

## International Legal Framework

### GATS

The General Agreement on Trade in Services (GATS) extends the basic pillars of the multilateral trading systems, such as transparency to international trade in services among WTO Members, and the MFN and national treatment principles. The GATS applies to measures affecting trade in many service sectors, including professional services and more specifically services supplied, for instance, by lawyers and IP advisors, including patent advisors.

The GATS distinguishes among four different modes through which services can be provided (or “modes of supply”). Lawyers and IP advisors can supply their services to consumers located in foreign countries for instance via telecommunication (phone, fax or e-mail) or postal means (mode 1 - cross-border supply); through the establishment of a commercial presence in the country of the client (mode 3 - commercial presence); or by traveling to the country of the client (mode 4 - movement of natural persons). Finally, the consumers can visit the lawyers and IP advisors in the latter’s country (mode 2 - consumption abroad).

GATS obligations can be classified into two main groups: “horizontal” (or unconditional, such as the MFN and transparency obligations) which apply to all measures affecting trade in services, and “specific” (or conditional) obligations, the application of which is dependent upon the existence of obligations taken by Members on an individual basis and contained in their “schedules of specific commitments”. Market access, national treatment and domestic regulation fall into the latter category.

Under GATS, the issue of “privilege” for any professional service provider (including patent advisors) falls under the realm of domestic regulation. Each Member is free to regulate the provision of services in its own market. However, in sectors where specific commitments are undertaken, under Article VI:1 of GATS each Member shall ensure that measures are administered in a “reasonable, objective and impartial manner.” Under Article VI:5 of GATS, qualifications and licensing requirements and technical standards must be based on objective and transparent criteria, and should not be more burdensome than necessary to ensure quality of service. The same provision in paragraph 4 mandates the development of multilateral disciplines on domestic regulation that would prevent domestic regulations from constituting unnecessary barriers to trade. Little headway has been made so far under this negotiating mandate, with the exception of the accountancy sector. Even in the case of the accountancy sector – the draft disciplines have yet to enter into force. Article VI:5 aims to make it easier to obtain the qualifications necessary for suppliers to operate in a foreign country. However, it is to be noted that in sectors in which a Member has not undertaken specific commitments, for instance in the sector of legal services, it remains “unbound” and retains freedom in regulation of the activities of foreign suppliers of legal services in its domestic market.

The provision of GATS on “Recognition” may also have some relevance to the issue of “privilege”. Pursuant to Article VII, a WTO Member may recognize the education or qualifications obtained abroad by a service supplier. Such recognition may be done on an autonomous basis or through an agreement with the other country. GATS Article VII nevertheless requires such recognition not to be exclusive. Other WTO Members are to be afforded an opportunity to negotiate their accession to a recognition agreement or, in the case of autonomous recognition, to demonstrate that their qualifications should be recognized as well. Recognition of education and qualifications of foreign lawyers and IP advisors, which may result

from the application of this provision, would facilitate their access to foreign markets and their eligibility to the same treatment as domestic ones. However, the recognition of qualifications of foreign lawyers and IP advisors under this provision would not necessarily guarantee that the “privilege” would be extended to those foreign service suppliers as Members retain their right in the application of their judicial proceedings. A key principle in the GATS is the flexibility it accords to Member States with respect to their ability to regulate. This is in line with the principle of progressive liberalization under GATS where Members are allowed to liberalize the service sector at their own pace.

As long as discussions in the SCP are confined to the professional secrecy obligation and client-patent advisor privilege in connection with judicial proceedings, it appears that those issues are outside the scope of GATS. It should also be noted that the issue of the privilege of the foreign patent advisor concerns also local patent advisors who do not provide services across borders and the issue also exists if the service only takes place in the country of origin.