the issues, including the pros and cons of various approaches, and ensuring that the Bar communicates effectively with government, and with legal services regulators and stakeholders in other countries.

## **Some key policy questions**

Before seeking engagement with government negotiators, Bars may want to ensure that they have undertaken some groundwork. This is a non-exhaustive list of questions that it will be helpful for the Bar to have addressed.

### **Do we understand what the national trade policy/trade development plan consists of?**

In many cases, governments will have an elaborated economic development strategy document or plan that incorporates trade in services. This will give the Bar insight into government priorities, pressures from external organisations on particular policy matters (eg, the Financial Action Task Force (FATF) on anti-corruption matters and WIPO on the incorporation of intellectual property standards). In turn, this will enable the Bar to see where it might

provide assistance to government negotiators and help them better understand legal services-related issues.

## **Do we understand what legal services-related promises our country has already made?**

As it is highly likely that your country is already a member of the WTO, at least some of the provisions of the WTO will apply to your legal services sector. In order to understand the full implications of what WTO rules mean for your Bar, you should look at your country's WTO Schedule of Specific Commitments, which may be available on the government's trade webpage, but if not, can be accessed from a WTO webpage.<sup>17</sup>

Part II of this guide provides technical information about how to read and interpret a GATS Schedule of Specific Commitments so that a Bar can understand the commitments that its country has already undertaken. Part II will also provide information that will help Bar representatives to understand and participate in the legal services portion of ongoing international trade agreement negotiations.

## **Do we understand how the outcome of trade agreements will be incorporated into domestic law?**

One final high-level question is how international trade agreements are incorporated into a country's domestic law. There is no single answer to this question. In some WTO member states, the

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17 Schedules of Specific Commitments and lists of Article II exemptions (WTO), <https://perma.cc/VB3M-ZMFU> accessed 12 April 2023.



agreements will be implemented at a national level, whereas other member states will rely on ‘subnational’ implementation or a combination of national and subnational action. In some countries, it is the government that will implement the legal services provisions of international trade agreements, whereas in other countries, it will be the legal services/legal profession regulator.

Countries that have government-level implementation differ with respect to the branch of government responsible for implementation. In some cases, it may be the legislative branch of government that is responsible for implementation, whereas in others, it may be the executive, the judicial or a combination of different branches of government.

If a country has a legal services regulator that differs from the bodies listed above, that regulator (or Bar) may have the responsibility for implementing some or all of the legal services provisions. In short, there is no easy or consistent answer to the question. Moreover, the implementation methods may vary depending on whether one is referring to the WTO and GATS agreements, or bilateral or regional agreements.

The IBA Directory of Regulators (2016)<sup>18</sup> and the IBA Global Report on International Trade in Legal Services (2014)<sup>19</sup> include information that may be helpful. Bars may also find it helpful to consult with one another if the issue of implementation arises in connection with ongoing international trade agreement negotiations, since IBA Member Bars collectively have a range of approaches and experience.

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18 Directory of Regulators of the Legal Profession (IBA, 2016) <https://perma.cc/88FC-95WL> accessed 5 May 2023.

19 IBA Global Regulation and Trade in Legal Services Report 2014 (IBA, 2014) <https://perma.cc/757X-ZCZT> accessed 5 May 2023.

## What if there are disagreements?

The Dispute Settlement Understanding<sup>20</sup> (DSU) is the WTO agreement that specifies how WTO agreements, such as the GATS, are enforced (and the remedies if a country's WTO commitments are not honoured). The DSU is an intergovernmental process and establishes a multi-step process that countries must use to try to resolve their trade dispute. If the parties are unsuccessful in resolving their dispute, the last stage is a decision by a panel of judges set up by the WTO, in the form of the WTO Appellate Body.

Neither the DSU nor any other WTO agreement forces a country to live up to WTO or GATS commitments. The remedy for a successful claimant under the DSU is the ability to impose retaliatory trade sanctions, which under normal circumstances would themselves be illegal. Disputes under the GATS are very rare, in part because WTO members were conservative about the formal legal commitments they made, and often allow far greater market access to foreign providers than their WTO services schedules would suggest. The main interest for Bars or legal services stakeholders in WTO dispute resolution is therefore more likely to reside in points of interpretation of the GATS or other parts of the Treaty arising from cases concerning other sectors.

Although the WTO and GATS limit formal complaints to those filed by WTO member states (ie, governments), this is not true of all international trade agreements. Some international trade agreements include investment chapters that have imported concepts from bilateral investment agreements. In some cases, these chapters provide scope for claims to be filed by foreign private

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20 'Dispute settlement' (WTO) <https://perma.cc/KGP4-J8WG> accessed 12 April 2023.

investors who believe they have been harmed by a government that has not honoured the trade agreement's commitments – eg Chapter 14 of the US–Mexico–Canada Agreement. These kinds of investor-state provisions have, on occasion, proven to be controversial. Critics argue that they encroach on the government policy-making space. Although this is now something about which governments are much more cautious, if your country is negotiating an international trade agreement, your Bar should inquire about the enforcement mechanism and whether it includes investor-state remedies. In October 2012, the IBA adopted rules for investor-state mediation, which provides further useful background on this topic.<sup>21</sup>

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21 *IBA Rules for Investor-State Mediation* (IBA, 4 October 2012) <https://perma.cc/TT7S-JVCF> accessed 5 May 2023.

# Part II: What are your country's WTO legal services commitments and what do they mean?

## What are the obligations of WTO members?

When a country becomes a WTO member state, it agrees to be bound by the general obligations in the GATS. These obligations include transparency, MFN and certain domestic regulation procedures.

In addition to these general obligations, WTO members were expected, at the time of accession, to make at least some sector-specific commitments that offer some degree of openness in the specified services sectors and subsectors. GATS Article XX requires these sector-specific commitments to be placed in the country's Schedule of Specific Commitments. Each WTO member's schedule is assigned a specific and unique WTO symbol. If a country revises or updates its schedule, that fact will be reflected in the revised document's new symbol.<sup>22</sup>

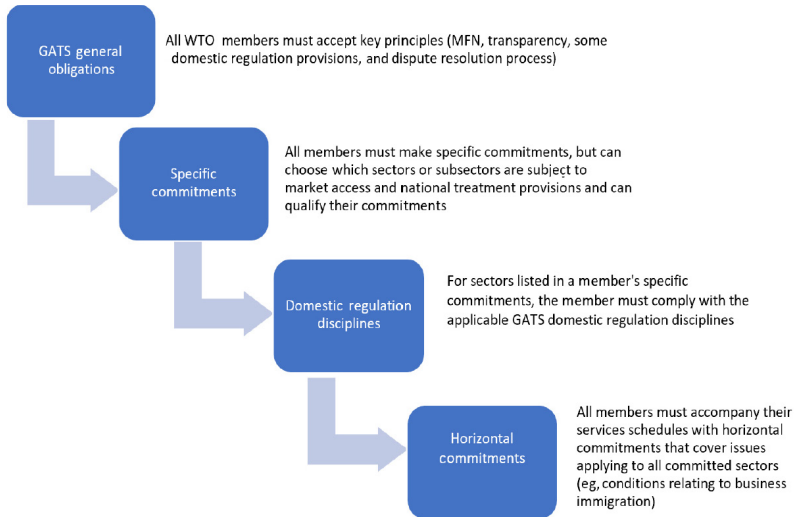
If a WTO member makes a specific commitment to open up a particular sector or subsector, then there are additional GATS provisions, described below, which apply to the sector or subsector listed on the WTO member's schedule. In addition to the sector-specific commitments, WTO members' Schedules typically include horizontal commitments that cover cross-cutting issues. The

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<sup>22</sup> This guide contains an appendix that provides additional information about how to locate WTO documents and interpret their symbols.

horizontal commitments on a member’s schedule may apply to all service sectors covered by the GATS or they may be limited to the specific service sectors that the country included on its schedule. This structure is explained in more depth in Figure 4.

**Figure 4: Levels of commitment in legal services and what they mean**



## The generally applicable obligations

The GATS contains generally applicable provisions that apply to all WTO members, regardless of whether or not they are taking on specific commitments for sectors such as legal services.

### MFN (Article II)

As previously noted, the most important of these obligations is the MFN principle, which states that WTO members must grant

‘immediately and unconditionally’ no less favourable treatment to the services and service suppliers of any other WTO member than it supplies to any other country.

The MFN principle is a critical underpinning of the GATS and designed to ensure that the WTO remains a multilateral trade agreement in which all signatories have confidence that they are treated fairly.

Nonetheless, because the GATS was the first ever global multilateral agreement on trade in services, as a confidence-building measure, signatory countries were allowed a one-time opportunity to make exceptions to MFN treatment. In other words, WTO members were allowed to specify the terms and conditions under which they could treat the services and service providers of some WTO members differently. In some cases, these exceptions applied to the services sector as a whole, but in other cases, they would apply to specific services sector or subsector. MFN exceptions tend to fall into the following categories:

- exceptions that grant preferential treatment stemming from historical relationships, such as ties between former colonies, pre-existing preferential agreements (eg, Gulf Cooperation Council) or regional integration arrangements (eg, the EU and Central America). These tend to specify particular types of preferential access that will be granted (eg, movement of natural persons or recognition of qualifications);
- exceptions that apply reciprocity to the treatment of service suppliers (eg, reciprocal recognition of qualifications); and

- exceptions that relate to the specific nature of the particular service (eg, audio-visual productions that are co-productions may receive national treatment).

