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"LIBERALIZATION OF TRADE ON LEGAL SERVICES"

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INDEX

INTRODUCTION

Trade in goods, and even at a greater pace trade in services, has showed an extraordinary growth over the last decades. In this always growing context of international operations, legal services turn out to be a vital element, that must be in conditions to keep up with the pace and needs of international trade.

Every international operation needs legal advice. International trade can not take place without the presence of legal services. And every day the demand for these services is more complex.

So liberalization of legal services appears as a crucial element for international trade, as important and necessary as the liberalization of trade in goods, investments or of different types of services, such as engineering and medical services.

This need to liberalize legal services has a strong relation with the specific characteristics of this type or service. Companies want to work with lawyers who are in knowledge of their dynamics and ways of work. It is very important for legal services demanders to build a relation of trust and reliance with their lawyers. These elements are crucial at the moment to decide on hire legal services, which are involving progressively different number of jurisdictions and legislations.

To deal with these points, this work aims to analyze the two types of agreement that liberalize the trade on services: NAFTA-like agreements, and GATS-like agreements.

The work will analyze the provisions relating to legal and professional services contained in each of them, as well as their approach to

liberalization. After that, it will point out the implications of each of these approaches, adopted by the two types of agreements: positive list approach, adopted by the GATS-like agreements, and the negative list approach, adopted by NAFTA-like agreements.

Chapter II will use an example of each of these agreements that Chile has signed: the Free Trade Agreement between Chile and the United States, and the Protocol on Trade in Services between Chile and Mercosur.

The first one adopts the NAFTA model and the second one the GATS model. In both cases the Chapter will analyze the specific provisions related to legal services contained in them, and afterwards it will review the commitments that in the case of the Protocol signed with Mercosur each if its countries have made towards Chile, and in the case of the Free Trade Agreement with the United States, will analyze the Annexes I and II, containing reservations on the obligations.

Both agreements are just examples of agreements that adopt one model or the other. The Free Trade Agreement with the United States is a landmark in the international commercial relations of Chile, and a good example of the policies adopted by Chile in the context of its international insertion. In the case of Mercosur, it is an agreement Chile has recently negotiated for trade in services. It has not been approved yet by the Congresses of the countries involved.

The first section of Chapter III will review the main obstacles to trade on legal services. These obstacles are related with national treatment, market access and domestic regulation.

The next section will show the results of a series of interviews made to lawyers who form part of different Chilean well known legal firms.

Guided by certain questions, the interviews look to build a point of view on how the international Chilean legal services market works: what are the types of services traded, to which countries these services are being provided, in which modes are they being supplied, etc.

Finally, the work will assess if the agreements signed by Chile to liberalize services, are useful for the Chilean legal services providers, namely big national law firms. Knowing the characteristics of the Chilean legal services market, and the obstacles that usually trade in legal services faces, it will intend to assess if the agreements are useful, and eventually what provision should be revised to get the most out of them.

The methodology used for the work was mixed. The first two chapters use a descriptive approach to the legal texts and the commitments made by different countries to Chile, and systematize this information.

The third chapter uses an analytical approach finding the obstacles that trade on legal services face, then presents the results of the interviews, and finally analyzes if the agreements signed by Chile are useful to tackle the current obstacles in the trade of legal services.

CHAPTER I
AGREEMENTS ON SERVICES

a. General comparison between NAFTA and GATS models: Protocol on Trade in Services between Chile and Mercosur and the Free Trade Agreement between Chile and the United States.

Agreements seeking the liberalization of international trade in services are much more recent than the ones seeking for the liberalization of trade on goods. Precursors on trade on services agreements are the Canada - United States Free Trade Agreement, in 1989, the North American Free Trade Agreement (NAFTA) between United States, Canada and Mexico, in 1994, and the General Agreement on Trade in Services (GATS), in 1994.

In recent years though, a great number of preferential trade agreements involving services have been signed. These agreements have, in general, followed two models: the NAFTA and the GATS. Although latest agreements have mixed both kinds of models (Roy, Marchetti & Hoe, 2006, p.10), there are several differences between these two types of agreements.

GATS structure is based on a distinction between general obligations and specific commitments. The general obligations apply for all signing members and for all sector and modes of supply. Among these obligations we can find the most favored nation treatment, transparency obligations and provisions on domestic regulation.

The specific commitments apply only to the sectors and modes of supply that are included in the list of each member, and in the way conditioned there. These obligations are related with market access and national treatment. For them each country can list exceptions.

The NAFTA's Cross-Border Trade in Services Chapter does not make differences between general obligations and specific commitments. There are obligations and for some of them each country can list exceptions.

The main difference between the GATS and the NAFTA is the approach to the liberalization of services: a positive lists approach in the case of GATS and a negative list approach in the case of NAFTA. This has to do with the way the countries make their commitments.

In a positive list approach, countries commit only what is included in the list, and in the way it is expressed there. In the case of negative lists, countries commit everything, except what is included in the list (present and future non-conforming measures contained in Annexes I and II). This is called a "list or loose" approach. This issue will be treated in more detail in section b) of this Chapter.

A second element that distinguishes the NAFTA from the GATS has to do with the mode of supply[1]. In NAFTA, modes one (cross-border supply), two (consumption abroad) and four (presence of a natural person) are treated separately from mode three (commercial presence). This last one is treated in the Investment Chapter, which includes investments in goods and services.

In the case of NAFTA, the Services Chapter has no market access obligations. Neither has the Investments Chapter[2].

[1] As referred to in article I.2 of the GATS. According to this provision, there are four ways in which services can be supplied: "(a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member". Each one of this modes of supplied is referred to as Mode 1 through 4, respectively.

[2] The United States changed this approach including market access obligations in its latest Free Trade Agreements, among others the one with Chile.

However, the NAFTA, in article 1207 establishes that any non-discriminatory quantitative restriction must be listed, and that members should notify the adoption of new ones.

GATS treats all four modes of supply in the Services Chapter, containing for all of them market access obligations related to discriminatory and non-discriminatory quantitative restrictions, listed in article XVI.

Another aspect is domestic regulation. This is a very important issue for professional services. Many of the restrictions and barriers applicable to the supply of legal services in foreign countries have to do with domestic regulations, both administrative and legal.

