

22 September 2015



Ms Angela MacRae
Commissioner
Australian Services Exports
Productivity Commission
Locked Bag 2, Collins Street
Melbourne VIC 8003

By email: services.exports@pc.gov.au

Dear Ms MacRae

Draft Report on Barriers to Growth in Services Exports

In addition to previous input provided on 3 June 2015 to the *Barriers to Growth in Services Exports* issues paper and previous background research provided to the Productivity Commission on the issue of international market access for legal services, the Law Council is grateful for the opportunity to make the following further comments on the Productivity Commission's draft report on Barriers to Growth in Service Exports.

Chapter 4: Domestic barriers to service exports

Although the draft report identifies Australia's foreign investment framework and investment in infrastructure as potential domestic barriers to investment, the Law Council considers that there are a range of regulatory barriers that impact on investment in the legal services sector.

Regulation of the legal profession

Responsibility for the regulation of lawyers rests with Australia's state and territory governments. As a consequence, the development of regulation of the legal profession has been shaped by the varied histories of legal, economic and social life in each jurisdiction. In 2009, the Council of Australian Governments appointed the National Legal Profession Reform Taskforce to make recommendations and propose draft legislation the aim of creating a system of regulation to fully implement a truly national legal profession. This initiative resulted in the Legal Profession Uniform Law.

The objectives of the Legal Profession Uniform Law are "to promote the administration of justice and an efficient and effective Australian legal profession by:

- providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession
- ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services

- enhancing the protection of clients of law practices and the protection of the public generally
- empowering clients of law practices to make informed choices about the services they access and the costs involved
- promoting regulation of the legal profession that is efficient, effective, targeted and proportionate, and
- providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.”¹

Although New South Wales and Victoria have both implemented the Legal Profession Uniform Law, other state and territory jurisdictions maintain their own systems of regulation for the legal profession. The Law Council’s position is that all states and territories should fully implement the Legal Profession Uniform Law. Achieving a truly uniform system of regulation for the Australian legal profession would provide a springboard for legal services providers in Australia by removing unnecessary compliance costs and making it easier for firms to establish offices across a number of states and territories.

The unresolved inconsistencies between jurisdictions also represent potential barriers to foreign investment. This is because laws regulating the provision of legal services under Australian law also apply to foreign lawyers who want to establish businesses in Australia to provide advice on foreign and international law.

The need for unified regulation of legal practice in Australia is especially critical in the context of international trade negotiations. Being able to present a single set of requirements, which are no more burdensome than necessary, for the practice of law throughout Australia would place Australia in a stronger position at the negotiating table and make Australia a more attractive destination for investment in legal services.

Available business structures for Australian law firms

The limited liability partnership has become a common and preferred business structure in many countries and jurisdictions. Limited liability partnerships, which combine the benefits of limited liability with the flexibility of partnerships, provide a business vehicle for law firms and other professions that supports growth and investment.

Limited liability partnerships are already available in a number of jurisdictions, in which the Australian legal profession would wish to expand and compete, including:

- the United States of America
- the United Kingdom
- China
- India
- Canada
- Singapore

¹ See Legal Services Council, *Uniform Law Objectives* (18 August 2015), <<http://www.legalservicescouncil.org.au/Pages/uniform-law/objectives.aspx>>.

- Malaysia
- Japan, and
- Hong Kong

Since their inception in the US in response to the 1988/89 “savings & loans crisis”, limited liability partnerships have become one of the internationally preferred business vehicle for professions, including the legal profession. In the context of law practices, limited liability partnerships are the predominant form of business structures used by the major global law firms with operations, affiliations or alliances in Australia. The absence of limited liability partnerships as an available form of entity for Australian law practices, coupled with the federal and state impediments to transitioning an Australian law practice from one business structure to another, has required the adoption of complex and inefficient business structures for the Australian operations of most major global law firms.

As a consequence, Australian law firms are at a competitive disadvantage when compared to law firms established in countries such as the United States of America and the United Kingdom. The availability of limited liability partnerships would enable Australian law firms to more readily form new business relationships and join existing networks across global markets.

Paragraph 5.6: Request for further evidence on international barriers

There are a number of general types of barrier to practicing law in a foreign jurisdiction. These were listed in Australia’s communication to the World Trade Organisation in the Doha round of WTO negotiations (**Attachment A**). For each type of barrier, the Law Council has included examples of where this barrier has acted to restrict the export of Australian legal services.

- Restrictions or prohibitions on the establishment of foreign law firms*
- Restrictions or limitations on joint ventures between local and foreign firms*
- Restrictions on profit sharing by local and foreign firms*
- Limited or no recognition of qualifications*
- Restrictions on the practice of home-country law and third-country law*

These five restrictions are often found together within inhospitable systems of regulations for foreign lawyers. This is because the regulation of the legal profession in a particular foreign country will often not include any distinction between the practice of local and foreign law. In these legal systems, the practice of law means, exclusively, the practice of local law. Foreign lawyers are regarded as not being properly qualified to practise law in that country, whatever their qualifications in the law of one or more foreign jurisdictions. In these places, foreign lawyers must either gain admission as local lawyers or be regarded as providing services of a strictly non-legal nature.

This can be seen in Thailand where only Thai nationals are permitted to practise law and foreigners are not permitted to practise either Thai or foreign law, regardless of their qualifications. However, there are certain foreign law firms or individuals who (consistent with Thai law) provide legal services via a Thai majority-owned joint venture company or secondment to a Thai majority-owned law firm. Foreign lawyers who provide legal services do so under various descriptions (none of which mention law or legal services), the most common being a “business consultant”.

Similarly, the practice of foreign law in India falls outside the definition of legal practice under its regulation of the legal profession. As only those practicing local law are entitled to establish law firms, foreign legal service providers use the workaround of providing legal services on a fly-in, fly-out basis. There is no scope for Australian law firms to establish a commercial presence in India. As well as preventing Australian lawyers from sharing profits with Indian counterparts, this restriction on establishing a commercial presence undermines the effective and efficient practice of foreign law in India.

A solution to this would be for India to recognise the practice of foreign law as distinct from the practice of local law. This would permit foreign lawyers to practise on this basis, including by establishing a commercial presence in collaboration with local lawyers.