According to the Integrated Trade Intelligence Portal (I-TIP) services database, which is a joint initiative of the WTO and the World Bank, there are seven WTO members that have MFN exemptions in legal services and five others that have similar exemptions extending across professional services more generally, including legal services. The countries that have MFN exemptions for legal services are Brunei Darussalam, Bulgaria, the Dominican Republic, Lithuania, Montenegro, North Macedonia and Singapore.

In the cases of the Dominican Republic, North Macedonia and Montenegro, the MFN exemption allows differing treatment in circumstances in which reciprocal treatment exists in the potential legal service provider's home country. Bulgaria's MFN exemption lists other countries to whom preferential treatment is extended, and in Lithuania, the MFN exception allows foreign advocates to appear in court where their services are linked to a bilateral assistance treaty. The nature of the MFN exemption is slightly different in Brunei Darussalam and Singapore, as it is drawn widely and non-specifically, covering 'all measures pertaining to the provision of legal services'.

The countries that have MFN exemptions for professional services, which is a broader category than legal services, are Costa Rica, Honduras, Panama, Turkey and Venezuela. These exemptions all relate to the reciprocal treatment of professionals.

In most of the cases cited above, the MFN exemptions actually represent additional commitments on top of what appears in a

country's legal services schedule – however, these commitments are available only to certain countries. In the case of Brunei and Singapore, neither country has made any commitments in legal services, and so the inclusion of this sector as an MFN exemption simply underlines their policy room for manoeuvre in negotiating bilateral agreements in the future, without then needing to make the same treatment potentially available to other WTO members.

New members joining the WTO are also given the opportunity to request MFN exemptions. But in all cases, for both new and existing members, these exemptions are supposed to be time limited. The annex to the GATS on Article II Exemptions<sup>23</sup> states that 'In principle, such exemptions should not exceed a period of 10 years'. Presumably, had further rounds of WTO services negotiations been successful, these MFN exemptions would have been whittled down significantly, if not entirely eliminated.

## **Transparency (Article III)**

Another obligation that applies to all WTO members is the requirement in GATS Article III that all relevant measures be published or otherwise publicly available. Members are expected to establish enquiry points that can respond to requests from other members for information. There are additional transparency requirements that apply in circumstances where specific commitments have been taken (see below).

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23 'Annex on Article II Exemptions' (WTO) <https://perma.cc/FA98-PQ47> accessed 12 April 2023.



## **Economic integration (Article V)**

The MFN principle described above does not prevent members from entering into closer economic integration arrangements that result in more liberalisation of trade in services – see GATS Article V. However, these arrangements must, among other things:

- cover a substantial number of services sectors (in other words, they cannot be limited to one or a few specific) (Article V(1)(a));
- eliminate substantially all discrimination between the parties involved and must not increase barriers to other WTO members (Article V(1)(b)); and
- be notified to the WTO (Article V(7)(a)).

Other members may seek compensatory adjustments in the services schedules of the integrating members if they have been disadvantaged. The GATS sets out the procedure for this in Article XXI. It is also worth noting that developing countries are granted extra flexibility when entering into economic integration agreements (GATS Article V(3)).

## **Recognition (Article VII)**

The fourth section of the GATS, which is generally applicable to all services, including legal services, is Article VII, titled ‘Recognition’. This article allows a WTO signatory country to agree to a mutual recognition agreement (MRA) that ‘recognises’ the qualifications of providers from another WTO signatory country, provided that country offers all WTO member states the opportunity to participate on an equal footing in an MRA. The WTO has been notified of

very few MRAs, and none, apparently, in the field of legal services. Additional information about MRAs can be found in Part III.

## **Selected domestic regulation requirements (Article VI (2))**

GATS Article VI covers domestic regulation. Although most of Article VI applies only to service sectors that a country places on its Schedule, Article VI(2) requires WTO members to provide procedures that provide for the prompt review of decisions affecting trade in services. The article states that members shall maintain or institute judicial, arbitral or administrative tribunals or procedures that provide prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. It further states that, where such procedures are not independent of the agency entrusted with the administrative decision concerned, the member shall ensure that the procedures provide for an objective and impartial review.

## **Dispute resolution (Article XXIII)**

WTO dispute settlement provisions apply to the GATS, enabling members to bring claims against each other for failure to carry out GATS general obligations or specific commitments. Since the GATS came into force in 1995, there have been 32 WTO disputes relating to services. Most of these were not related exclusively to services but covered goods and/or intellectual property as well. In only a very few cases – mostly notably an online gambling case involving the US, Antigua and Barbuda, where the US was held to have implemented

measures against online gambling in a discriminatory way – have members been challenged on how they regulate services.

The US–Antigua gambling case<sup>24</sup> does, however, illustrate the importance of WTO members being aware of their GATS obligations when they make new regulations governing a services sector. Bars should carefully think through any proposed rule changes to ensure that they do not have a discriminatory effect or introduce new barriers in a discriminatory way. Even if a member has scheduled a specific sector, such as legal services, there is nothing in the GATS to prevent a WTO member from introducing new rules provided they are consistent with the Schedule and GATS Article XVI. These new rules must be introduced in a way that does not constitute ‘arbitrary or unjustifiable discrimination between countries, where like conditions prevail, or a disguised restriction on trade in services’ (Article XIV). As noted previously, the remedy is retaliatory trade sanctions.

## **Other generally applicable obligations**

Other generally applicable GATS provisions include provisions related to:

- a commitment by WTO members to support the increasing participation of developing country members in world trade by helping to strengthen their domestic services capacity, improving their access to information networks, and liberalisation of market access in sectors and modes of supply of export of interest to them (Article IV);

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24 ‘United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services’ (WTO) [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm) accessed 12 April 2023.

- ‘general exceptions’ that enable countries to retain policy space for action (eg, exceptions permitted to prevent fraud or deal with default on services contracts, data protection and privacy issues and taxation-related measures)(Article XIV);
- international transfers and payments for current transactions relating to services commitments, which cannot be restricted except in cases of balance-of-payments difficulties and other specified circumstances (Articles XI and XII); and
- government procurement (Article XIII) and security exceptions (Article XIV bis).

## **Sector-specific services commitments**

As noted above, all members of the WTO have made sector-specific services commitments, which are compiled in their GATS Schedule of Specific Commitments, which then become part of their WTO Treaty obligations.

The commitments contained in a country’s GATS services schedule have been made on an opt-in basis. This approach is often described as a positive list approach because the country’s sector-specific commitments, as well as its horizontal commitments, are limited to those that are affirmatively listed in the country’s Schedule of Specific Commitments.

Although GATS Article XIX required members to engage in progressive rounds of negotiations to improve foreign supplier access to services markets, as previously explained, this has not yet happened as robustly as was expected. However, the expectation of the GATS is clear. WTO members should be prepared to liberalise their services markets on a progressive basis. In fact, many WTO

members now offer better access to foreign service suppliers in practice (de facto access) than they have committed in the GATS (de jure access). This gap between members' GATS commitments and their applied regimes gives governments a degree of policy flexibility, but it is also increasingly becoming the focus for bilateral and regional trade in services negotiations (see Part III).

#### About sector-specific services commitments

- Sector-specific commitments are effectively **promises** to allow foreign service suppliers access to defined local services markets under specified conditions.
- Commitments – whether absolute or qualified – are **unconditional** once they are made. This means that once made, WTO members cannot renege on commitments except in exceptional circumstances, such as those set forth in Article XIV. Reneging on a commitment has consequences and may require the granting of better access to other WTO members in other sectors, as a form of 'compensation'. See, for example, Articles XXI and XXIII regarding modifications and disputes. The access to a services sector that a WTO member offers can be **qualified** – either in terms of the market access offered or by some discrimination between local and foreign suppliers – but this must be made clear in **its Services Schedule**, which provides the detail underlying its commitment.

## Locate the legal services-specific commitments, if any

The starting point for understanding what degree of liberalisation a WTO member has agreed to for legal services is to determine whether the country made any specific commitments that apply to the legal services sector.

The first part of a member's GATS schedule of specific commitments contains the country's horizontal commitments. As noted previously, some horizontal commitments may be relevant to legal services. For example, the horizontal commitments section may have commitments about business visitors or intra-corporate

transferees. The second part of a member's schedule contains that member's sector-specific commitments.

If a country has made legal services commitments, they will appear at the beginning of the sector-specific section of that country's schedule of specific commitments. In 1991, before the WTO and GATS agreements were signed, the WTO Secretariat circulated a document called the Services Sectoral Classification List.<sup>25</sup> Although use of this list was not mandatory, most countries used this document when scheduling their GATS commitments.

The Secretariat's Services Sectoral Classification List contains these 12 broad categories of services sectors:

1. business;
2. communication;
3. construction and engineering;
4. distribution;
5. education;
6. environment;
7. financial;
8. health;
9. tourism and travel;
10. recreation, cultural and sporting;
11. transport; and
12. other.

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<sup>25</sup> *Services Sectoral Classification List: Note by the Secretariat, MTN.GNS/W/120* (WTO, 10 July 1991) <https://perma.cc/Z9WA-YD8S> accessed 5 May 2023.