This topic is treated in article VI of the GATS, and states that measures of general application affecting trade in services must be administered in a reasonable, objective and impartial manner. It also states that there must be ways to review administrative decisions through the existence of judicial, arbitral or administrative tribunals or procedures. The state of applications for the authorization to supply a service, when required by a country, must be answered in a reasonable period of time. Members commit to develop disciplines that shall aim to ensure that requirements to provide services are based on objective and transparent, not more burdensome than necessary to ensure the quality of the service and in the case of licensing procedures not in themselves a restriction on the supply of the service.

NAFTA has a similar provision in article 1210 “Licensing and Certification”. This article establishes that measures adopted or maintained by a Party relating to the licensing or certification of nationals of another Party must be based on objective and transparent criteria, such as competence and the ability to provide a service; must not be more burdensome than necessary to ensure the quality of a service; and must not constitute a disguised restriction on the cross-border provision of a service.

Chile prefers to use the NAFTA model in its negotiations; however, it has signed agreements that follow both models. The next lines will analyze two agreements, one following the NAFTA model and the other following the GATS model. We have chosen the Chile – United Sates FTA in the first case, and the Protocol on Trade in Services between Chile and Mercosur, in the second.

The Chile - United States FTA is in force since 2004, and the Protocol between Chile and Mercosur, is very recent, and has not been approved yet by their respective Congresses.

The Chile – United States Free Trade Agreement

Chile and the United States signed in June 6, 2003 a Free Trade Agreement. Chapter Eleven of this agreement refers to “Cross-Border Trade in Services”, following the NAFTA model. This section will give a glance of this Chapter.

The scope and coverage of this Chapter is treated in article 11.1. It covers cross-border supply of services, therefore excludes mode three, as it is said in article 11.12, that defines “cross-border trade in services” and “cross-border supply of services”, making reference to modes one, two and four (in the GATS language), and explicitly excluding mode three as defined in article 10.27, the “Definitions” article of the Investment Chapter.

Nevertheless, Article 11.3 paragraph 3 makes applicable to mode three (the supply of a service in the territory of a Party by an investor of the other Party) articles 11.4, about market access, 11.7 about transparency in development and application of regulations and 11.8 about domestic regulation. These provisions are analyzed infra.

Article 11.1.2 refers to the origin of the measures covered by the agreement: central, regional or local governments and authorities, and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

Nonetheless, article 11.6 states that the national and most favored nation treatments, market access obligations and local presence provision do not apply to existing non-conforming measures maintained by local governments, not requiring to include sectors or modes of supply in the annexes.

There are some exclusions of the application of this Chapter, defined in article 11.1 paragraph 4: financial services, air services, procurement, and services supplied in the exercise of a governmental authority, the latter defined as any service which is supplied neither on a commercial basis, nor in competition with one or more suppliers[3].

There is a **national treatment** clause in article 11.2, pointing that each Party shall accord to service suppliers of the other Party treatment no less favorable that that it accords, in like circumstances, to its own service suppliers. The expression “service suppliers”, as is stated in a note to this article, must be understood as having the same meaning as the expression “service and service suppliers” in article XVII.1 of the GATS.

This national treatment clause uses the expression “in like circumstances”, that it is not generally used in a Mercosur or Caricom context, but nevertheless it is used in the Protocol between Chile and Mercosur. The use of this expression can introduce elements of subjectivity and some uncertainty (Comunidad Andina, 2003, p. 56), although this issue has not been yet presented in the dispute settlement system of the World Trade Organization.

[3] Financial Services and Government Procurement are self-contained Chapter in the FTA.

The agreement also contains a **most favored nation clause** in article 11.3, stating that each Party shall accord to service suppliers of the other country a treatment no less favorable than that it accords, in like circumstances, to service suppliers of a non-Party. In this case, “service suppliers” must be understood as having the same meaning of the expression “services and services suppliers of article II.1 of the GATS.

In relation with **market access**, article 11.4, this agreement makes a difference with other NAFTA-based agreements, because it contemplates obligations regarding non-discriminatory quantitative restrictions, in a similar way that article XVI of the GATS does.

There is a difference though with this article of the GATS: in this, there is a list of six measures related with market access restrictions being the latest the provision referred to limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. This limitation is not contained in the Services Chapter, but in the Investment Chapter. This is because this restrictions is applicable only in the context of mode three (commercial presence), that, as it has been said, is treated in the Investment Chapter.

The rest of the five kind of measures contained in article XVI of the GATS are contained with the same phrasing in Chapter 11of the FTA.

The Chapter also contains a **right of non establishment to supply a cross border service** or **local presence** provision in article 11.5. This means that a country cannot require from the service provider of the other country to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

The agreement contains a **"ratchet" mechanism** (Sauve, 2002, p. 19), under which "any liberalization measures adopted by a member country cannot be replaced by new measures that are more restrictive"[4] . This clause is contained in article 11.6 letter (c). This provision allows the members to change the non-conforming measures listed in the annexes if the amendment does not increase the disconformity of the measure as it existed immediately before the amendment.

There are some **transparency** provisions that go further than the general transparency obligations set out in Chapter Twenty of the same agreement. It includes three provisions established in article 11.7.

The first one determines that the Parties shall maintain or establish mechanisms for responding inquiries regarding regulations on services. The second establishes that if a Party adopts final regulations on services, it shall address in writing substantive comments received form interested persons with respect to the proposed regulations. The third obligation states that each Party shall allow, to the extent possible, a reasonable period of time between the publication of final regulations and their effective date.

A particularly important subject for the trade of professional services is **domestic regulation**. Article 11.8 deals with this issue in similar way than GATS does in article VI, paragraphs 3 and 4.

Article 11.8 paragraph 1 states that when a Party requires authorization to supply a service, the competent authority shall inform of the decision within a reasonable period of time. Also, upon request, the authorities shall give information without undue delay, about the status of the application.

Paragraph 2 of the same article establishes that qualification requirements and procedures, technical standards and licensing requirements shall not

[4] ORGANIZATION OF AMERICAN STATES. Dictionary of Trade Terms. Sice, Foreign Trade Information System. http://www.sice.oas.org/dictionary/IN_e.asp.

constitute unnecessary barriers to trade. This means that these measures must be based on objective and transparent criteria, shall be not more burdensome than necessary to ensure the quality of the service and, in the case of licensing procedures, not be in themselves a restriction on the supply of the service.