Under Indonesian law, Australian lawyers are not able to enter into partnerships, joint ventures or other forms of commercial association with Indonesian law firms. Australian lawyers practicing in Indonesia, other than on a fly-in, fly-out basis must be employed as a legal consultant by a local law firm. This framework prevents Australian law firms from establishing firms to exclusively practice Australian law or enter into joint ventures with Indonesian lawyers. The requirement for foreign lawyers to practise as a consultant employed by a local firm also means that foreign lawyers cannot be equal partners with Indonesian lawyers and that foreign lawyers cannot practice under the name of their firm.

A range of consequences flow from the non-recognition of foreign law, including prohibitions on establishing a law firm to practise foreign law, establishing joint ventures with local lawyers and sharing profits with local lawyers. In a practical sense, the non-recognition of foreign law also encourages foreign lawyers to find workarounds in order to provide the legal services that their clients demand.

While these workarounds may be sufficient to enable Australian lawyers to provide services in a range of foreign countries, the Law Council's view is that providing advice on foreign law through workarounds could have negative implications for the rule of law. In particular, there is a legitimate concern that foreign lawyers, by operating on the basis that they are not providing legal advice, may also leave aside the ethical and professional standards and duties that lawyers are obliged to uphold in the course of their work. Even where this is not the case, the perception that a section of the legal profession is not bound by the rule of law could contribute to damaging confidence in the profession as a whole.

Restrictions on employing local lawyers

Under Singapore's regulations for foreign lawyers, the number of lawyers practicing Singapore law in a 'qualifying foreign law practice' must not exceed four times the total number of lawyers registered to practise foreign law as part of that practice.

Australian law service providers in China must operate through 'registered offices' and are not permitted to employ Chinese lawyers. However, once an Australian registered office has been established for three years, it may enter into contracts with Chinese law firms to mutually dispatch lawyers to each other's offices to provide legal advice. In addition, registered offices are only permitted to be established in a particular geographic location; the China (Shanghai) Pilot Free-Trade Zone.

Numerical ceilings on foreign law firms and foreign lawyers

Indonesia, Malaysia and Singapore are examples of countries that have restrictions on the number or percentage of foreign lawyers who may be employed by a local law firm (Indonesia) or in special joint venture structures specifically for the purpose of practicing local and foreign law (Malaysia and Singapore).

In Indonesia, only one foreign lawyer may be employed for every four Indonesian lawyers employed in a firm, with a maximum of five foreign lawyers employed by any one Indonesian law firm. An Indonesian law firm with only three lawyers may employ a single foreign lawyer.

Malaysian regulation creates three avenues to practise for foreign lawyers in Malaysia. These are: practice as a foreign lawyer employed by a Malaysian law firm, establishment of an International Partnership with a Malaysian law firm, or as a Qualified Foreign Law Firm. The QFLF category has been created for a specific purpose (to support Malaysia's International Islamic Finance Centre initiative) and firms must be able to demonstrate experience in international Islamic finance in order to apply for this category of registration. Only five QFLF licences are available for the entire Malaysian legal sector.

Australia's experience is that Singapore also uses a quota system for the various licences that permit some form of commercial association between foreign and local law firms. However, these quotas are not generally made known in an official and transparent way. For example, Singapore allows a Qualifying Foreign Law Practice (QFLP) to practise Singapore law through Singapore admitted partners or employees. However, no Australian firms, and only 10 large international firms overall, have been granted a licence to establish a QFLP in Singapore. The most recent of QFLP licences were granted on 1 April 2013. Out of 23 applications, only four licences were granted.

Unreasonable restrictions on licensing

Australian lawyers can register as 'foreign legal consultants' in Japan, however a requirement of registration is that the person resides in Japan for at least 180 days per year. This restriction prevents Australian lawyers from practicing Australian law in Japan on a fly-in/fly-out basis. This mode of practise is important because it allows law firms to flexibly provide high-quality legal services to clients. For example, fly-in/fly-out allows law firms to bring together ad hoc teams of lawyers with expertise in the required area or areas of law rather than having to keep particular lawyers stationed in a country in advance of being required to provide advice.

In addition, Japanese legal profession legislation treats each member state of a federation as a separate jurisdiction. This means that lawyers who have not spent a continuous period of two years in their home jurisdiction (e.g. New South Wales) will not meet the minimum 'home jurisdiction' experience requirements for registration as a foreign lawyer. For example, a lawyer admitted to the NSW Supreme Court who has practised Australian and English law in the United Kingdom since 1995, but has practised in NSW for less than two years would not meet Japan's minimum experience requirements for registration as a foreign lawyer.

Lack of transparency in regulatory processes and systems

China's registration requirements for foreign lawyers and the establishment of registered offices are onerous. Applications to establish a registered office must include a range of certified and translated documents. These documents will be considered by the provincial judicial administration department within three months. The judicial administration department of the State Council, with the advice of the provincial authority, must then make a decision about the application within six months (i.e. not more than 9 months after the initial application). There are instances where, over the last five to 10 years, the initial registration of individual lawyers has taken up to 18 months, with six to 12 months not being unusual.

Reasons must be given if an application is rejected, however the discretion whether to issue a licence or not is at large and not guided by any particular requirements (aside from ensuring documentary requirements are met and the timeframes described above). Once permitted to establish an office, the foreign lawyer must register before providing legal services and must re-register annually in order to continue providing these services.

Registered offices must also annually submit a range of documents to the provincial judicial administration department for the purpose of enabling supervision by that authority. These includes proof of registration, documents detailing the legal services provided and referred to Chinese law firms, financial statements, changes in foreign and local staff and employee's residency information.

Registration can be revoked for a large number of reasons, ranging from failure to properly submit documents on time to endangering China's State security, public security or the administration of public order. Recent crackdowns on the legal profession in China give an indication of the possible range of interpretation available in relation to these provisions.

Onerous visa procedures

Difficult and bureaucratic requirements for registration as a lawyer, and long delays in obtaining permission to practise can compound difficulties in obtaining the required work visa to practise as a foreign lawyer, especially (as in China and Japan) when a person must be physically present in a jurisdiction in order to become registered as a foreign lawyer..

For example, during these extensive periods where a foreign lawyer's registration is pending, there could be considerable uncertainty about that person's right to work in compliance with their visa conditions.

While Australian lawyers are able to work in Indonesia on a fly-in/fly-out basis, they must obtain a business permit which enables them to enter Indonesia to follow up on a business opportunity. However, this does not equate to a work permit.