## The WTO Sectoral Classification List

In order to determine if a WTO member has made any legal services commitments, look at the first section of the **sector-specific section** of that country's schedule of specific commitments. Legal services commitments should appear under the heading 'Business Services' and the subheading 'Professional Services':

<b>MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND</b>	<b><u>RESTRICTED</u></b> MTN.GNS/W/120 10 July 1991 Special Distribution
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### SERVICES SECTORAL CLASSIFICATION LIST

#### Note by the Secretariat

#### SERVICES SECTORAL CLASSIFICATION LIST

<u>SECTORS AND SUB-SECTORS</u>	<u>CORRESPOND- ING CPC Section B</u>
1. <u>BUSINESS SERVICES</u>	
A. <u>Professional Services</u>	
a. Legal Services	861
b. Accounting, auditing and bookkeeping services	862
c. Taxation Services	863
d. Architectural services	8671
e. Engineering services	8672

In this Secretariat paper, 'Legal Services' are represented as a subsector of 'Professional Services', which in turn is a sub-classification of 'Business Services'.

Since 'Professional Services' is the first subsector listed under 'Business Services' and 'Legal Services' is the first subsector listed under 'Professional Services', a WTO member's legal services commitments, if any, can be found easily near the beginning of the sector-specific section of its schedule of specific commitments.

## **If ‘legal services’ are included on a member’s Schedule, review the definition**

After locating a country’s legal services commitment, if any, the next step is to determine how that WTO member defines ‘legal services’. This step is crucial to understanding what the detail of any commitment means in practice. As the paragraphs below explain, there is wide variation in the way that WTO members have defined legal services in their schedules of specific commitments.

Moreover, some of the legal services definitions in WTO member schedules do not match up to the way that legal services are regulated in that member state. This is an area in which the IBA has been active, and has changed the way some legal services negotiations are conducted and commitments are made.

As a starting point, it is helpful to know that neither the GATS nor the WTO agreement specifies the sector definitions that a WTO member must use when making sector-specific commitments in its Schedule. However, as shown in the illustration above, the WTO Secretariat’s 1991 Services Sectoral Classification paper included a United Nations Central Product Classification (CPC) code for each sector or subsector, including legal services. Many countries looked to these UN CPC codes to specify or define the scope of their sector-specific commitments.

While the UN CPC classification codes may be the optimal way for WTO members to define some of their sector-specific commitments, this has not proven true for legal services. In 1998, less than three years after the GATS took effect, the WTO Secretariat offered the following observation about WTO members’ legal services commitments:



'As the UN CPC classification in this sector did not reflect the reality of trade in legal services, Members have preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services: (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.'<sup>26</sup>

This WTO Secretariat Background Note asked whether the UN CPC's legal services codes should be revised and whether the distinction between host country, international, home country and third country law was satisfactory.

Largely as a result of the questions posed in the 1998 WTO Secretariat's legal services paper, the IBA Bar Issues Commission's International Trade In Legal Services (BIC ITILS) Committee developed draft language that could be used when defining legal services commitments in trade agreements. The committee's proposed terminology was reviewed at a special IBA meeting to which all IBA Member Bars were invited and thereafter was endorsed in the *2003 IBA Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations*.<sup>27</sup>

Following the IBA's 2003 resolution, a number of WTO members circulated a Joint Statement that encouraged all WTO members to use legal services definitions that were substantially similar to the

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26 *Legal Services: Background Note by the Secretariat, S/C/W/43* (WTO, 6 July 1998) <https://perma.cc/P53D-D9K3> accessed 5 May 2023.

27 *Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations* (IBA, September 2003) <https://perma.cc/PXR8-ZZ6B> accessed 5 May 2023.

terminology in the IBA Resolution.<sup>28</sup> This apparently had an impact. In 2010, the WTO Secretariat issued a second paper about the legal services sector.<sup>29</sup> Among other topics, this paper revisited the issue of how WTO members were defining their legal services commitments. The WTO Secretariat once again observed that some members did not find the UN CPC codes for legal services helpful:

‘It appears that the UN CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was not as relevant to Members scheduling commitments as the distinction between advice and representation in host country, home country and international law. Some 60 Members have instead preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services [citing the IBA Resolution categories]. . . Whereas there is wide agreement that the disaggregation contained in CPC Prov. does not accommodate the practical nature of international trade in legal services, Members have held different views on preferable approaches to classification.’

The 2010 Secretariat paper referred to the Joint Statement cited above, included the text of the 2003 IBA Terminology Resolution, and provided several examples of legal services definitions used in members’ Schedules. The Secretariat paper highlighted some members’ use of CPC codes, but noted that only 13 of 76 WTO members that scheduled legal services had done so by referring to CPC 861, without any modification.

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28 *Joint Statement on Legal Services S/CSC/W/46* (WTO, 24 February 2005) <https://perma.cc/6EKW-WE96> accessed 5 May 2023.

29 *Legal Services: Background Note by the Secretariat S/C/W/318* (WTO, 14 June 2010) <https://perma.cc/ULF4-ZWFK> accessed 5 May 2023.

## Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations

The International Bar Association:

[After some important 'whereas' type clauses],

RESOLVES to recommend that the following system of terminology be used for such 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.

RESOLVES FURTHER that the forgoing terminology should be understood in accordance with and qualified by the definitions set out in the schedule to these resolutions, and

RESOLVES FINALLY to invite all members of the World Trade Organization to adopt this terminology for the purposes of negotiations on trade in legal services.

Adopted September 2003, <https://perma.cc/PXR8-ZZ6B>

So, if WTO members did not use CPC 861 (or its subparts) to make their commitments, what did they use? Charts 5 and 6 and Annex III in the Secretariat's 2010 Legal Services paper show the Mode 1 and Mode 3 commitments members made for home, host and international law with respect to advisory services and representation services. What all of this means is that:

- when members prepared their schedules , they could choose how they wanted to define the legal services for which they were making commitments; and
- there is a wide range of legal services definitions used by members that have made GATS legal services specific commitments.

IBA Member Bars should be aware of this variability, particularly if their government wants to make binding trade commitments in a manner that does not match the way in which legal services are regulated in their country. IBA Member Bars should also be aware that the terminology found in the 2003 IBA Resolution has been widely used and can be found in official WTO documents.

According to the WTO trade in services database,<sup>30</sup> of the 86 WTO members that have made a specific commitment on legal services (52 per cent of all members):

- Thirty-three (39 per cent) have opted to use the UN CPC definition 861, but have, in many cases, qualified this, for instance, identifying specific elements of legal services to which these commitments apply.
- Forty-nine (58 per cent) have used a variant on the terminology recommended by the IBA and subsequently endorsed by the WTO Secretariat. This classification recognises that lawyers are unusual among professional service suppliers in that they may provide services in another country (eg, advisory services in their home country law) without having any impact on the services provided by local lawyers.

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<sup>30</sup> See <http://i-tip.wto.org> accessed 5 May 2023.

- Three WTO members (Sierra Leone, Samoa and Guyana) have simply referred to ‘Legal Services’ in their schedule definition without being specific about what is being referred to.

## **Qualifying market access and national treatment commitments**

If a WTO member has chosen to include legal services – however defined – in its GATS schedule of specific commitments, it has agreed to abide by the market access (Article XVI), national treatment (Article XVII) and domestic regulation (Article VI) provisions in the GATS. However, the member can still include ‘limitations’ or qualifications to the first two of these obligations. The schedule will cover issues such as:

- **Which modes of service delivery are covered by commitments?** In other words, do the terms of liberalisation contained in the schedule of commitments apply equally to the cross-border delivery of legal services by a foreign lawyer (Mode 4) and to foreign establishment (Mode 3), for example?
- **Are there any limitations imposed on foreign suppliers’ market access or national treatment?** These qualifications are listed in two columns in a WTO services schedule: the second column contains the market access commitments and limitations, and the third column lists the national treatment commitments and limitations. According to GATS Article XX(2), if a limitation is listed in the market access column, that same limitation does not need to be listed in the national treatment column. Figure 5 sets out the sort of limitations that WTO members are permitted to apply, though not all of these are relevant to legal services.

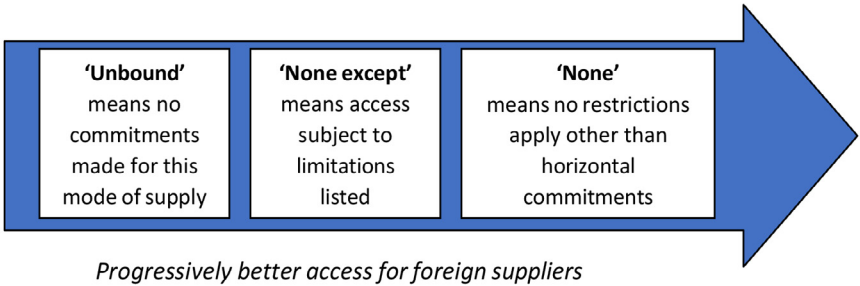
The next section of the guide looks at some current trade issues facing different Bars, all of which must build on these WTO foundations.