Finally, paragraph 3 states that if negotiations under article VI.4[5] of the GATS enter into effect, the article shall be amended to bring those results to this agreement.

Article 11.9 deals with **mutual recognition**. This issue is strongly related to domestic regulation, and the requirements established by a country to practice a certain profession in its territory. The limitations on trade imposed by these requirements can be softened by mutual recognition agreements, so that the titles or authorizations obtained in one country can be used in the other, or to facilitate the access to the titles or authorizations to practice in the other country.

In the case of the Free Trade Agreement between Chile and the United States, the article states that a Party may recognize that the education or experience obtained, requirements met or licenses or certifications granted in particular country, fulfill the standards, criteria for authorization, licensing or certification of services suppliers established by it. This recognition may be based upon an agreement with a country, o may be accorded autonomously.

[5] Article VI.4 of the GATS: "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.".

Paragraph three states that this recognition shall not be accorded in a way which would constitute a means of discrimination between countries, or a disguised restriction on trade in services.

Paragraph 2 states that the recognition of the education or experience obtained, requirements met or licenses or certifications granted in the territory of a non-Party (article 11.3)[6] shall not be construed to require the Party to accord such recognition to the education or experience obtained, requirements met or licenses or certifications granted in the territory of the other Party.

In Paragraph 3 it is stated that if a Party is a party to a mutual recognition agreement, that Party shall give the other Party the opportunity, if interested, to negotiate the accession to such agreement or to negotiate a similar one. If the recognition is accorded autonomously, the Party shall afford adequate opportunity for the other Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Party's territory should be recognized.

There is an important issue that has deep relation with the trade in services, and particularly professional services, which is not contained in this Chapter: the **temporary entry for business persons**, treated in Chapter 14.

The main obligation in that Chapter has to do with the granting of temporary entry for business persons, which includes different categories of persons and their requirements to obtain visas[7]. Annex 14.3 letter D refers to the entry of professionals, defined in paragraph 1 as "business person seeking to engage in a business activity as a professional, or to perform training functions related to a particular profession".

[6] The most favored treatment clause of the agreement.
[7] The Free Trade Agreement between Chile and the United States established a quota of 1.400 visas for Chilean professionals.

This is especially important when discussing about services supplied through mode four, presence of a national of a Party in the territory of the other Party. Business person is defined by article 14.9 as "a national of a Party who is engaged in trade in goods, the supply of services, or the conduct of investment activities".

The Protocol on Trade in Services between Chile and Mercosur

Recently, in July 2008, Chile and Mercosur finalized the negotiations to sign a Protocol on Trade in Services, within the frame of the Economical Complementation Agreement between Chile and Mercosur (Acuerdo de Complementación Económica entre Chile y Mercosur), also known as ACE Nº 35. The ACE Nº 35 entered in force on October 1st 1996. The Protocol on Trade in Services has not yet been approved by the Chilean Congress neither by MERCOSUR Congresses[8].

The Protocol follows the GATS model. Therefore, it uses a positive list approach.

The Protocol coverage is determined in article II. It is applicable to the four modes of service supply. It excludes air traffic rights and related services, except the ones listed in article II.2[9]; government procurement; and services supplied in exercise of governmental authority, defined as any service that is supplied neither on a commercial basis, nor in competition with one or more suppliers.

The measures covered by the Protocol must come from central, regional or local governmental authorities and from non-governmental institutions in exercise of powers delegated by the named authorities.

[8] Up to February 2009.
[9] These are: aircraft repair and maintenance services, selling and marketing of air transport services, and computer reservation system services.

Article III contains a **national treatment** clause. The national treatment is applied to the sectors included in the list of each country, with the conditions and exceptions established there. The treatment can be formally equal or formally different to the one given to the national service supplier, but it must not be less favorable.

Regarding to **market access** obligations, article IV.2 lists discriminatory and non-discriminatory quantitative restrictions that shall not be applied to the specific commitments list. These restrictions are the same than the ones listed in article XVI of the GATS.

Article VII refers to **domestic regulation**. Paragraph 1 allows the Parties to make regulations and introduce new ones to fulfill national policy objectives.

Paragraph 2 imposes the obligation to apply these regulations in a reasonable, objective and impartial way.

Paragraph 3 establishes that qualification requirements and procedures, technical standards and licensing requirements must be based on objective and transparent criteria, so they do not constitute unnecessary barriers to trade.

Then the article states that when a Party requires an authorization to supply a service, the competent authority shall inform of the decision within a reasonable period of time. Also, upon request, the authorities shall give information without undue delay, about the status of the application.

Regarding transparency, the agreement obliges each Party to publish all measures of general application that refers to the Protocol or affect its functioning, and to answer promptly to every request for information about

these measures. Parties must also publish every international agreement signed with any country, or measures that can affect trade in services.

Parties also have to inform to the Administrative Commission of the ACE Nº 35 the adoption of new laws, regulations, or administrative directives, or the modification of them, that can affect significantly the trade in services established in the specific commitments list.

To facilitate the communication among the Parties about these matters, each Party must designate a contact point.

Conclusions

a. The main difference between the Chile – United States Free Trade Agreement, and the Protocol on Trade in Services between Chile and Mercosur, is the liberalization approach each one endorses. The first one uses negative list and the second a positive one.

b. Other relevant distinction has to do with the mode of supply that each Services Chapter covers. In the case of the Chile - United States Free Trade Agreement, only modes one, two and four are covered, and mode three is treated in the Investments Chapter. On the other hand, Chile - Mercosur covers the four modes of supply.

c. There is a most favored nation clause in the Chile – United States Free Trade Agreement, but there is no equivalent provision in the Chile - Mercosur Protocol.

d. The national treatment clause is present in both agreements. In the Chile Mercosur Protocol though, it is applicable only to the sectors included in the list, and with the conditions established there, and in the Free Trade Agreement between Chile and the United States, it

applies to all sectors, unless it is exempted in Annexes I or II to determined sectors.

e. Business models, and especially the way in which professional and legal services are normally provided, combines the different modes of supply. For example, it is frequent that foreign clients who want to invest in Chile come and consult to the Chilean law firm in Santiago. After that the same firm (services provider) sends reports by e-mail to its clients. Finally a lawyer from the Chilean law firm travels to the main office of the client abroad. This way of doing business may lead us to the conclusion that it may not be practical to regulate and establish commitments about the provision of services distinguishing between the different modes of supply, as it is the case of the positive list approach.

b. Liberalization Approaches: Positive and Negative Lists

As it has been said in section a) of this Chapter, there are two approaches to liberalize trade in services: positive and negative list. The first one has been used in GATS (and other GATS-based agreements, like Chile - European Union and Chile - Mercosur) and the second in NAFTA (and other NAFTA-like agreements, like Chile - United States and Chile – Australia FTA's).