In order to work in an Indonesian law firm, a foreign lawyer must make an application through the Ministry of Law and Human Rights. The process is complicated and lengthy. The prospective employing law firm must lodge an application with the Minister. The Minister must then obtain a written recommendation from the Bar Association in respect of each lawyer applying for a work permit. Each foreign lawyer seeking to work in Indonesia

must also pay, in advance, a fee equal to \$100USD multiplied by the number of months that they intend to work in Indonesia.

Draft Recommendation 9.2: Mutual recognition arrangements

Mutual recognition arrangements apply differently to the legal services sector because of the distinction between domestic and foreign law. Essentially, unlike other professional service sectors, the requirements for the practice of local law include knowledge of certain areas of knowledge that are specific to each country (constitutional law is an example). For this reason, mutual recognition of foreign legal qualifications, and granting rights to foreign lawyers to practise domestic law on the basis of foreign qualifications, is not practical. However, there is a possibility to 'mutually recognise' the right to practise foreign laws.

Under the Legal Profession Uniform Law, recognition of a foreign lawyer turns on whether the foreign lawyer "is properly registered or authorised to engage in legal practice in a foreign country by the foreign registration authority for the country".²

Subject to satisfying domestic regulatory requirements (incorporating academic qualifications or skills/experience; practical legal training and good character requirements), foreign lawyers may also apply to be admitted as Australian legal practitioners (local lawyers) on the basis of qualifications obtained outside Australia.

Recognition as a foreign lawyer

The Australian approach to recognition of foreign lawyers emphasises that the practice of foreign law and local law are separate fields of knowledge and it is this fact that makes recognition as a foreign lawyer a worthwhile proposition.

Recognition as a foreign lawyer does not, in contrast to other service sectors, entail recognition that the foreign lawyer's qualifications are equivalent to local qualifications. Legal training, despite a trend towards incorporating international and comparative law subjects, is inherently focussed on preparing a student to practise in a particular jurisdiction. Legal training in the law of a foreign jurisdiction is not intended to prepare a person to practise Australian law.

Similarly, legal professionals have duties to the court *in the jurisdiction where they are admitted to practise* to uphold certain ethical and professional standards. A person practicing foreign law in Australia owes this duty to the court in the foreign country where they are admitted to practise law, rather than to the court in Australia.

While these differences may be considered shortcomings in terms of the practice of Australian law, the reality is that lawyers who practice foreign law complement and increase the range of legal services that are available in the Australian marketplace. As set out in the Legal Profession Uniform Law, the objective of recognising foreign lawyers:

...is to encourage and facilitate the internationalisation of legal services by providing a framework for the regulation of the practice of foreign law in this

² This is the definition of "foreign lawyer" given by the *Legal Profession Uniform Law* (NSW), s6.

jurisdiction by foreign lawyers as a recognised aspect of legal practice in this jurisdiction.³

Recognition as an Australian legal practitioner (local lawyer)

At best, where a foreign lawyer seeks to practise Australian law as a local lawyer, mutual recognition arrangements may provide a pathway for the recognition of part of the qualification due to the existence of country-specific qualification requirements that all countries maintain for the practice of domestic law.

The Trans-Tasman Mutual Recognition Arrangement (TTMRA), agreed between Australia and New Zealand in 1996, provides a noteworthy exception to this general principle. Under the TTMRA, a person who is entitled to practise a profession in Australia is also automatically entitled to practise that profession in New Zealand and vice versa.

However, foreign lawyers not entitled to practise in New Zealand can apply to be admitted as Australian legal practitioners on the basis of qualifications obtained outside Australia. To become an Australian legal practitioner, a foreign lawyer must demonstrate that they have completed a legal qualification that is substantially equivalent to Australian legal qualifications in terms of minimum duration, areas of study, skills, practice areas and values.

Recent changes to Australia's Uniform Practice Rules, which currently apply in New South Wales and Victoria, further increase the scope for recognition of overseas trained legal professionals by permitting:

- recognition of relevant experience in lieu of having legal qualifications with strict equivalence to Australian legal qualifications, and
- conditional admission to practise (for example, to be permitted to practise only within their area of expertise).

In addition to the information provided above, the Productivity Commission may wish to consider the submission made by the International Legal Services Advisory Council to the Productivity Commission's 2010 Report on Bilateral and Regional Trade Agreements. A copy of this submission, which discusses barriers to trade in legal services, is provided at **Attachment B**.

Yours sincerely



Michael Brett Young
CHIEF EXECUTIVE OFFICER of the Law Council of Australia

³ *Legal Profession Uniform Law (NSW)*, s58

COMMUNICATION FROM AUSTRALIA

Negotiating Proposal for Legal Services

The following communication has been received from the delegation of Australia with the request that it be circulated to the Members of the Council for Trade in Services.

1. This paper sets out a negotiating proposal from Australia for the legal services sector. Australia reserves the right to submit further and more detailed proposals on this sector at a later date.

I. IMPORTANCE OF TRADE LIBERALISATION IN THE SECTOR

2. Legal services play a vital role in supporting and facilitating business and form a critical part of the infrastructure that underpins transactions in the commercial world. It is scarcely possible to contemplate conducting business transactions, particularly those of a transnational nature, in a legal vacuum. Legal firms around the world are internationalising as their clients pursue opportunities in a rapidly globalising marketplace and demand a consistent level of service across multiple jurisdictions. The importance to international trade and investment of a regulatory framework that facilitates the ready provision of transnational legal services and service suppliers cannot be overstated.

3. Legal firms not only establish a commercial presence in overseas markets, but lawyers also increasingly engage in short-term "fly-in, fly-out" assignments, and e-commerce provides the potential for greater crossborder supply.

4. Australia has consistently argued within the WTO the importance of liberalising trade in legal services. Not only would such liberalisation improve opportunities for legal service providers, but it would also facilitate access by businesses, particularly those operating across different jurisdictions, to a comprehensive range of legal services by a common provider. The current market access barriers in legal services serve as a hindrance to trade in other services - for example, when firms in other service areas are unable to gain access for their own legal advisers to foreign jurisdictions.