**Figure 5: Qualifications to services commitments**

<b>Market Access Limitations (Article XVI)</b>	<b>National Treatment Limitations (Article XVII)</b>
<p>The following limitations on foreign suppliers are permitted under the GATS if listed as a limitation in a Schedule:</p>	<p>The following illustrates the types of discrimination permitted under the GATS if listed in the Schedule:</p>
<p><b>a) Limits on the number of service suppliers, or economic needs tests</b> <i>(eg, number of foreign hospitals limited)</i></p>	<p><b>a) Subsidies</b> can be reserved to nationals or businesses established in the country.</p>
<p><b>b) Limits on the value of transactions by quotas or economic needs tests</b> <i>(eg, foreign banks must not hold more than 20 per cent of the total domestic assets of all banks)</i></p>	<p><b>b) Tax measure</b> Can be applied asymmetrically <i>(eg, taxes on insurance premia)</i></p>
<p><b>c) Limits on the total number of operations or quantity of output by quota or economic needs tests</b> <i>(eg, limits on foreign broadcasting time)</i></p>	<p><b>c) Other financial measures</b> Fees or charges can discriminate <i>(eg, Port services can be made cheaper for nationally flagged vessels)</i></p>
<p><b>d) Limits on the total number of foreign employees a foreign supplier may employ by quota or economic needs tests</b> <i>(eg, foreign employees limited to 30 per cent of employment in a foreign establishment)</i></p>	<p><b>d) Nationality requirements</b> Key roles can be reserved to nationals or citizens <i>(eg, company directors)</i></p>
<p><b>e) Restrictions on the type of entity a foreign supplier can use</b> <i>(eg, foreign suppliers must have subsidiaries and cannot have branches)</i></p>	<p><b>e) Residency requirements</b> Service suppliers can be required to have residency</p>
<p><b>f) A limit on the share that foreign capital can have in a service operation through a maximum percentage limit on foreign ownership or by value</b> <i>(eg, foreign investors can hold up to 51 per cent of the capital)</i></p>	<p><b>f) Licensing and qualifications</b> Access to certain qualifications may be restricted for foreigners</p>
	<p><b>g) Technology transfer/ training requirements</b> Foreign suppliers may be required to provide technology transfer or training</p>
	<p><b>h) Local content</b> Preference can be given to local services <i>(eg, local content in broadcasting)</i></p>
	<p><b>i) Ownership of property/land</b> Non-residents can be excluded from the acquisition of real estate</p>

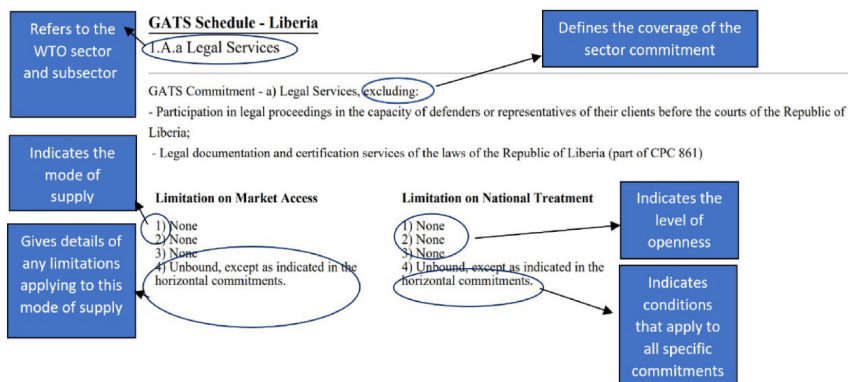
It is common for WTO members to list their market access and national treatment limitations according to the four modes of services previously described. Thus, a GATS schedule will typically include in both the second and third columns the numbers 1), 2), 3) and 4): each of which refers to a particular mode of supply. For each of the four modes, the Schedule will use words such as ‘unbound’, ‘none except’ and ‘none’ to describe the level of openness granted in that mode for the scheduled sector or subsector. Figure 6 illustrates the progressive level of openness for each of these terms. When using the ‘none except’ approach in Figure 6, members may refer to the kinds of limitations that appear in Figure 5 and that are drawn from GATS Articles XVI and XVII.

**Figure 6: Terminology used in GATS scheduling**



The example in Figure 7 is an extract from the GATS schedule of Liberia, which joined the WTO in 2016. This excerpt shows how the commitments and limitations appear.

**Figure 7: GATS legal services schedule of Liberia<sup>31</sup>**



## Other elements of services commitments

In addition to the main aspects of a services schedule outlined above, there are three other important elements of a country's WTO services commitments: its additional commitments, its horizontal commitments and the domestic regulation implications of its legal services commitments. The significance of these to legal services varies.

### Additional commitments

The furthest right column that appears in a WTO services schedule is titled 'Additional commitments'. In most cases for legal services, this column is left blank. It is mainly used by countries that have made additional voluntary commitments that apply specifically to a particular sector. There are, for example, specific sectoral 'reference

31 Nb. The existence of spelling mistakes in this Liberian GATS schedule published by the WTO illustrates that WTO schedules can contain errors and may even be unclear.



papers' in telecoms and financial services that cover some of the regulatory specificities of these sectors that are relevant for trade, and to which WTO members have chosen whether to sign up, but no official legal services reference paper that members could designate. A few WTO members have chosen to add recognition of qualification issues to their services schedules in the form of additional commitments, but generally this column is blank for legal services.

## Horizontal commitments

As noted earlier, in addition to sector-specific commitments, GATS schedules set out conditions that apply to all services sectors (or to multiple sectors) in which commitments have been made (horizontal commitments). Horizontal commitments usually cover the following issues that are relevant to legal services, but may also include issues more relevant to other services, such as access to public subsidies and ownership of land:

- movement of natural persons (ie, the categories of foreign service suppliers permitted) and conditions attached (eg, intra-corporate transferees, for three years); and
- generally recognised business vehicles (eg, public company, limited company and partnership), which may then be supplemented in sector schedules if there are specific sectoral types of business vehicle applicable.

As noted previously, the horizontal commitments will be found at the very beginning of a country's Schedule, before the sector-specific commitments.

## Domestic regulation disciplines

If a WTO member has made a commitment for a specific sector or subsector, then most of GATS Article VI on domestic regulation applies to that (sub)sector. Unlike the market access and national treatment obligations, however, GATS Article VI does not allow a WTO member to list ‘limitations’ to this obligation. Article VI, Sections 1, 3, 5 and 6 provide that:

- In sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner (Article VI (1)).
- Where authorisation is required for the supply of a service on which a specific commitment has been made, the competent authorities of a member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the member shall provide, without undue delay, information concerning the status of the application (Article VI(3)).
- In sectors in which a member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors, the member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner that:
  - does not comply with certain outlined criteria outlined; and

- could not reasonably have been expected of that member at the time the specific commitments in those sectors were made (Article VI(5)(a)).
- In determining whether a member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organisations applied by that member (the term ‘relevant international organisations’ refers to international bodies whose membership is open to the relevant bodies of at least all members of the WTO) (Article VI(5)(b)).
- In sectors where specific commitments regarding professional services are undertaken, each member shall provide for adequate procedures to verify the competence of professionals of any other member (Article VI(6)).

These four domestic regulation provisions apply to scheduled services, without limitation (ie, without the possibility of derogation). (As previously discussed, Article VI(2) is a generally applicable provision and requires timely procedures for review of trade in legal services decisions regarding foreign suppliers, regardless of whether the country scheduled that service.)

GATS Article VI(4) has not been previously mentioned; it requires WTO members to negotiate domestic regulation disciplines on qualification, licensing and technical standards. WTO members have reached agreement on disciplines for the accountancy sector, but have been unable to reach agreement on horizontal disciplines that would apply to all other sectors. In the absence of an Article VI(4) agreement on GATS domestic regulation disciplines, Article VI(5), which was

listed above, applies to those service (sub)sectors that a member has included on its Schedule.

Thus, because many WTO member states have included legal services in their schedules, those members will be obliged to do the following in order to comply with the domestic regulation provisions noted above:

- ensure they have mechanisms in place to respond to applications from foreign lawyers or law firms for licences to practise in whatever form allowed, if this is required by the WTO member's system (some IBA Member Bars come from jurisdictions in which foreign lawyers are unregulated);
- provide transparency and timely information about applications for licensing or recognition of qualifications;
- avoid introducing licensing or qualification requirements that undermine their commitments (eg, a member's WTO schedule could grant a foreign lawyer the right to establish in order to practise their home country law, subject to registration, but then introduce eligibility requirements for that registration which undermined the commitment); and
- offer a mechanism for assessing the qualifications of lawyers from other WTO member states, enabling them to cross-qualify.

The practical consequence of these provisions on domestic regulation for Bars is that IBA Member Bars from countries that have made WTO commitments in legal services should be mindful of the fact that they cannot, by virtue of Article VI, introduce new regulatory measures that would undermine the commitments in their country's GATS schedule unless authorised by a GATS exception, such as the security and other general exceptions from Article XIV.

# Part III: Use cases

Part II described how the WTO deals with legal services. The GATS is the foundation for virtually all other international agreements on legal services trade, but how it is relevant will vary depending on circumstances.

There are various occasions on which a Bar might need to focus on formal trade in services negotiations being undertaken at a national level:

- when its national government is negotiating accession to the WTO;
- when there are new developments at the WTO that could be agreed to, which would require changes to be adopted nationally;
- when a free trade agreement (FTA) is being negotiated or membership of a regional economic community or multilateral trade and cooperation agreement is being considered; or
- when an MRA for, or including, legal services is being considered. Each of these situations is considered in more detail below.