This section will analyze the implications and the strengths and weaknesses of each approach.

The first thing to be noted is that both negotiation modalities have the potential to produce the same final effects over the liberalization of services trade. Theoretically, the same results can be obtained using positive or negative list approach (Piña, 2003, p. 216; Suave, 2002, p. 15).

i. Positive lists

The positive list used by GATS may be actually a hybrid approach. It comprises a positive list of sectors and subsectors and modes of supply to which each country decides to apply the specific obligations of the agreement, with a negative list containing the non-conforming measures applied to each of these commitments. So everything that is not in the list is not subject to any commitment, except the general obligations contained in the agreement.

In the case of GATS, theses commitments refer to the market access and national treatment obligations. The transparency obligations and the most favored nation treatment are general obligations which apply to all sectors.

A first problem of this approach is that countries do not have any obligation to list existing non-conforming measures (in terms of national treatment or market access). This approach makes possible for countries to consolidate commitments that do not reflect the actual openness of their regulations.

This can be a problem to a potential exporter from the transparency point of view, because this gap, that can give the countries a margin for future negotiations, or allow countries to postpone policy definitions regarding a certain sector, without comprising it yet, makes the destination market changeable, more obscure and less predictable for services exporters.

Another characteristic of the positive list is that the measures that are contained in the lists are general descriptions, and there are no legal references in the lists.

ii. Negative lists

This approach implies that all sectors are liberalized unless they are listed. Therefore, everything that is not included in the Annex I (non-conforming measures) or Annex II (future non-conforming measures) is liberalized.

This approach can show that countries wish to tackle liberalization in a comprehensive and extensive way (Piña, 2003, p. 220).

A very important effect of this approach is that the status of the regulation is somehow locked, because countries are not allowed to increase the level of non-conformity of the regulations in all sectors listed in Annex I or not listed in any Annex. This is an important difference between negative and positive lists. In the latter, as anything not in the list is not committed, countries can introduce new measures and regulations that are non-conforming relating with sectors or modes of supply that were originally excluded of the list. In the negative list approach this can happen only in sectors or sub sectors listed in Annex II.

The negative list approach demands from the countries a deeper knowledge of the whole reality of their services sectors and suppliers, and a good dialogue with their private sector so as to be in conditions to include in the Annexes (and therefore exclude of the obligations of the agreement) every sector that have a restriction (Annex I) or for any reason does not want to be liberalized, such as public policy definitions or private sector requirements (Annex II).

This negative list approach, if finish in greater liberalization, could be a problem for services providers of a given country, if they are not prepared to compete with the providers of foreign countries that can take advantage of that liberalization.

When the negative list is used, the measures that are contained in Annex I, which lists existing non-conforming measures, are mentioned with the specific legal reference that contains the measure. So what is mentioned is the specific legislation or regulation that establishes the measure.

The negative list may be preferable over the positive list from an exporter's point of view, mainly due to the transparency of the destination market. When there is a negative list, the sectors that may have restrictions are explicitly shown in the list. So it can be exactly determined the barriers that, in this matter, the exporter has in the destination market.

On the other hand, when there is a positive list, there is no total clarity about the real situation of sectors that are not committed; even in the cases that are committed, actual restrictions could be less than the ones listed. It is more difficult to know which ones are the real restrictions exporters will face on those markets. In spite of it, the obligation to establish enquiry points contained in the GATS and in the agreements that use this approach, compensates, in part, this problem.

CHAPTER II
DISCIPLINES AND COMMITMENTS IN PROFESSIONAL AND LEGAL SERVICES IN THE PROTOCOL ON TRADE IN SERVICES BETWEEN CHILE AND MERCOSUR AND IN THE FREE TRADE AGREEMENT BETWEEN CHILE AND THE UNITED STATES

a. Disciplines for Professional and Legal Services

The general regulation of the supply of services through special chapters in trade agreements cannot always cover the specific needs of certain sectors. This happens, for example, in particular with legal services, where in some agreements this sector has special provisions dedicated to it.

According to the Services Sectorial Classification list of the World Trade Organization[10], Professional Services are a Subcategory of the Business Services, and Legal Services are a sub sub-category of the Professional Services. This classification is based on the one used by the United Nations Provisional Central Product Classification[11].

The Cross–Border Trade in Services Chapter of the Chile - United States Free Trade Agreement, contains an Annex 11.9, about professional services. This Annex has three sections: Section A, General Provisions; Section B, Foreign Legal Consultants and Section C, Temporary Licensing of Engineers.

Section A, General Provisions, is divided in three parts: Development of Professional Standard, Temporary Licensing and Review.

Paragraph 1, about development of professional standards, states that Parties shall encourage their relevant bodies to develop mutually acceptable standards and criteria for licensing and certification of professional services providers, and to provide recommendations on mutual recognition to the

[10] See http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.
[11] See http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1&Top=1.

Commission established in article 21.1 of the agreement[12]. On receipt of a recommendation, the Commission will determine, in a reasonable time, whether it is consistent with the agreement, and if compliant, will encourage the competent authorities to implement it within a mutually agreed time.

Then, paragraph 2 sets the matters in which the standards and criteria referred to in the first paragraph should be developed. These are education (accreditation of schools or academic programs), examinations for licensing; experience required for licensing; conduct and ethics; professional development and re-certification; scope of practice (extent and limitations); and local knowledge and consumer protection.

Regarding to temporary licensing, the Parties shall encourage the relevant bodies to develop procedures for the temporary licensing of professional service providers of the other Party.

Finally, paragraph 5 states that the Commission shall, at least every three years, review the implementation of this Section.

Section B refers to foreign legal consultants (FLCs). Normally this concept refers to foreign lawyers practicing international law, home country law and third country law (World Trade Organization, 2000, p. 403; Geloso, 2004, p. 25). This provision stipulates that the practice and advice of the law of any country in which the foreign legal consultant is authorized to practice as a lawyer, shall be permitted, subject to the conditions and obligations set out in Annexes I and II of the Agreement.