II. IMPEDIMENTS TO FURTHER LIBERALISATION

5. Australian exporters have identified a number of impediments to further liberalisation of the legal services sector. These include:

- restrictions or prohibitions on the establishment of foreign law firms;
- restrictions or limitations on joint ventures between local and foreign firms;
- restrictions on the practice of home-country law and third-country law;

- restrictions on employing local lawyers;
- restrictions on profit sharing by local and foreign firms;
- numerical ceilings on foreign lawyers;
- unreasonable restrictions on licensing;
- limited or no recognition of qualifications;
- lack of transparency in regulatory processes and systems;
- onerous visa procedures.

III. PROPOSAL

6. Consistent with proposals submitted as part of the WTO Information Exchange (July 1998), Australia believes that the following specific guiding principles are particularly relevant to achieving liberalisation of trade in legal services.

- (a) Formal recognition, on reasonable terms, of the right to practise home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (eg, a minimum number of years of professional experience or a refusal to recognise concurrent practice rights where the foreign lawyer's home country is a federal jurisdiction).
- (b) Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.
- (c) Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.
- (d) The right to practise local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through a transparent process.
- (e) Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.
- (f) Formal recognition of the right to prepare and appear in an international commercial arbitration.

7. Australia is of the view that the 'limited licensing' concept is an important element in meeting the requirements of law firms providing transnational legal services. It is a concept that embodies the idea that legal service providers need not be licensed to provide legal services covering the entire body of law of a single jurisdiction or multiple jurisdictions, but only in areas in which they possess competence and/or qualifications.

8. As implied in principle (a) above, the limited licensing concept provides for regulators to recognise the separate existence of home-country, host-country, third-country and international law.

This allows a limited licence to be issued enabling foreign lawyers to practise prescribed areas or aspects of host-country law (aspects that are incidental to the practice of foreign law) as well as home-country, third-country (where qualified) and international law. In such circumstances, foreign lawyers wishing to provide transnational legal services would not be compelled to obtain a full licence by undertaking the often burdensome process of fully qualifying in host-country law. The limited licensing approach, coupled with voluntary commercial associations between local and foreign lawyers/firms, creates a regulatory environment in which local and foreign lawyers/firms can engage in providing a wide range of transnational legal services to local and international clients.

9. Australia considers that nationality and residency requirements are trade-distorting barriers that should be eliminated. Consumer protection, ethical standards and quality of service, together with safeguarding the rule of law, should be achieved through other more appropriate, nondiscriminatory regulatory means.

10. Australia also considers that with further strengthening, the disciplines developed for the accountancy sector in 1998 by the Working Party on Professional Services (WTO document S/L/64) could be extended to the legal services sector. These disciplines represent a significant step forward in terms of improving the transparency of, and minimising the trade restrictiveness of, licensing procedures, technical standards and qualification recognition. However, Australia considers there is scope to tighten the disciplines, including by extending their reach to measures subject to scheduling under Articles XVI and XVII of the GATS.



Australian Government



INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL

SUBMISSION TO THE PRODUCTIVITY COMMISSION

**REVIEW OF BILATERAL AND REGIONAL TRADE
AGREEMENTS**

SEPTEMBER 2010

Table of Contents

Introduction	3
Executive Summary	3
1. International trade in legal services	5
2. Australia’s approach to legal services trade	5
3. Impacts on trade and investment barriers	6
3.1 The effectiveness of FTAs in reducing barriers	6
3.2 The role of FTAs in ensuring trade barriers are not introduced and reintroduced	7
3.3 The role of FTAs in ensuring a ‘level playing field’ for Australia.....	8
3.4 Behind the border barriers: the complementary role of FTAs and direct negotiation	8
4. The economic impact of FTAs	9
4.1 FTAs generate business for the legal and related services sector.....	9
4.2 FTAs are a catalyst for domestic reforms to improve the competitiveness of the Australian legal services sector	10
5. The way forward - FTA or WTO?.....	11
5.1 The complementary role of FTAs and the WTO process.....	11
5.2 The role of the WTO and FTAs in progressive liberalisation	11
6. Consultation.....	12
ATTACHMENT A	13
ATTACHMENT B.....	15

Contact

Mr Arjuna Nadaraja
Director
Secretariat, International Legal Services Advisory Council
Attorney-General’s Department
3-5 National Circuit
Barton ACT 2600
AUSTRALIA

INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL

SUBMISSION TO THE PRODUCTIVITY COMMISSION

REVIEW OF BILATERAL AND REGIONAL TRADE AGREEMENTS

Introduction

The International Legal Services Advisory Council (ILSAC) is the peak public-private forum for Australia's international legal and related services sector. ILSAC members are drawn from the private sector, academia, and government (Members: **Attachment A**). Since its inception in 1990, ILSAC has played a pivotal role in enhancing the international presence and improving the international performance of Australian legal services.

The Council operates as a high level consultative forum for the legal sector and government to coordinate, support and promote the development internationally of Australia's legal and related services. In this context, the latest version of the Council's export strategy *AUSTRALIAN LEGAL SERVICES: Strategic Global Engagement 2009-2012*¹ provides an overarching guide for the legal sector and policy makers in enhancing Australia's exports in legal and related services internationally.

The Council has a strong record of providing input to enable the Government to take a leading role promoting the liberalisation of trade in legal services internationally. It provides ongoing advice and support to the Australian Government, particularly on market access and behind the border domestic regulatory barriers impacting on trade in legal services, in relation to international trade negotiations (both World Trade Organisation (WTO) and free trade agreements (FTAs)).

ILSAC is pleased to contribute to the Productivity Commission Review into Bilateral and Regional Trade Agreements.

Executive Summary

1. The international legal services sector is complex and dynamic. Country-specific considerations and differences in the systems of law, as well as the overlapping role of government and the profession in regulation, have shaped ILSAC's and Australia's approach to expanding international trade in legal services informed by both a country-specific and a generic level of market access.
2. Australia has adopted a strategic and multifaceted approach to increasing market access for legal services, in which bilateral and regional trade agreements perform an essential role, along with the WTO process and direct negotiation with and between professional bodies. Close collaboration between the Australian Government, ILSAC, law firms with an international interest, and the peak professional bodies like the Law Council of Australia (LCA), is essential in order for this multifaceted approach to work effectively.