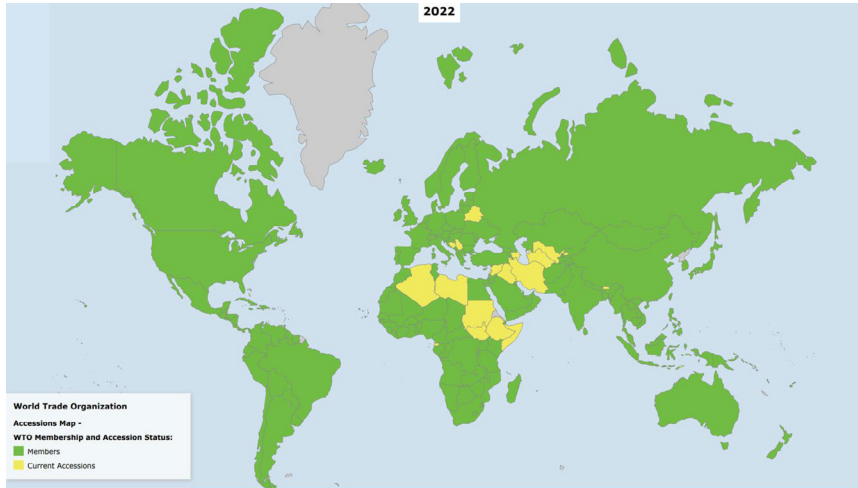
## WTO accession

At the time of writing, there were 24 countries formally engaged in the WTO accession process:

- **Africa:** Algeria, Comoros, Equatorial Guinea, Ethiopia, Sao Tomé and Príncipe, Libya, Somalia South Sudan; Sudan and
- **Europe:** Andorra, Belarus, Bosnia and Herzegovina, and Serbia;

- **Asia:** Azerbaijan, Bhutan, Iran, Iraq, Lebanon, Syria, Timor-Leste, Turkmenistan and Uzbekistan; and
- **Americas:** the Bahamas and Curaçao.

**Figure 8: WTO members and accession countries, 2022<sup>32</sup>**



Although countries that joined the WTO on its formation in 1995 were given a great deal of flexibility on their services commitments, this has not been the case for more recent joiners. All members joining after the initial signatories to the WTO Treaty have committed at least some liberalisation of their legal services sectors in response to the demands of existing members in accession negotiations.

<sup>32</sup> 'WTO Accessions' (WTO) <https://perma.cc/J6M2-J3E8> accessed 12 April 2023.

## How does the accession process work?

Accession to the WTO is triggered by a request from the applicant country. The process of acceding to the WTO can be lengthy. Although on average it takes around six years, there are some countries that have had open applications for up to 20 years. There are four broad elements to the accession process:

- opening formalities;
- the multilateral negotiating process;
- the bilateral negotiating process; and
- concluding formalities.

The opening formalities include the formal request of an applicant for membership of the WTO, and its acceptance by all existing members to the status of observer or applicant member. Two further activities are required at this stage:

- the submission of a detailed description of all aspects of the applicant country's trade regime; and
- gap analysis that benchmarks the applicant's legislation against WTO obligations.

Once these submissions have been received, the WTO will form a working party of existing members who will take the lead on the WTO's consideration of membership. This process involves detailed scrutiny of an aspiring member's national policies. At this stage, applicant members are often required to put in place new legal frameworks to meet the obligations of membership; this is an area where the involvement of the national Bar can potentially be very helpful.

## What do newly acceding members of the WTO need to do about legal services?

Negotiations on services form part of the overall accession process. The agreement on services, including legal services, is only achieved when the whole package of negotiations is concluded.

Figure 9: The application process



Accession negotiations on services have two elements:

- a **multilateral element**, in which the applicant member must demonstrate that its trading system is compatible with GATS general obligations (eg, essential legislation is in place); and
- a **bilateral process**, in which the applicant member makes an initial offer (ie, it sets out which services sectors it is willing to commit to open, or keep open). It is then open to individual WTO members to come back with specific requests for improved or clarified access in specific sectors and subsectors. If the applicant member agrees to the request and revises its offer,



that offer or market opening will extend to all WTO member states, not just the member state that made the ‘request’.

The issues that will arise for the Bar in a country negotiating accession will include the following:

- Are there MFN exemptions that might need to be considered (these will usually be broader than legal services, and relate to pre-existing relationships with other countries – eg, recognition of qualifications)?
- What is the existing regulatory framework for lawyers and how would this translate into a GATS schedule?
- Would the extension of new market access to foreign lawyers following the bilateral request-offer process (eg, for rights of establishment for foreign lawyers to practise international and home country law) require any new regulatory powers for the Bar (eg, the ability to regulate or license foreign lawyers in some form)?

WTO members scrutinise the legislation of applicant members, but their interest is principally in ensuring that domestic regulation does not remove or water down GATS commitments. Applicant countries must decide for themselves whether they have the necessary tools in place to regulate effectively, and this is where Bars in applicant countries might benefit from early engagement with relevant government departments.

Such engagement will be useful not least because the bilateral request-offer phase of accession may well result in demands for greater liberalisation of the legal services market – this has become a standard request by some WTO members.

## Legislative questions arising for WTO applicants

- ***Is there an appropriate law in place to regulate the committed sector?*** (If not, does there need to be? If yes, does the law need revision/updating?)
- ***Who is responsible for overseeing or regulating the committed sector?*** (If unclear, is a new regulatory authority needed? If clear, does it have the powers it needs to regulate foreign suppliers?)
- ***Are there any other provisions that may need to be reviewed?*** (Is existing legislation up to date? Are there gaps?)

The process of negotiating WTO accession can be lengthy and not always continuous – negotiations may be dormant for many years. This underlines the importance of maintaining periodic contact with national negotiators to find out how matters are progressing. If accession takes many years, there is no guarantee that priorities or sensitivities that have been communicated by a Bar will be remembered.

Once all the bilateral negotiations have been completed, along with the legislative scrutiny, the WTO Accession Working Party will make a report and the formal elements of accession will be dealt with by the WTO Ministerial Meeting, which usually takes place every two years. After signing the accession Treaty, the applicant member will then need to undertake the process of ratification. As outlined in Part I of this guide, how this is done will depend on national constitutional and legislative arrangements.

## Further developments at the WTO

While there has been relatively little progress in the WTO at a multilateral level on market access in services since the conclusion of the Uruguay Round, there have been some WTO developments worth noting. These developments will have an impact on the environment influencing trade in legal services.

## Trade in Services Agreement (TiSA)

Once it had become clear that the Doha Round of services negotiations, which were intended to build on the conclusions of the Uruguay Round in services, were stymied by the stalemate in other areas of WTO negotiations, such as agriculture and intellectual property, a group of WTO members<sup>33</sup> launched a new set of services negotiations in the margins of the WTO in 2013. These negotiations, which were led by the US, Australia and the EU and began in 2013, were known as the TiSA. The TiSA negotiations occurred outside the WTO, but with the intention of integrating the agreement back into a multilateral framework at a later date and encouraging additional WTO members to sign up on to any TiSA agreement.

The TiSA negotiations broke new ground for services negotiations on market access by:

- recognising and proposing to close the significant gap between *de jure* and applied commitments in services sectors (as noted earlier, many GATS schedules, especially those of countries that joined the WTO at its inception, do not reflect the true degree of market access that is offered in practice);
- suggesting as a starting point for new commitments that Modes 1 and 2 of services trade should automatically be open; and
- proposing a new approach for parties to make commitments in services. Instead of the ‘positive listing’ approach of the GATS, which requires parties to identify and commit to opening

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<sup>33</sup> Australia, Canada, Chile, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, New Zealand, Norway, Switzerland, Taiwan, the US, the EU (28 countries), Colombia, Costa Rica, Mexico, Panama, Peru, Turkey, Pakistan and Paraguay.

specific sectors and then to identify the modes of service supply that they are prepared to open up in those sectors, the TiSA agreement adopted a hybrid approach. This proposed that sectors selected for opening should be positively identified, as in the GATS. For those sectors, the assumption would be that if a sector was covered, then it would be open except to the extent that specific measures that limited market access or national treatment had been listed in an annex. Any limitations not listed could then not be relied upon subsequently.

The chief characteristics of this hybrid approach are that it: (1) promotes greater transparency; (2) requires countries to ‘bind’ the full extent of the market access that they offer in practice; and (3) states clearly the measures that would need to be changed if there were to be further liberalisation.

The TiSA agreement foundered around 2017 before producing any agreement, mainly due to the inability of the EU and US to agree on an approach to data protection. But it nonetheless represented an important development milestone in services trade, as it mainstreamed different, more ambitious methods of scheduling services commitments to a wider group of trade partners.

## **Domestic regulation**

Although TiSA did not conclude successfully, it did produce the text that formed the basis of an agreement on Services Domestic Regulation. This text picked up on the unfinished business on horizontal domestic regulation disciplines that had begun in the WTO alongside the Doha Round but failed to advance.

## JOINT INITIATIVE ON SERVICES DOMESTIC REGULATION

WT/L/1129 (2 December 2021)

4. The [67] Participants intend to incorporate the disciplines in the Reference Paper as additional commitments into their GATS Schedules...