[12] This Commission is established in the Agreement in Chapter 21, Administration of the Agreement. It has the following obligations according to article 21.1.2: "(a) supervise the implementation of this Agreement; (b) oversee the further elaboration of this Agreement; (c) seek to resolve disputes that may arise regarding the interpretation or application of this Agreement; (d) supervise the work of all committees and working groups established under this Agreement; (e) establish the amounts of remuneration and expenses that will be paid to panelists; and (f) consider any other matter that may affect the operation of this Agreement".

Paragraphs 4 to 7 refer to future liberalization. These provisions state that each Party shall establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants. They shall also review the recommendations referred to in the cited Paragraph 2, to ensure their consistency with the agreement. If they are consistent, Parties shall encourage their implementation within one year.

Paragraph 6 establishes the obligation for the Parties to report to the Commission[13] one year after the entry in force of the Agreement, and each year thereafter, on its progress in implementing the work program referred to in the precedent paragraph.

Finally, this Section established the obligation for the Parties to meet within one year form the entry in force of the agreement to assess the implementation of the precedent Paragraphs, as explained; to amend or remove when appropriate non-conforming measures and to assess further work that may be appropriate regarding this matter.

In spite of the disciplines agreed, not much result has been achieved. The obligation to the Parties is to “encourage” relevant bodies, i.e. professional associations. In Chile, professional associations are not well organized and are not looking for new export markets (with some exceptions). The basic element to get some result is to have professional bodies in both countries interested in it.

Another problem is found in the state structure of the United States. If a standard is acceptable at federal level, it will not be necessarily recognized at state level. In addition, if a standard is acceptable in one state it will not be necessarily recognized in others.

[13] See note 1212.

The Protocol between Chile and Mercosur has no specific provisions related to professional or legal services. A reason could be the level of commitments that in this area the Mercosur countries, and Chile, have granted. As it is shown in the next pages, this level is not very high.

b. Commitments on legal services

Just as in the beginnings of the liberalization of goods, the liberalization of services has been sometimes a slow and difficult process. Even though agreements contain disciplines that have the potential to liberalize the trade in services, the real liberalization of this trade is given by the weight of the commitments countries make.

Great disciplines with no sectors committed (in the case of positive lists) or with vast sectors listed in the annexes (in the case of negative lists) may result in no real liberalization.

The next lines will describe the commitments that in both agreements the countries of Mercorsur (Brazil, Argentina, Paraguay and Uruguay) on one hand, and the United Sates, in the other, have made towards Chile.

In the case of Mercosur, the commitments are made in a country by country basis, so there are four lists (plus the list from Chile). Each one will be analyzed separately.

In this last case it must be pointed out that to date, the Protocol has not been yet approved by Congresses of any of the Parties, and so the lists analyzed here, even though are the product of an already closed negotiation, are still to be approved. In the Chilean legislative process, the agreement (and the lists, as a part of it) can be approved or rejected by the Congress, but the text of the Protocol and the lists cannot be changed.

In the case of the **Chile – United States Free Trade Agreement** there are two Annexes.

Annex I refers to existing non-conforming measures, which will not be worst in the future, and Annex II refers to non-conforming measures that are existing or will exist in the future (sector with no commitments).

Annex I contains existing measures that will not be subject to the following obligations established in the agreement[14]: national treatment (article 11.2); most favored nation treatment (article 11.3), market access (article 11.4) and local presence (article 11.5).

This Annex sets out the following elements in each entry: the sector; the obligation that will not be applicable to the sector listed; the level of government that maintains the listed measure; the measure itself, which must identify the specific law or regulation, and a general description of the measure.

Here is a real example of an entry contained in the Annex I of Chile:

Sector:	Specialized Services Customs Agents (*Agentes de Aduana*) and Brokers (*Despachadores de Aduana*)
Obligations Concerned:	National Treatment (11.2) Local Presence (11.5)
Measures:	*Decreto con Fuerza de Ley 30 del Ministerio de Hacienda*, Diario Oficial, abril 13, 1983, Libro IV[15]
Description:	Cross-Border Services

[14] The Annex contains non-conforming measures related to investments and services. Only these last ones will be reviewed here.
[15] Today the current rule is "Decreto con Fuerza de Ley N° 30 de 2004, Diario Oficial de 4 de junio de 2005, Libro IV".

> Only Chilean natural persons may act as customs brokers (*Despachadores de Aduana*) or agents (*Agentes de Aduana*).

There are two kinds of entries. Some apply to all sectors, and some to specific sectors. In the case of the example, the entry refers only to a specific sector.

The analysis will consider entries that apply to all sectors referring to obligations contained in the Services Chapter, and entries related with legal services.

This (plus the analysis of Annex II) should give us an idea of how open is the United States legal services market for Chilean legal services providers.

The first entry that will be reviewed from the United States applies to all sectors, and exempts from the application of the most favored nation treatment and local presence to all existing non-conforming measures at the regional level, to all the states, the District of Columbia and Puerto Rico.

This means that regional governments can maintain all legislation, regulations and other measures that do not comply with the most favored nation treatment and the local presence. For instance, if a given state has a law that obliges a services provider to establish an office in that state to be allowed to provide that service, but exclude some countries from the obligation due to some arrangement with those countries, then that law can be maintained pursuant to article 11.6. But as this entry is circumscribed to measures that come from a regional level of government, if the same law is a federal law, then the measure would be inconsistent with the agreement.

There is a particularity of this entry. Normally in Annex I the measures are expressed as a particular piece of legislation or regulation, with the article and

identification of the law or the regulation. But as in this case the governmental level is regional, the commitment is not to make the non-conforming measures worst than the ones existing when the Agreement come into force, without having the obligation of listing[16].

In Annex I there is also an entry referring to legal services. This exempts from national (11.2) and most favored nation (11.3) treatments and local presence (11.5) to the following sectors: "Professional Services – Patent Attorneys, Patent Agents, and Other Practice before the Patent and Trademark Office".

This does not include every exercise of the legal profession, but only representation before the United Sates Patent and Trademark Office. In theory, there are not restrictions related with the obligations mentioned above in other exercise of the legal profession unless restrictions are at state level and existed in 1994 (date were the agreement entry into force).