¹ *AUSTRALIAN LEGAL SERVICES: Strategic Global Engagement 2009-2012* is available at www.ilsac.gov.au

3. Bilateral and regional trade agreements have made a significant contribution to reducing barriers for Australia's legal and related services sector, in particular by:
 - i. reducing restrictions in priority markets specifically identified by the Australian legal services sector (including by going beyond existing commitments under the General Agreement on Trade in Services (GATS))
 - ii. ensuring trade barriers are not introduced or reintroduced, including by codifying existing arrangements, thus providing legal certainty that underpins decisions to invest/establish overseas
 - iii. providing a 'level playing field' where competitors have concluded FTAs with trading partners, and
 - iv. providing a framework and impetus for direct negotiation by, and with, professional bodies to focus on reducing 'behind the border' barriers.
4. Although it is difficult to quantify the economic impact of FTAs, ILSAC considers that bilateral and regional trade agreements have produced positive results for Australia's legal services sector by:
 - i. generating new business for Australia's law firms, universities and arbitrators and mediators
 - ii. increasing overall trade for Australian businesses, and
 - iii. providing a catalyst for domestic reforms to improve the international competitiveness of the Australian legal profession.
5. Bilateral and regional trade agreements have built-on, and complemented, Australia's work to promote greater liberalisation of trade in legal services through the WTO:
 - i. there has been a positive two-way 'exchange' of regulatory models and information between the multilateral and FTA trade negotiations that has improved the level of knowledge and, importantly, increased the confidence, of regulators and officials on the possibility and benefits of adopting more open regulatory regimes
 - ii. FTAs address situations where no WTO commitment has been made, and where there are commitments, provide a mechanism to go beyond the WTO level of liberalisation, and
 - iii. FTAs have increased the pace of trade liberalisation, further promoted the possibility of progressive liberalisation, and will provide an impetus, in the longer-term, to 'multilateralise' the liberalisation gains achieved through FTAs.
6. ILSAC submits that Australia should continue to actively seek to enter into bilateral and regional trade agreements. However, this should be undertaken on a strategic basis through the identification of priority markets that have medium to long term growth potential, including key markets where competitors have concluded FTAs and eroded an Australian advantage or a 'level playing field'.

1. *International trade in legal services*

With rapid developments in information technology, and international commerce, international legal services emerged as a significant global market in the late 1980s. Over subsequent decades the capacity to provide legal services covering the laws of multiple jurisdictions has attained critical importance in facilitating efficient transnational trade in services and encouraging investment, including foreign direct investment. Indeed, legal services, particularly commercial legal services, as an enabling service, form part of the essential infrastructure that underpins a robust economy. Hence, increased opening of legal services markets through trade agreements will have a multiplier effect on the outcome of those agreements by enabling more efficient trade across all goods and services traded under the terms of the agreement.

2. *Australia's approach to legal services trade*

Faced with the challenges of an increasingly global legal services market, Australia has adopted an innovative and strategic approach to international legal services trade. This strategy has ensured the continued international competitiveness and profitability of Australian legal services providers (legal services exports estimated to be worth AUD538m for 2008-09 by the Department of Foreign Affairs and Trade (DFAT)²).

Due to the interplay of the General Agreement on Trade in Services (GATS), FTAs, and government, judicial and professional regulation at the national level, the governance of international legal services has been described as 'complex and fluid'.³ In that context, Australia has taken an overarching approach to legal services market access that incorporates the WTO framework, bilateral and regional trade agreements and direct negotiation at the profession to profession level. This involves cooperation between DFAT, the Attorney-General's Department (AGD), ILSAC, and the LCA, as well as other bodies including the Council of Australian Law Deans (CALD) and the Australian Centre for International Commercial Arbitration (ACICA).

The foundation for Australia's market access requests in trade negotiations, are six guiding principles for achieving liberalisation in trade in legal services (**Attachment B**) developed by ILSAC in 1998. The six principles outline the interests of Australian lawyers in practising as foreign lawyers, establishing a commercial presence, obtaining admission to practise local law (after appropriate supplementary qualification), and appearing in international arbitration.

It is important to note that the level and scope of access for lawyers engaged in providing business/commercial legal services internationally does not have to extend to becoming a local lawyer with all the rights that full admission provides a local lawyer. The country-specific nature of legal practice means it is unrealistic to expect total recognition of a right to practise. Corporations, financial institutions and other clients involved in cross-border commercial transactions seek legal *advisory* services covering the laws of jurisdictions in which the transaction spans. Australia, therefore, does not seek market access for Australian lawyers to provide *consumer* legal services, such as those relating to family law, wills and personal injury. Nor is a right to represent clients in local courts sought, other than a right to appear in international commercial arbitration.

In the WTO Doha Round, Australia has taken a leading role on promoting the liberalisation of trade in legal services, as a founding member and Chair of the 'Friends of Legal Services' group. In that

² Department of Foreign Affairs and Trade, *Trade in Services Australia 2008-09* (2010) 29.

³ C. Arup, 'Legal services and professional regulation internationally? Australia abroad' (2009) 37(3) *Federal Law Review* 418.

regard, Australia was instrumental in establishing definitive minimum legal services requirements as a basis for accession to the WTO. It is suggested that this work in the Friends group had a positive impact on gaining meaningful WTO accession legal services commitments from China,⁴ as well as those of other important markets, such as Cambodia,⁵ and Vietnam.⁶

This work has been complemented by the incorporation of meaningful legal services commitments into subsequent free trade agreements, such as those with Chile, and the Association of South East Asian Nations. Australia also embarks on direct profession to profession negotiations with support from the Government, particularly where legal services regulation falls outside the ambit of national governments (such as the US). Government to government FTA negotiations continue to be a catalyst that gives impetus and, sometimes a framework, for these profession to profession negotiations. ILSAC is currently supporting the Australian Government in its ambitious program of negotiations, including in priority markets such as the People's Republic of China, Japan and the Republic of Korea.

3. *Impacts on trade and investment barriers*

3.1 The effectiveness of FTAs in reducing barriers

ILSAC's experience is that FTAs have made a meaningful contribution to reducing barriers to trade in the legal services sector. In some cases FTAs have directly resulted in the alleviation of trade restrictions. In others they have provided a platform for the legal profession to address barriers through direct negotiation with overseas counterparts. Indeed, trade negotiations have at times led to increased engagement with the broader market access issues and facilitated increased liberalisation even though this may not have been formalised in a trade agreement.

The following case studies are specific instances where trade agreement provisions have reduced barriers to legal services trade and investment.

Case Study: Joint Ventures under SAFTA

The Singapore Australia FTA (SAFTA) resulted in better conditions for Australian lawyers and law firms, as well as improved export opportunities for Australian universities.