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The topic subheadings in the 22 paragraph, eight-page Reference Paper included headings related to:

- scope of the disciplines;
- application filing and processing;
- fees;
- assessment of qualifications;
- recognition;
- independence;
- publication and information available;
- opportunity to comment before entry into force;
- enquiry points;
- technical standards; and
- development of measures.

In December 2021, 67 WTO members signed up to the Joint Agreement on Services Domestic Regulation.<sup>34</sup> This agreement is significant because it marks the adoption of some important disciplines on domestic regulation of services relevant to trade, such as licensing and authorisation of service providers, assessment and recognition of qualifications, and independence of competent authorities assessing international applications from the local competitors to those service providers. The implications of this for Bars are as follows:

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34 Joint Initiative on Services Domestic Regulation (WTO, 2 December 2021) <https://perma.cc/6ENE-UWCL> accessed 5 May 2023.

- Bars in WTO members signing up to the initiative that have not made GATS legal services commitments will be bound by the provisions of the Joint Statement; and
- Bars in signatory WTO members that have made GATS commitments on legal services may find an extra layer of scrutiny exists over their rulemaking.

In general, the Joint Statement is unlikely to be unduly onerous for any regulatory Bar that follows good regulatory practice.

## **Data flows and electronic communications**

Another area of WTO negotiations with relevance to the legal sector that has been ongoing in recent years are e-commerce negotiations. While these may not seem to be directly related to legal services, many of the issues the negotiations address have a direct relevance to legal services and the way in which they are transacted in the 21st century.

WTO members are currently negotiating a Joint Statement Initiative (JSI) on E-commerce, which would, like the JSI on Domestic Regulation, be a plurilateral rather than a multilateral agreement. In other words, WTO members could voluntarily sign up to the commitments contained within it.

Suggestions for topics to include in the initiative are based on papers put forward by WTO members, and cover issues such as:

- approaches to the definition of categories of data, which might help to establish ownership of data produced by individuals when using digital platforms, and possible compensation for those whose data are being used;

- adequate regulation of cross-border data flows, to ensure sustainable development outcomes from the data-driven economy;
- consideration of issues such as national security, human rights (including the right to privacy) and law enforcement; and
- approaches to ensure that developing countries do not end up becoming the providers of raw data to global digital platforms, subsequently finding themselves having to purchase digital products built entirely from their own data.

All these questions translate into some difficult policy issues, such as whether countries should be able to impose customs duties on electronic transmissions in order to deal with tariff revenue losses arising from the sale of digital products (eg, books, software and films), which in their physical form would have crossed the border and, possibly, been subject to tariffs. WTO members have agreed to a rolling moratorium on the imposition of such duties since 1998, but with increasing reluctance among some.

#### **WTO Joint Statement on Electronic Commerce**

We confirm our intention to commence WTO negotiations on trade-related aspects of electronic commerce.

We will seek to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO members as possible.

We recognise and will take into account the unique opportunities and challenges faced by Members, including developing countries and LDCs, as well as by micro, small and medium sized enterprises, in relation to electronic commerce.

We continue to encourage all WTO members to participate in order to further enhance the benefits of electronic commerce for businesses, consumers and the global economy.

WTO, 25 January 2019

The issue of the continuing WTO moratorium raises potential concerns for the legal sector. Historically, customs duties typically are not assessed on services, like legal services, because of the difficulty of identifying when a service is provided cross-border. In theory, however, if the 1998 moratorium ended, custom duties could be applied to efforts to sell legal services ‘products’, such as document templates or fixed-price standardised services. Opponents of the idea of imposing tariffs on electronic transmissions point out the practical difficulties, but as long as the moratorium remains temporary and needs to be renewed at every WTO ministerial meeting, it creates uncertainty for those seeking to innovate in countries that might be tempted to introduce such duties.

Other difficult policy questions include data localisation and privacy requirements, which are much more directly significant for lawyers, and thus for Bars, than the customs issue. If foreign countries in which lawyers do business require use of local servers when dealing with local clients, then Bars may need to ensure that, for example, they have regulations in place that enable them to have the regulatory access they need to client files in such circumstances.

## **RTA negotiations**

Perhaps the main reaction to the difficulties of moving services negotiations forward at a multilateral level in the WTO has been for individual WTO members to shift their focus to regional and bilateral trade agreements.

Regional and bilateral trade agreements (referred to collectively as RTAs) have evolved substantially from their early manifestation



as ‘FTAs’. This is reflected in their titles, which today include descriptors such as ‘Economic Partnership Agreement’, ‘Trade and Cooperation Partnership Agreement’ and ‘Regional Comprehensive Economic Partnership Agreement’. These titles illustrate a level of ambition that goes beyond simply reducing or removing trade barriers.

Such agreements can be negotiated by two or more countries. Because most of the trade partners involved will be members of the WTO, the approach they take must conform to WTO rules on closer regional integration, such as GATS Article V. As previously noted, the GATS requires the coverage of any RTAs to be broad and deep. Thus, the starting point for trade partners negotiating such agreements is to decide on the ‘chapters’ that the trade agreement will include. RTAs typically cover both trade in goods and trade in services, but many will contain other chapters likely to be of direct interest to Bars regulating trade in legal services. These chapters can range from chapters on Transparency and Professional Services Regulation through to the treatment of data flows.

In addition, lawyers more generally may be interested in the other opportunities potentially created by new-style RTAs, for example, in the form of prompts for new domestic legislation (eg, the adoption of new government procurement rules), and areas of more general dialogue and cooperation on topics that might be relevant to other areas of local law, such as gender or employment. RTAs will also always include a statement of how disputes under the agreement would be treated. This too could create opportunities for lawyers in the form of appointments to the agreement’s standing panel of arbitrators.

Trade in legal services may be covered in a variety of different ways in RTAs. The most common approaches are outlined below.

## **Traditional GATS-style RTAs**

Not surprisingly, many countries engaging in bilateral negotiations on trade in services as part of a wider bilateral trade agreement may simply use the same approach as the GATS and build on existing commitments with wider/deeper commitments specifically for the RTA partner. This, for example, is what the Republic of Korea has done through its bilateral agreements with the EU, US and European Free Trade Association (EFTA).

The process of negotiating a trade in legal services commitment under such an RTA follows the same steps as the GATS:

- agreement on a services chapter text;
- specification of any relevant MFN exemptions;
- identification of services sectors to be included (a positive selection); and
- negotiation of specific commitments, including any limitations, often through a request-offer process.

Even though RTAs using this approach generally follow the structure of the GATS, they can depart in significant ways. Some measures that have figured in existing GATS-style RTAs that are worth noting include:

- provisions that incorporate by reference any GATS-related liberalisation – see Article 815 of the Thailand–Australia FTA which provides for amendment of the chapter and specific commitments if the GATS is updated through new negotiations;

- provisions on recognition of qualifications. These kinds of provisions usually note that other WTO parties can negotiate comparable agreements;
- cooperation measures, such as the one set out in the box (some cooperation measures are more structured and require an annual meeting);
- provisions that establish a professional services or legal services working group and specify issues for consideration, such as the US–Australia FTA; and
- provisions on further liberalisation – see eg the EFTA-Indonesia Comprehensive Economic Partnership Agreement (CEPA), which includes the following article:

‘With the objective of further liberalising trade in services between them the Parties shall review at least every three years, or more frequently if so agreed, their Schedules of Specific Commitments and their Lists of MFN-Exemptions, taking into account in particular any autonomous liberalisation and on-going work under the auspices of the WTO. The first such review shall take place no later than five years from the date of entry into force of this Agreement.’

#### **Example of Co-operation Provisions in an RTA**

‘The Parties shall strengthen and enhance existing cooperation efforts in service sectors and develop cooperation in sectors that are not covered by existing cooperation arrangements, through inter alia: research and development; human resource and professional development and apprenticeship; trade in services data management; and small and medium enterprises capacity enhancement.’

(Malaysia–Australia FTA, 2005)

Overall, Bars should take care to note the differences between any proposed bilateral agreement and the GATS, and be conscious of what this might imply for their own regulatory approaches.

## **RTAs that include both cross-border services and investment chapters**

A variation of the traditional GATS-style services agreement has emerged in recent years. These RTAs place services commitments in two separate chapters of an FTA. One chapter will focus on commitments that relate to cross-border services, whereas the other will contain commitments relating to establishment, and which are therefore linked to investment. This distinction promotes the opportunity to adopt a more open approach to market access for cross-border services, and the creation of a more holistic approach to tackling barriers to foreign establishment. This approach has been used by the EU, most significantly in its agreements with Korea and Singapore.

For IBA Member Bars, it is important to be aware that this type of agreement can exist. It reinforces the important point that they should review the whole of an RTA text, not limit themselves to looking for the chapter that contains services provisions.

## **Negative list RTAs**

So-called ‘negative list’ agreements are becoming increasingly common. First adopted by the North American FTA (NAFTA), this approach is now favoured by countries that wish to promote more open services sectors.

Negative list approaches tend to be used in advanced agreements that encompass new areas of cooperation not traditionally found in

the GATS. As in the case of GATS-style RTAs, Bars should carefully study the text of any overarching services provisions to understand what is covered.