The analysis of the regional measures exceeds the purpose of this work, although it is acknowledged that a real assessment of the possibilities of Chilean legal exporters in the United States market needs to be reviewed state by state.

Annex II of the Chile – United States Free Trade Agreement lists non-conforming measures existing by the time when the agreement was signed, or that may be established in the future in the respective sector.

Annex II of the United States has two entries that, relating with obligations of the Services Chapter, comprises all sectors.

The first one is about the market access obligation, in article 11.4. It states that the United States reserves the right to adopt or maintain any measure that is

[16] See Annex I of the United Status.

not inconsistent with the United Sates' obligations under article XVI of the General Agreement on Trade in Services, which refers to market access. As it has been said, article 11.4 of the Chile – United States Free Trade Agreement is almost the same as the article XVI of the GATS. The only difference, as it has also been pointed out supra, is that one of the measures (related with commercial presence) is not included in article 11.4 (Services Chapter) but in the Investment Chapter.

These measures, as set out in article XVI of the GATS are the following:

a. limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
b. limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
c. limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
d. limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
e. measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
f. limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

A second horizontal entry listed by the United States affects the most favored nation treatment, set out in article 11.3. According to this, the United States

reserves the right to adopt and maintain any measure that gives different treatments to countries in conformity with any bilateral or multilateral agreement, in force or signed prior to the date of entry into force of the Free Trade Agreement.

The entry also reserves for the United States the right to adopt or maintain any measure that accords differential treatment to countries under any international agreement in force or signed after the entry in force of the Free Trade Agreement, involving aviation, fisheries or maritime matters.

So, measures taken by the United States that give preferential treatment to another country will not be affected by the most favored nation treatment obligation of the Free Trade Agreement, as long as these measures are in conformity with any bilateral or multilateral agreement that entered into force before the Free Trade Agreement with Chile did.

But in aviation, fisheries or maritime matters, these measures can be in conformity with agreements that enter into force after the Chile – United States Free Trade Agreement.

These are the areas that, relating directly or indirectly with the trade in legal services, can be affected by non-conforming measures.

It is important to mention that notwithstanding what has just been pointed out in the last paragraphs, it is still necessary to consider the domestic regulations that each state contemplates to assess the possibilities to access the United States legal market.

In the case of **Mercosur** it will be examined each of the four set of commitments that **Argentina**, **Brazil**, **Paraguay** and **Uruguay** included in their lists.

In these cases, the lists have two kinds of commitments: on one hand, horizontal commitments, which apply to all sectors and to the mode of supply indicated there, and, on the other, specific commitments.

In each list of commitments (that involves a sector and a respective mode of supply) countries have the possibility to establish limitations to market access, and to national treatment.

In the case of **Argentina**, there is a horizontal commitment for all sectors included in the list, referred to mode four (presence of natural persons). This mode is not consolidated (i.e., it is excluded from commitments), except for certain categories of people:

a. Personal transferred within a company (executives, managers, specialists and interns).
b. Business persons.
c. Service providers with a contract (employees of legal persons).
d. Independent professionals.
e. Foreign company's representatives.

For each of these categories there are particular conditions in which the presence of natural persons is permitted.

Specific commitments on the list of Argentina include, among business services, professional services, and within this, legal services, accounting, auditing and bookkeeping services, and taxation services.

For professional services, modes one, three and four, there are many requirements, such as recognition of the professional title, inscription in the local professional association and establishing legal address in Argentina. The latter does not involve a residency requirement.

For legal services, modes one, two and three there are no market access or national treatments limitations (except for the conditions established for all professional services just mentioned). For mode four there are no commitments other that the ones specified in the horizontal commitments.

The exact same regulation and conditions are established for accounting, auditing and bookkeeping services, and for taxation services.

In the case of **Brazil**, horizontal commitments involve modes three and four. In the case of mode three, the limitation has to do with the legal form that the provider of the services must adopt to supply it. The service must be provided by a legal person, registered in the respective public registry.

Mode four, as in the case of Argentina, is not consolidated, except on what refers to measures that affect the temporary entry of people in one of the following categories. In each case there are particular conditions to be met so to access to the benefits of the agreement:

a. Personnel transferred within a company (executives, managers, specialists, each one in certain cases set out in the list).
b. Persons in business visit (services salesmen, persons responsible to establish a commercial presence).
c. Service provides with a contract – legal persons employees.
d. Independent professionals.
e. Interns.

The specific commitments from Brazil related to professional services involve legal services, accounting, auditing and bookkeeping services, and taxation services.

In the case of legal services, the commitments are limited to advice in Chilean law.

Modes one and two are committed with no limitations others than the ones contained in the horizontal commitments.

For mode three there are several limitations for both market access and national treatment:

a. Every lawyers firm must be constituted as a "civil legal person" ("sociedad civil");
b. It is prohibited for foreigners to supply representation services, by themselves or through third parties, directly or indirectly;
c. Lawyer's legal persons must be formed only by natural persons, Brazilians or resident foreigners, registered in the Brazilian Lawyers Association (Orden de Abogados de Brazil, OAB).
d. Theses legal persons can only provide legal services. The supply of multidisciplinary services is forbidden;
e. Chilean lawyers, even those whose title has not been recognized and do not reside in Brazil, can advice in Brazil about Chilean law, if they are registered in the OAB (this registry will replace the respective visa, when there is no need for a resident visa).

Mode four is not committed, except for what is stated in the horizontal commitments, described supra.

In the case of taxation services, mode one is not committed. For mode two there are no limitations. For mode three, there are limitations both for market access and for national treatment. This limitation establishes that it is not permitted for foreigners the participation on legal persons controlled by Brazilians. Judicial representation is also prohibited. If the service is provided by lawyers, the restrictions applicable to legal services also apply here.

Mode four is not consolidated, except for what is contemplated in the horizontal commitments.

Paraguay included horizontal commitments referred to mode three, for all the services listed. These include different limitations for market access and for national treatment.

The limitations for market access are the following: the authorization for commercial presence will be granted to legal persons constituted in conformity with the national legislation, with office and representation. The entry also contains particular requirements for legal persons when they are constituted in a foreign country.

The limitations for national treatment are two. In the first one Paraguay reserves the right to establish special agreements over stocks, and give preference to the employees in the purchase of stocks of a state company when privatized.