Under SAFTA, conditions on the establishment of joint ventures and formal alliances in Singapore involving Australian law firms have been eased. These conditions include requirements with respect to the minimum number of foreign lawyers of the foreign law firm who must be resident in Singapore and a minimum number of years of experience those lawyers were required to have. Easing of these requirements provides Australian law firms with the capacity to better compete with the larger US and UK transnational law firms.

Australian law firms have taken advantage of the relaxation of Singapore's joint law venture conditions. For example, in April 2007, Australian law firm Arthur Allens Robinson and Singapore based law firm TSMP announced a joint law venture (JLV) in Singapore. While there are other

⁴ *The People's Republic of China – Schedule of Specific Commitments*, GATS/SC/135 (2002) (trade in legal services commitments).

⁵ *The Kingdom of Cambodia – Schedule of Specific Commitments*, GATS/SC/140 (2005) (trade in legal services commitments).

⁶ *Viet Nam – Schedule of Specific Commitments*, GATS/SC/142 (2007) (trade in legal services commitments).

non-JLV Australian firms in Singapore, the JLV facilitates a higher level of access that is prized by Australian firms as it provides for close association with local lawyers and a solid base to service clients in Singapore and the region (a majority of the work of the JLV is in the region using Singapore as a base).⁷

Case Study: ANZCERTA

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) has also yielded commercial benefits for Australian law firms. For example, Minter Ellison has opened offices in Auckland and Wellington to provide legal services to the New Zealand market. Another significant benefit of ANZCERTA has been its role in enabling a high level of exchange of legal talent between Australia and New Zealand.

3.2 The role of FTAs in ensuring trade barriers are not introduced and reintroduced

ILSAC also notes the valuable role of bilateral and regional trade agreements in ensuring that existing legal services trade is not eroded, including by codifying existing conditions. In that context, FTAs have provided additional security for Australian legal services providers considering international trade with FTA partners.

Case Study: AANZFTA

The FTA between Australia, New Zealand and the Association of Southeast Asian Nations (ASEAN) supplements Australia's existing bilateral FTAs with Singapore and Thailand (and the proposed FTA with Malaysia) in strengthening Australia's trade within the region.

The legal services provisions of AANZFTA are of significant commercial value to Australian law firms, particularly in relation to Australia's market interests in Indonesia and Vietnam. Vietnam has made commitments permitting Australian law firms to employ local lawyers and local law firms to employ Australian lawyers. Indonesia has also included its existing foreign lawyer regulatory regime, which provides for Australian lawyers to work as employees or consultants in Indonesian law firms.

ILSAC is aware of previous instances where nations have, in the absence of binding WTO or FTA commitments, increased restrictions on legal services trade. Vietnam, for example, introduced significant foreign lawyer restrictions in 1995,⁸ and issued a decree to shut down foreign representative offices in 1996⁹. The AANZFTA ensures that the existing international trade in legal services will be safeguarded from the introduction of trade barriers of this kind.

⁷ Allens Arthur Robinson, *Allens Arthur Robinson and TSMP form Singapore Joint Law Venture* (2007) Allens Arthur Robinson Media Releases <<http://www.aar.com.au/med/pressreleases/pr24apr07.htm>> at 24 April 2007.

⁸ P. Gauntlett, 'Tough going in Vietnam' (1996) 31(6) *Australian Lawyer* 14-15.

⁹ R. Tomasic, 'Globalisation and the Transformation of Commercial and Legal Practice in the Asia Pacific: Opportunities and Challenges for Australian Commercial Lawyers and their Clients' (Paper presented at the Finlaysons Commercial Law Lecture, Adelaide, 1996) 27.

3.3 *The role of FTAs in ensuring a 'level playing field' for Australia*

One of the many justifications for entering into an FTA is to ensure that Australia does not become disadvantaged in key markets due to FTAs entered into by competitors and trade partners.¹⁰ An associated issue is the 'first-mover advantage' obtained by early entrants to a market.¹¹ Australia's major legal services competitors have vigorously pursued increased market access through bilateral and regional trade agreements. For example, the United States of America has FTAs in force with 17 countries, and a further three signed but yet to be ratified by Congress.¹² The European Union has entered into numerous FTAs, and Singapore has concluded 18 FTAs and signed two more.¹³

Case Study: KORUS and the EU-Korea FTA

The (yet to be ratified) Republic of Korea-United States Free Trade Agreement (KORUS) signed on 30 June 2007, and European Union-Korea Free Trade Agreement (EU-Korea FTA), initialled on 15 October 2009, deliver significant market access advantages to the US and EU compared to Australian legal services providers. Under the two FTAs, Korea commits to liberalising its legal services trade with the US and EU in relation to foreign legal consultants, specific cooperative agreements, joint venture agreements,¹⁴ and, in the case of the EU, international commercial arbitration.¹⁵

ILSAC is currently providing advice and support to AGD and DFAT in negotiations for the proposed Korea-Australia Free Trade Agreement (KAFTA). Securing an outcome where Australian legal services providers receive similar concessions to those obtained by the EU and US will be of great importance in ensuring a 'level playing field' for Australian law firms to compete successfully in the Korean legal services market.

3.4 *Behind the border barriers: the complementary role of FTAs and direct negotiation*

In some countries, where the profession has responsibility for the regulation of the legal services sector, rather than the Government, direct profession to profession engagement is particularly useful in gaining market access, including through the reduction of 'behind the border' domestic regulatory barriers. However, as direct profession to profession negotiations yield only non-binding commitments, they remain susceptible to change in policy or government regulation.

ILSAC submits that complementary use of FTAs, through which at least a minimum viable level of binding commitments are gained, and profession to profession negotiations to address additional 'behind the border' domestic regulatory barriers is a process that often has the real potential to provide meaningful levels of market access for the legal and related services sector.

¹⁰ B. Mercurio, 'Should Australia continue negotiating bilateral trade agreements? A practical analysis' (2004) 27(3) *University of New South Wales Law Journal* 687-693.

¹¹ P. Lamy, 'Multilateral and bilateral trade agreements: friends or foes?' (Speech delivered at the Annual Memorial Silver Lecture, New York, 31 October 2006).

¹² Office of the United States Trade Representative, *Free Trade Agreements* (2009) <www.ustr.gov/trade-agreements/free-trade-agreements> at 10 May 2010.