The negative list presupposes that all services sectors are open, except to the extent that domestic legislation and regulation that restrict openness to foreign service providers have been specified in a list of ‘non-conforming measures’ that is appended to the agreement. These measures are appended in much the same way as a services schedule would be attached in a normal GATS-style RTA agreement. The sort of wording that might appear in a negative list-based services agreement is shown below in text drawn from the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP):

*‘Article 10.7: Non-Conforming Measures*

*1. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to:*

*(a) any existing non-conforming measure that is maintained by a Party at:*

*(i) the central level of government, as set out by that Party in its Schedule to Annex I;*

*(ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or*

*(iii) a local level of government;*

*(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or an amendment to any non-conforming measure provided that it does not reduce the conformity of the measure compared to its prior state.’*

The negative listing approach raises new challenges for Bars, as it requires all legislation and regulation that might impact on the provision of legal services by foreign providers into the local economy to be identified and adequately described.

An example of how a non-conforming measure can be drafted is set out below in an example drawn from the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.

## Extract from CETA

### Annex : Non-Conforming Measures Reservations applicable in Belgium<sup>35</sup>

<b>Sector:</b>	Business services
<b>Sub-Sector:</b>	Legal services
<b>Industry Classification:</b>	Part of CPC 861
<b>Type of Reservation:</b>	National treatment Market access
<b>Level of Government:</b>	National (Federal State)
<b>Measures:</b>	Belgian Judicial Code (Articles 428-508); Royal Decree of 24 August 1970
<b>Description:</b>	<p><b>Investment and Cross-Border Trade in Services</b></p> <p>Full admission to the Bar is required for the practice of legal services in respect of Belgian law, including representation before courts. Residency (commercial presence) is required in order to obtain full admission to the Bar.</p> <p>The residency requirement for a foreign lawyer to obtain full admission to the Bar is at least six years from the date of application for registration, three years under certain conditions. Required to have a certificate issued by the Belgian Minister of Foreign Affairs under which the national law or international convention allows reciprocity (reciprocity condition). Representation before the 'Cour de Cassation' is subject to quota.</p>

35 Text of the CETA – Annex I – EU Party (Government of Canada) [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/A1-EU.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/A1-EU.aspx?lang=eng) accessed 12 April 2023.

This CETA excerpt illustrates the fact that lists of non-conforming measures can be long and detailed. For service providers, these lists offer a far greater degree of clarity about what is permitted in another WTO member compared to the GATS. However, developing such a list can be a challenge for the responsible regulating authority. This highlights the importance of good communication between the Bar and the government department responsible for drawing up the lists of non-conforming measures to be appended to any RTA.

Negative list RTAs also often include a standstill and ratchet clause. A standstill clause prevents signatories from adopting new measures that nullify their commitments or decrease the conformity of their regulation. A ratchet clause ensures that any liberalisation measures introduced by either party that go beyond the original commitments made in the trade agreement are then 'locked in' as new commitments. This prevents the drift between *de jure* trade commitments and *de facto* market access, which has become characteristic of the GATS system.

## **Hybrid RTA agreements**

There is a variant on the negative listing type agreement, which is worth noting as this may also become a more common phenomenon in larger regional-type agreements. This is the approach used in the Regional Comprehensive Economic Partnership Agreement (RCEP) signed in 2020 by Australia, New Zealand, Korea, China, Japan and ASEAN.

The approach taken to services in RCEP allowed signatories to select whether they wanted to make their services commitments by using a GATS-style 'positive list' approach or a NAFTA style

‘negative list’ approach. However, parties using the positive list approach are referred to as ‘transitioning parties’ and they must translate their schedule into lists of non-conforming measures within 12 years. This revised schedule must offer at least the same level of liberalisation as offered in the original positive list.

It is significant that ASEAN as an RTA in its own right is in the process of moving its own internal schedules from a positive to a negative listing approach to conform with RCEP commitments.

## **MRAs**

MRAs build on the market access arrangements agreed under the GATS or in other trade agreements. MRAs deal with the recognition of regulatory decisions by trade partners and, in the case of legal services, they most often deal with the recognition of professional qualifications.

The recognition of professional qualifications means that lawyers moving between jurisdictions to provide services do not need to repeat the entire host country qualification process in order to either requalify as a lawyer or gain recognition as a foreign legal consultant, if such a scheme is in operation.

MRAs may be made under a framework explicitly set out in a trade agreement (eg, the EU–Canadian CETA), which delegates the task of making an MRA to national Bars or may be made independently by Bars, provided that any such arrangement is consistent with WTO obligations.



# Part IV: What can the IBA do to help?

## What efforts has the IBA made with respect to international trade agreements?

The IBA has taken a leadership role in helping the legal profession understand and respond to international trade agreements, including the GATS.

GATS Article VI refers to ‘the international standards of relevant international organizations’ and explains in a footnote that the term ‘relevant international organizations’ refers to international bodies whose membership is open to the relevant bodies of at least all members of the WTO. With respect to legal services, the IBA is one of the few international organisations that meets this definition, and it was one of the earliest to be engaged regarding the GATS. The IBA consulted with the WTO Secretariat on the editions of its own GATS Handbook and has responded to WTO requests for input on policy decisions.

The BIC ITILS Committee has provided both formal and informal presentations to the WTO. It continues to meet with WTO Secretariat<sup>36</sup> and WTO member state representatives in Geneva,

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<sup>36</sup> For information about the WTO Secretariat, see Overview of the WTO Secretariat. Among other things, this webpage notes that the ‘WTO Secretariat, with offices only in Geneva, has 625 regular staff and is headed by a Director-General. Since decisions are taken by Members only, the Secretariat has no decision-making powers. Its main duties are to supply technical and professional support for the various councils and committees, to provide technical assistance for developing countries, to monitor and analyse developments in world trade, to provide information to the public and the media and to organize the ministerial conferences.’ The WTO Secretariat has produced a number of useful papers, in addition to its 1998 and 2010 papers on the legal services sector. The WTO’s ‘Documents Online’ webpage has a robust search. The ‘trade topics’ section of the webpage is also useful.

and often mounts educational programmes at IBA meetings and elsewhere in the world. Further information on these activities can be found on the BIC ITILS webpage.<sup>37</sup>

Finally, the IBA has also adopted a number of resolutions relevant to international trade agreements.

## **Formal IBA positions on international trade**

Over the past 25 years, the IBA Council has passed the following resolutions related to international trade in legal services.

### **1998 Resolution on GATS and Deregulation of the Legal Profession**

The earliest relevant resolution arose out of concerns at the time about deregulation of the legal profession around themes of globalisation and competitiveness. It is sometimes referred to as the ‘core values’ resolution. It continues to be important because of its recital of the core values of the legal profession (eg, confidentiality, avoidance of conflict of interest, independence and the rule of law), and because of the following two statements, which remain true today in the context of negotiations on legal services:

- ‘1. that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society; and
2. that any steps taken with a view to deregulating the legal profession should respect and observe the principles outlined above (namely the core values).’

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<sup>37</sup> See [www.ibanet.org/BIC-ITILS-Committee](http://www.ibanet.org/BIC-ITILS-Committee) accessed 5 May 2023.

## **1998 Statement of General Principles for the Establishment and Regulation of Foreign Lawyers**

This resolution set out some common principles on which regulation of cross-border establishment of lawyers by IBA Member Bars should be based.

## **2001 Standards and Criteria for Recognition of the Professional Qualifications of Lawyers**

This resolution took the form of a submission to the WTO on issues relating to the recognition of legal qualifications. It was designed to ensure that any rules made by the WTO on the mutual recognition of qualifications took into account the specificities of the legal profession.

## **2003 Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations**

As Part II explained in greater detail, this resolution has had an impact on the legal services terminology used by the WTO Secretariat and by government negotiators when submitting legal services trade proposals.

## **2003 Communication to the WTO on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector**

As its name indicates, this resolution is relevant to the topic of ‘disciplines on domestic regulation’, which has been the subject of ongoing Doha Round WTO GATS negotiations.

## 2008 Resolution on Transfer of Skills and Liberalization of Trade in Legal Services

This resolution was adopted in order to inform jurisdictions from developing countries in particular about the ‘capacity building’ conditions they might want to include in their Schedules of Specific Commitments when making market access commitments, such as a requirement for a foreign lawyer to participate in the provision of continuing legal education programmes for local lawyers, or to provide individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to local lawyers.

In addition to the resolutions listed above, IBA Member Bars should be mindful of the IBA’s *International Principles on Conduct for the Legal Profession*, most recently updated in 2018. IBA Member Bars may find it useful to cite international standards such as these, especially when communicating with government officials, since they provide an explanation of lawyers’ core values as generally globally agreed. If any of the core values are, say, threatened by a government negotiating stance, the principles provide useful evidence for why the core value in question should be protected.

### Other useful IBA resources

In addition to the resolutions and *International Principles* document listed above, Bars should find the following IBA resources useful to consult when formulating a position on trade in legal services. (It should be noted, however, that the first two items were written a few years ago, and so legislation or regulation in the jurisdictions covered may have changed.) (Links are in the Appendix.)

## **IBA Legal Regulators' Directory**

This provides a list of organisations responsible for regulating the legal profession around the world; it is useful for Bars that wish to check on the qualifications or disciplinary records of lawyers from other countries, and for lawyers and law firms interested in cross-border working. The directory generally divides the regulatory functions governing legal practice into three stages: admission, practice and discipline, indicating the body responsible for each function and how it may be contacted.