The second one establishes that the central office located abroad must pay a special tax of 15% over the benefits of the offices in the country.

In relation to mode four, there are also different limitations for market access and for national treatment.

The market access obligation is not consolidated for mode four, except for measures concerning the entry, permanence and work of natural persons with temporary contracts with companies making direct foreign investment, relating to the following categories of persons:

a. Business persons
b. Personal transferred within a company (managers, executives and specialists).
c. Foreign companies representatives.

For each of these categories there are particular conditions in which the presence of these persons is allowed.

The mode four, in national treatment limitations has the same treatment as for market access, already analyzed.

In the case of specific commitments, the entire category of professional services is not consolidated. This is because Paraguay is working on a new legislation about professional exercise, and limitations will be consigned after this law is passed.

Uruguay's horizontal commitments refer to mode four, that is not consolidated, except for measures concerning the entry and temporary permanence for certain categories of persons. This limitation is applicable for both market access and national treatment. These categories of persons are the following:

a. Persons transferred within the same company (managers, executives)
b. Business persons.
c. Contracted services suppliers – employees of a legal person.
d. Professionals and specialized technicians.
e. Foreign companies representatives.

Regarding specific commitments, in the case of professional services, the market access limitation establishes that it is required that natural persons have a title recognized in Uruguay, and also that they have legal address there. Legal address does not imply residence in Uruguay. It is noted in the commitment that Uruguay authorities will regulate these professions in the future.

In relation with legal services, for modes one, two and three there are not limitations. Mode four is not consolidated except for what is indicated in the

horizontal commitments and in the note to professional services, described in the preceding paragraph.

In the case of Uruguay, there is also a commitment referring to legal documentation and certification. In this case, modes one through three have no limitations to market access. Mode four is not consolidated, except for what is indicated in the horizontal commitments and in the note to professional services.

In the case of national treatment, mode one is not consolidated. Natural or legal citizenship for at least two years of exercise is required, along with residence.

For mode two there are no limitations. Mode three is not consolidated, with the same preventions as in mode one. Mode four is not consolidated, except for what is indicated in the horizontal commitments and in the note to professional services.

As it can be appreciated, the way in which commitments are made in the Chile – United States FTA is different than in the Protocol between Chile and Mercosur.

In the first place, it is easier to analyze the actual commitments in the case of the United States, and harder in the case of Mercosur countries.

The way in which an exporter of legal services can determine which are the limitations to export his services is more direct and straight forward in the negative list approach than in the positive list approach.

But this does not necessarily mean that the actual degree of liberalization is greater in the first case that in the second.

Even though the commitments, both in the cases of the Chile United States FTA and the Mercosur Protocol, are referred to market access and national treatment, a thorough assessment of the possibilities to supply a service, particularly in the cases of modes three and four, cannot be done without considering the domestic regulation of the legal profession in a given country.

Measures restricting market access and national treatment may have the same goal to the measures related to domestic regulation, but must be distinguished from them. The reduction or elimination of market access and national treatment measures may not be sufficient to guarantee enough access to the destination market. Qualification requirements for example may be burdensome and sometimes constitute real obstacles to the supply of legal services (Geloso, 2004, p. 20). This issue will be treated in the next Chapter.

CHAPTER III
LEGAL SERVICES MARKET

The first part of this Chapter will analyze common obstacles to the trade on legal services. Then it will review the Chilean market on legal services, which services are being provided, how and where. Finally, it will analyze how the existence of these obstacles can affect the supply of Chilean legal services, and how the Chilean services providers can obtain benefits from preferential trade agreements, in the presence of the obstacles previously presented.

a. Obstacles to trade on legal services

The supply of legal services encounters basically three types of obstacles: market access measures, national treatment measures and domestic regulation.

In relation to **market access**, a typical restriction has to do with legal form. For example, certain forms of incorporation are not allowed in some countries. This seeks that professionals do not limit their liability, hiding behind legal forms (such as incorporation) that dilute their personal and professional responsibility.

Another limitation related to market access is the limitation on the movement of professionals[17]. These restrictions may be applied to natural persons that intend to move with the establishment of a firm in a foreign country, to provide services through mode three for example,-but also for short business visits, to lend their services through mode four.

In the case of national treatment measures, they include limitations to associate with local lawyers, and also limitations to foreign law firms to hire local lawyers. This measure is aimed to prevent foreign lawyers and firms to

[17] This issue is closely related to migratory regulations and policies.

practice local representation before local courts through the partnership or hiring of local lawyers (Geloso, 2004, p. 10). Although these measures can be considered also measures that restrict market access, as they restrict specific types of legal entity through which a service supplier may supply a service, it can be considered more a national treatment issue, because it limits the possibilities of foreign firms in favor of national lawyers and firms, as they have no limitation to provide these kind of services.

Another issue related with national treatment is the residency requirement, which can take the form of prior residency, permanent residency and/or domicile requirements. Prior residency has to do with the requisite to have residence in the host country for certain amount of time before getting any authorization or licenses to provide the service. This requirement is a violation of the national treatment because it puts domestic lawyers in a preferential position, as they will normally fulfill this requirement easily.

Permanent residency is often required to exercise representation before courts (World Trade Organization, 2000, p. 409). Domicile requirement is the less restrictive measure of these three, because it only requires of the supplier of the service to have an address in the host country, but not necessarily the residence of the provider in the host country.

If these measures represent identical formal treatment between foreign and domestic lawyers, it must be appreciated case by case if they are inconsistent with article XVII of the GATS, affecting conditions of competition, as indicated in paragraph three.

Another requirement is nationality, normally for representation before national courts and for advising on host law. Advisory services on home law, third country law and international law normally are not subject to nationality requirements. Although some authors consider this a market access

restriction[18] (Geloso, 2004, p. 11; World Trade Organization, 2000, p. 407), it could be considered a measure that affects national treatment, as it discriminates foreign service suppliers in favor of nationals.

In the case of **domestic regulation**, particularly qualification requirements have the potential to make an important impact on trade of legal services (Geloso, 2004, p. 23). This will depend on the differences of legal systems from country to country, and it is related with the protection of local consumers, as it is reasonable to think that a foreign lawyer, who studied an has normally practiced in a different legal system, is not in the best position to advice a client or represent it before a court.