¹³ Singapore FTA Network, *Free Trade Agreements* (2008) <www.fta.gov.sg/fta_general.asp?hl=19> at 10 May 2010.

¹⁴ *Republic of Korea-United States of America Free Trade Agreement*, signed 30 June 2007, Annex-I-Korea, 25 and Annex-II-Korea, 44-45.

¹⁵ *European Union-Korea Free Trade Agreement*, initialled 15 October 2009, Annex 7 A-4 Korea, Schedule of Specific Commitments in Conformity with Articles 7.7, 7.13, 7.18 and 7.19, 1.A.a.

Case Study: AUSFTA

The Working Group on Professional Services (WGPS) established under the Australia-United States of America Free Trade Agreement (AUSFTA) has provided a useful framework and impetus to engage with the US legal profession to obtain better market access for Australian lawyers. In particular, the WGPS became the platform for the Australian legal profession, led by the Law Council of Australia and supported by AGD, DFAT and ILSAC to successfully obtain liberal and commercially meaningful access for Australian lawyers to work as foreign legal consultants in Delaware, an important corporate law centre in the US. That process also provided a good framework to gain the support of the US Conference of Chief Justices in passing resolutions promoting the recognition of Australian qualified lawyers and law degrees for admission to practise in the US.

Case Study: JAFTA Negotiations

The current trade negotiations with Japan for the proposed Japan Australia Free Trade Agreement (JAFTA) have led to increased engagement with the broader market access issues and facilitated increased liberalisation. In particular, the negotiations have been supplemented by the Strengthening Australia Japan Legal Infrastructure project jointly undertaken by ILSAC and the LCA. As part of this process, Australia made representations to Japan about behind the border barriers, including providing detailed information required by the Japanese Ministry of Justice relevant to the licensing of foreign law firms in Japan. That process and information had a direct impact in achieving a positive result as it successfully facilitated issuing of a licence for the opening of an office by the Australian law firm Blake Dawson in Tokyo in 2009.¹⁶

4. *The economic impact of FTAs*

Although ILSAC has not attempted to definitively quantify the economic impact of FTAs on the export of legal services, ILSAC considers that there is strong anecdotal evidence that they deliver significant commercial benefits to Australia. While different FTAs that apply to different countries can add to the administrative costs and the complexity of regulation¹⁷ for those law firms that seek to operate across many of those countries, this is offset by the effect they have on legal services providers in providing them with additional opportunities, their clients, and as a driver for domestic innovation.

4.1 FTAs generate business for the legal and related services sector

As an enabling service, legal services are essential to underpin Australian businesses exporting overseas, as well as foreign companies looking to invest in Australia. Statistics published by ILSAC and DFAT indicate strong and continued growth in the legal services sector. ILSAC conducted legal services export surveys in 2004-05, revealing exports of AUD543.2m,¹⁸ and in

¹⁶ A. Boxsell, 'Blake Dawson first to open Japan office', *Australian Financial Review* (Sydney), 23 October 2009, 20.

¹⁷ F. Abbott, 'A New Dominant Trade Species Emerges: Is Bilateralism a Threat?' (2007) 10 *Journal of International Economic Law* 587.

¹⁸ ILSAC, *First International Legal Services Statistics Survey* (2004-05)

<www.ilsac.gov.au/www/ilsac/ilsac.nsf/Page/GlobalLegalServicesandMarketAccess_ILSACStatisticsSurvey_ILSACsFirstSurvey> at 21 May 2010.

2006-07, revealing exports and international activity generating AUD675m.¹⁹ Increases were also identified by DFAT.²⁰

In addition to increased activity as an enabling service resulting from increased trade in other sectors, specific studies are yet to be undertaken to provide definitive answers on the direct impact of FTAs on the export of legal services. However, ILSAC considers that the legal certainty of specific levels of market access that FTAs provide play a positive and significant role in decisions by law firms to invest in establishing branch offices overseas and in including export activity as a component of business strategy.

4.2 *FTAs are a catalyst for domestic reforms to improve the competitiveness of the Australian legal services sector*

ILSAC submits that the increased internationalisation of the Australian legal services sector, of which FTAs are a driving factor, has prompted beneficial changes in the regulation of the legal profession in Australia. This has also encouraged initiatives to improve services quality by Australia's law firms, arbitrators and mediators and universities. Trade agreements have also generated pressure to improve the domestic regulation of lawyers in Australia, including addressing barriers to foreign lawyers.

Case Study: Uniform and hospitable system for the regulation of foreign lawyers in Australia

As early as 1991, ILSAC called for a single Australian market to enhance the 'efficiency, flexibility and competitiveness' of the legal services sector.²¹ Subsequent multilateral trade negotiations under the Uruguay and Doha Rounds, and the numerous FTA negotiations over the past two decades, have continued to maintain pressure for the development of an open and hospitable foreign lawyer regulatory regime across Australia.

ILSAC has had a continued involvement in this process and is acutely aware that a key driver of this process has been a gradual, but increasing, recognition by the many stakeholders across the States and Territories of the need to liberalise at home to take advantage of opportunities overseas that trade agreements had the potential to provide. The Mutual Recognition initiatives across Australia in the early 1990s to the Trans-Tasman Mutual Recognition Agreement of 1997, and the Standing Committee of Attorneys-General (SCAG) decision in May 1996 that 'at the very least, there should be no statutory bar on the practice of foreign law in Australia' gave rise to the adoption of hospitable foreign lawyer licensing regimes across Australia to the National Legal Profession Reform²² initiative currently progressing under the Council of Australian Governments (COAG) were all influenced to varying degrees by the parallel trade liberalisation negotiations at both the multilateral and bilateral levels.

This process has, to date, delivered a very high level of reform and liberalisation in the regulation of the practice of foreign law by foreign lawyers in Australia. Further changes to the registration and full admission of overseas qualified lawyers have been included in the consultation draft of the

¹⁹ ILSAC, *Second International Legal Services Statistics Survey* (2006-07) < www.ilsac.gov.au/www/ilsac/ilsac.nsf/Page/GlobalLegalServicesandMarketAccess_ILSACStatisticsSurvey_ILSACsSecondSurvey> at 21 May 2010.

²⁰ Department of Foreign Affairs and Trade, *Trade in Services Australia 2008-09* (2010) 29.