## **Database on the Regulation of International Trade in Legal Services**

This 2014 database, updated in 2018, contains data on the regulation of domestic and cross-border legal practice in over 90 countries, or over 160 jurisdictions. It contains valuable information on the rules governing local practice in each jurisdiction, the rules governing cross-border legal practice and the actual position in relation to cross-border legal practice.

## **IBA BIC ITILS guide titled 'What model for cross-border joint practice?'**

This pamphlet outlines the different models that lawyers, firms, and countries use to permit or facilitate association among lawyers from different countries. It outlines some of the perceived strengths and weaknesses of the various approaches.

## **Globalisation seminars sponsored by BIC ITILS Committee**

For a number of years, the BIC ITILS Committee has been mounting seminars, principally in developing countries, to help local lawyers cope with the consequences of the globalisation of legal services. One goal is to help to ensure that local lawyers obtain a bigger share of the legal work relating to international transactions conducted in their jurisdictions. Member Bars may find it useful to consult the materials from past seminars, which are available in the ‘completed projects’ section of the IBA BIC Projects Webpage, and also on the webpage of the European Lawyers Foundation.

The IBA is always open to suggestions from its Member Bars on other resources and activities in relation to international trade in legal services that might be helpful. Ideas and requests can always be submitted to the officers of the BIC ITILS Committee.

## Conclusions

The IBA strongly recommends that Member Bars engage in issues related to international trade agreements.

Legal services fall within the ambit of the binding international trade agreements signed by virtually all IBA Member Bar countries. Even if they were not covered in a country's original WTO commitments, the world of international trade agreements is changing, and the new generation of bilateral and regional international trade agreements are much more likely to include legal services. Moreover, negotiators are more likely to place a higher priority on legal services negotiations than they did previously, because there is increasing recognition of the role of legal services as an 'infrastructure' service that facilitates other kinds of international trade.

This guide has aimed to provide the background that Bars will need to educate themselves on legal services-related international trade agreement issues. This should help IBA Member Bars engage effectively with their government's negotiators and with their counterparts in other countries.

# Appendix 1: Guide to WTO Documents

This appendix includes information about how to locate and read the symbols on WTO documents, and websites of interest.

## How to locate WTO documents and interpret their symbols

The WTO website includes a Documents Online search page that allows you to search for documents in many different ways – see [www.wto.org/english/res\\_e/res\\_e.htm](http://www.wto.org/english/res_e/res_e.htm). For example, you can search for documents that include the words ‘legal services’. Alternatively, if you know the WTO number for the document, including documents cited in this Guide, you can use the ‘document symbol’ function of the WTO Documents Online webpage – see [http://docsonline.wto.org/gen\\_search.asp?language=1](http://docsonline.wto.org/gen_search.asp?language=1).

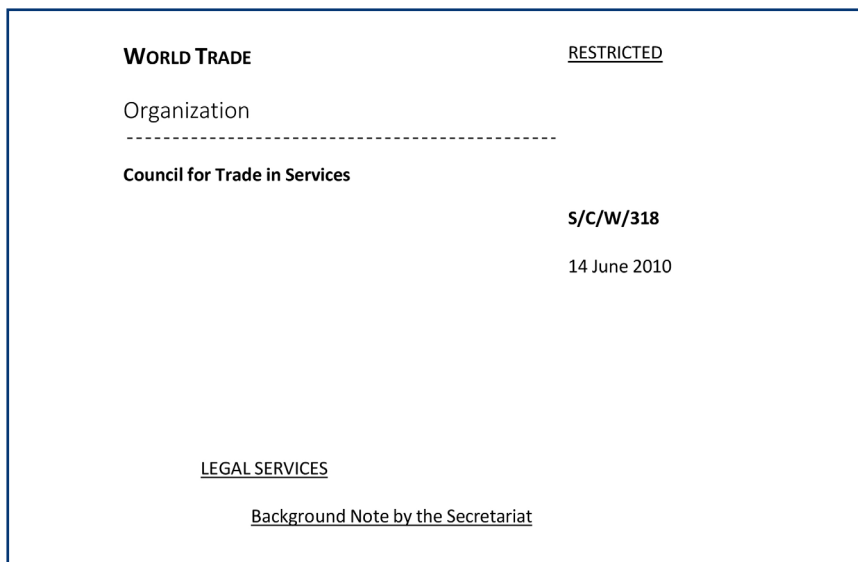
For example, if you insert S/C/M/24, you will retrieve the 24th set of minutes of the WTO Council for Trade in Services. If you insert the term ‘S/C/M’, then you will retrieve *all* minutes of the Council for Trade in Services that are publicly available. If you insert the term ‘S/C/’, then you will retrieve a list of all available WTO Council on Trade in Services documents. Once the search is complete and the list of relevant documents appears, you can select the documents and language to be downloaded.



Each WTO document has a unique set of numbers and letters assigned to it, which is its ‘name’ or symbol. The symbol for each document appears in the upper right-hand corner of the first page of the document, together with the date on which the document was prepared. All documents related to the GATS begin with the letter ‘S’. The second letter designates the entity issuing the document: for example, ‘C’ is used for the Council for Trade in Services and ‘WPDR’ is the Working Party on Domestic Regulation (some documents are submitted to multiple WTO bodies and may have multiple sets of symbols). The third letter in the document’s ‘name’ indicates the type of document: ‘M’ designates minutes of meetings and ‘W’ indicates a working paper submitted to the entity in question. If no letter is included, it means that the document is an ‘action’ document, such as an official WTO decision. The fourth item listed is a number; these numbers are issued in chronological order so that S/C/M/24 indicates the 24th set of minutes issued by the Council for Trade in Services.

‘W’ documents include comments and drafts submitted by Member States. ‘W’ documents also include Secretariat papers and analyses. ‘W’ documents are non-public, restricted documents unless the author indicates otherwise. Sometimes documents are ‘derestricted’ at a time point after they were first issued (but the ‘restricted’ notation may not be removed from the copy that is available online). Sometimes restricted documents are leaked and available on the internet.

Reproduced below is the beginning of the 2010 Secretariat paper on legal services which includes the document symbol information.



The ‘S’ means that this document is related to the GATS. The ‘C’ means that the document is related to the work of the WTO Council for Trade in Services. The ‘W’ means that this is a ‘work’ document, as opposed to minutes or an official action document. All Secretariat papers related to the GATS will be ‘W’ or work documents. The number 318 means that this was the 318th work document that was directed to the Council for Trade in Services. The date is written with the month spelled out. It is useful to retain this format and spell out the month since countries differ with respect to whether they list the day of the month followed by the month or the month, followed by the date.

# Appendix 2: Bibliography and references

## Useful WTO resources

WTO homepage

[www.wto.org](http://www.wto.org)

The GATS Agreement

[www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#services](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#services)

WTO Guideline to Reading a Schedule of Specific Commitments

[www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm)

WTO Services Portal

[www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm)

WTO webpage with links to countries' Schedules of Specific Commitments and MFN exemptions

[www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm)

WTO Ministerial Declarations

[www.wto.org/english/thewto\\_e/minist\\_e/min\\_declaration\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm)

WTO webpage on negotiation proposals (check both legal services and professional services)

[www.wto.org/english/tratop\\_e/serv\\_e/s\\_propnewnegs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm)

WTO Subsidiary Bodies, including the WTO Working Party on Domestic Regulation, which addressed the topic of GATS Article VI(4) disciplines and the Domestic Regulation Joint Initiative

[www.wto.org/english/tratop\\_e/serv\\_e/s\\_coun\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm), [www.wto.org/english/tratop\\_e/serv\\_e/jsdomreg\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm)

Annex on Article II Exemptions

<https://perma.cc/FA98-PQ47>

## Useful IBA resources

IBA BIC International Trade in Legal Services Committee (here)

### **ITILS-related resources and guides**

IBA Global Regulation and Trade in Legal Services Report 2014 and the 2018–2019 updated Regional Reports, <https://perma.cc/V248-GTJD> and <https://perma.cc/757X-ZCZT>

IBA Legal Regulators Directory 2016, <https://perma.cc/88FC-95WL>

IBA International Principles on Conduct for the Legal Profession, most recently updated in 2018, <https://perma.cc/N5MQ-24GY>

What model for cross-border joint practice?: A Handbook for IBA Member Bars, <https://perma.cc/TQM5-XXWH>

See also the IBA BIC ITLS Globalisation Series Project (managed by the European Lawyers Foundation), <https://perma.cc/XS6E-Y577>

### **IBA Resolutions**

IBA Council Resolution on the Regulation of the Legal Profession 1998, <https://perma.cc/ZCU8-654G>

IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers 1998, <https://perma.cc/AB87-VTQL>

IBA Standards and Criteria for Recognition of the Professional Qualifications of Lawyers 2001, <https://perma.cc/235A-GARD>

IBA Council Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations 2003, <https://perma.cc/PXR8-ZZ6B>

IBA Communication to the WTO on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector 2003, <https://perma.cc/P9MW-NJF6>

IBA Resolution on Transfer of Skills and Liberalization of Trade in Legal Services 2008, <https://perma.cc/AUC9-NJQ6>



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