²¹ ILSAC, *The Importance of a Single Australian Market in the Export of Legal Services* (1991).

²² AGD, *National Legal Profession Reform Project – Consultation Regulation Impact Statement* (May 2010) 11.

proposed Legal Profession National Law.²³ ILSAC is cognisant of the fact that potential trade negotiations with India, which are likely to include legal services market access as an area of key interest for Australia, would put pressure on the need to implement the proposed Legal Profession National Law.

5. The way forward - FTA or WTO?

ILSAC considers that FTAs and the WTO both play an important and complementary role in achieving increased levels of liberalisation of trade in legal services internationally. The main cause for the stalling of the Doha round is not the existence of, or a surge in, FTAs. FTAs may have some effect on the availability of resources to achieve results in WTO negotiations, but the real cause of the Doha impasse is more complex and can be seen as more to do with the sheer number of parties involved (over 150 WTO members) and the varying degrees of political will to achieve a meaningful outcome.

5.1 The complementary role of FTAs and the WTO process

FTAs have provided an efficient forum for securing commitments where no WTO commitments previously existed, and for going beyond existing WTO commitments. Similarly, although a conclusion to the Doha Round appears elusive, negotiations in this forum still have exercised a positive influence on Free Trade Agreements.

In the context of legal services, the Doha Round discussions, particularly under the Legal Services Friends group, which canvassed many market access and regulatory issues, have informed the trade negotiators of WTO member countries of the impact and potential benefits of undertaking meaningful market access commitments in legal services. Importantly, that process has identified for trade negotiators the essential elements of a minimum viable commitment on legal services. This information has had a positive impact on FTA negotiations. An example is the proposed commitment by Korea on legal services in their yet to be ratified FTAs with the US and the EU. This proposed commitment has been modified from their offer in the Doha Round, but modified to be consistent with the legal services commitments identified as suitable during the Legal Services Friends Group discussions.

5.2 The role of the WTO and FTAs in progressive liberalisation

FTAs provide stimulus for the progressive liberalisation of economies. It is obvious that FTAs, with fewer parties and more focused interests than the WTO process, can be concluded in a far shorter period of time. They also allow liberalisation of international trade in areas where, for any number of reasons, it is not possible to secure a consensus in the WTO. Both these factors increase the pace of trade liberalisation in partner economies.

In that context, FTAs encourage trade partners to go beyond their base WTO commitment, which in turn fosters increased adaptation to free trade, including through domestic reform. This economic development encourages further unilateral, bilateral and regional liberalisation. It appears that there is an emerging trend from bilateral trade agreements towards regional or similar agreements (such as AANZFTA, and the proposed for the Trans-Pacific Partnership Agreement and Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement). ILSAC considers that the presence of multiple bilateral and regional trade agreements will provide an impetus, in the longer-

²³ AGD, *Legal Profession National Law – Consultation Draft* (May 2010).

term, to ‘multilateralise’ the liberalisation gains achieved through bilateral and regional or similar trade agreements. This has the potential to provide a greater jump in the level liberalisation that may not have been able to be achieved through a purely multilateral liberalisation process.

6. Consultation

ILSAC has worked extensively with the legal community to ensure widespread consultation on FTAs and has a strong history coordinating the development of Australia’s interests in legal services internationally in close consultation with the legal sector. However, we note that, at times, legal stakeholders are not fully cognisant of the benefits that an FTA can provide. This has required a process of information exchange and education. Alternatively, there are also stakeholders, who have established an international presence and have developed innovative ways to engage in providing services overseas, that may be disinclined to fully support the FTA process as they consider that the establishment of an FTA has the potential to upset their hard won arrangements and even negate the advantages that they have gained through direct negotiation. This is an aspect ILSAC is sensitive to, but continues to focus on developing approaches that are beneficial to the wider legal sector interested in engaging in the export of legal services.

**ILSAC MEMBERSHIP
(Sixth Term 2007-2010)**

Chairman

- Mr Tim Bugg
Partner, Dobson Mitchell & Allport, Hobart

Deputy Chairman

- The Hon Andrew Rogers QC, Sydney

Members

- Dr David Bennett AC QC
Wentworth Chambers, Sydney
- Professor Duncan Bentley
Pro Vice-Chancellor, Curtin Business School, Curtin University Of Technology, Perth
- Professor Michael Coper
Robert Garran Professor and Dean of Law, Australian National University, Canberra
- Mr John Denton
Partner and Chief Executive Officer, Corrs Chambers Westgarth, Melbourne
- Mr Jim Dunstan
Executive Partner - Asia, Allens Arthur Robinson, Hong Kong
- Mr Glenn Ferguson
Managing Partner, Ferguson Cannon Lawyers, Maroochydore
President, Law Council of Australia
- Dr Gordon Hughes
Partner, Blake Dawson, Melbourne
- Mr David Krasnostein
Head, Global Private Equity, MLC Sydney
- Ms Bronwyn Lincoln
Partner, Freehills, Melbourne
- Mr Russell Miller AM
Partner, Minter Ellison, Canberra
- Mr Robert Milliner
Chief Executive Partner, Mallesons Stephen Jaques, Sydney
- Ms Kerry Ryan
Consultant, Norton Rose, Sydney

- Mr Brian Wilson
Consultant, Clayton Utz, Sydney

Nominated representatives of:

- Attorney-General's Department
- Department of Foreign Affairs and Trade
- Australian Trade Commission (Austrade)
- Australian Agency for International Development (AusAID)
- The then Department of Education, Employment and Workplace Relations; Australian Education International (AEI)

**ILSAC SIX GUIDING PRINCIPLES FOR THE LIBERALISATION OF
TRADE IN LEGAL SERVICES**

Bearing in mind the general principles set out in the General Agreement on Trade in Services (GATS) of MFN (non-discrimination between countries), national treatment (non-discrimination between domestic and foreign entities), and transparency, as well as the other matters provided for, and the four modes of delivery for a services described in the Agreement, the following guiding principles appear particularly relevant to achieving liberalisation of trade in legal services:

1. Formal recognition, on reasonable terms, of the right to practise home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (eg, a minimum number of three years of professional experience or a refusal to recognise concurrent practice rights where the foreign lawyer's home country is a federal jurisdiction).
2. Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.
3. Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.
4. The right to practise local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through transparent process.
5. Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.
6. Formal recognition of the right to prepare and appear in an international commercial arbitration.