Normally foreign lawyers are required to re-qualify in the host country, especially for the practice of host country law or representation before local courts. In most countries this involves a degree of three to five years and a period of practical experience and some kind of examination (World Trade Organization, 2000, p. 410).

These requirements to provide legal services related to home country law constitute a big limitation to the provision of this kind of legal services, particularly when provided through modes three and four, as lawyers will have to go through a burdensome process to be in position to exercise the profession.

These measures are although less restrictive in the case of the practice of home country and/or international law, where the requirements are normally less burdensome.

It should be kept in mind that when these requirements imposed to foreign lawyers are more burdensome that the ones imposed to national lawyers, it

[18] Maybe if this measure is understood as a zero quota, may be interpreted as a market access measure. Anyway, these authors do not express why these measures should be classified within market access.

may be not only a matter of domestic regulation, but may also affect national treatment.

This kind of regulations point out the importance of mutual recognition agreements, which can be used to minimize the problems derived from the imposition of qualification requirements from country to country.

Foreign legal consultants (FLCs), defined as a foreign lawyer that practices in home country law, third country law and international law (World Trade Organization, 2000, p. 403; Geloso, 2004, p. 25), normally face fewer restrictions, but still are normally subject to licensing requirements (Geloso, 2004, p. 25). There are different ways to regulate the practice of FLC's from country to country, but some common features of these regulations are the following (World Trade Organization, 2000, p. 412): foreign legal consultants are not allowed to practice host country law; some countries regard them as lawyers, and some not, and in some cases, they cannot use the title of lawyers, and should use special denominations; some countries allow them to practice both home country law and host country law, as long as the lawyer is qualified to practice in the respective legislation; some countries allow them to appear before arbitral tribunals; some countries require that the foreign legal consultant registers in the local bar or professional association; some times they are required to pass an exam, normally different and less burdensome than the one for local lawyers, etc.

b. Chilean legal services market

The objective of this section is to make a general description of Chilean legal services market, to asses in the next section if negotiation of free trade agreements are being useful or could be useful for legal services providers.

To build this approach, we interviewed three lawyers of big and well known legal firms[19]. The idea of these interviews was, through the guidance of certain questions[20], to get to know where and how the legal services are being supplied. The firms selected are all big legal Chilean firms, with a high number of lawyers for Chilean parameters. All of them are firms that have participated in a work group organized by PROCHILE[21] to analyze the situation of trade of legal services from Chile, and how can it be fostered.

The intention behind this is to, having a panoramic view of the legal services market, asses if the free trade agreements and punctually the services chapter contained in them are useful to the legal services providers in Chile in their efforts to lend services to foreign clients.

In first place, this section will expose the results of the interviews[22].

Modes of supply

The most common way in which the firms interviewed provide their services is through mode one, cross border supply, and mode two, consumption abroad. In the first case, services are normally provided via internet and via telephone and video conferences. In the second case, the services are provided in Chile to foreign clients that have offices in the country.

Normally these two modes of supply are used in combination in the process of providing a legal service to a given client.

[19] See the Annex.
[20] The questions are contained in the Annex. Each matter is described in the title of the explanation, which follows.
[21] A Chilean governmental agency, belonging to the Foreign Affairs Ministry, in charge of fostering Chilean exports. See www.prochile.cl.
[22] The questions were first sent to each of the lawyers to be interviewed, and then a meeting was fixed to talk through the questions. The information required in the questions was not always available in the exact terms required, particularly the exact proportion in which the different type of services are provided and the countries to which the services are supplied. In these cases, the persons interviewed gave rough approaches in answer to the questions.

None of the firms interviewed use mode three as a way to provide their services. They do not have any commercial presence abroad, at least directly. It is frequent though the association with foreign legal firms to which the clients are derived, or are contacted to ask for advice when is needed in the legislation or area of expertise of the associated foreign legal firm. This scheme cannot be classified as a provision of legal services through mode three, because when the client is derived or the advice is required, the services is being supplied by a foreign supplier, and not by the Chilean legal firm, that is actually "buying" a foreign legal service, and not supplying it through a certain mode.

The use of mode four is used eventually, but it is not very frequent.

All the firms interviewed respond to a traditional scheme of service lending, in which they normally have companies (also natural persons) as clients, which ask them advice to do business, or represent them in courts of law or arbitration tribunals. Notwithstanding, one of the legal firms interviewed created an associated consulting company, both working in parallel and in constant cooperation. This consulting company mixes advice in legal and economic matters, and has had an important number of public clients, particularly foreign governments. This is achieved through participation in international tenders. The product is normally the delivery of legal advice, and sometimes the combination of both legal and economic matters. The delivery of this kind of services requires, from the professionals of the consulting company, more physical presence in the destination country (in 70-80% of the cases) than the one required from the professionals of the legal firm. In this case mode four is used as frequently as mode one, and normally are used in combination with respect to a given client.

Legal and administrative obstacles

In all the interviews the answer to this question was the same: there are no direct obstacles detectable to supply the service, in any of the modes used by the legal firms.

In the case of the consulting company, it was detected that sometimes international tenders by foreign governments benefit national firms over foreign ones, by giving them more punctuation in the evaluations. This was not an obstacle to compete or even to win the tender, but it made the application less competitive, and sometimes obliged them to associate with local firms. Anyway this is a matter that falls under government procurement regulation.

Although there were no obstacles found, neither legal nor administrative to supply the service, some problems related not with the supply of the service itself, but with the tax regime involve, were named. There was a problem for example because there were not double taxation agreements[23], so that would involve an extra cost for the client[24]. In the specific case of Chile, legal services are exempted of the VAT (value added tax), but this leaves the legal firm without the possibility to deduce and recover the VAT credit they have paid in goods and services bought by them to be in conditions to produce their service.

It was highlighted in one of the interviews that even though normally there were no legal or administrative obstacles, the exercise of the legal profession depends a lot on the personal relation that clients and lawyers can establish. This reinforces the idea already exposed that companies prefer the concept of "one stop shopping" (GELOSO, 2004, p. 19; WORLD TRADE ORGANIZATION, 2000, p. 399), accessing to only one lawyer or team of lawyers to take care of their whole legal issues.

[23] For example, there is no double taxation agreement with the United States, although one is being negotiated. See http://www.sii.cl/pagina/jurisprudencia/convenios.htm.
[24] This is obviously a transversal problem not related specifically with the supply of legal services, but was a relevant problem for the firm.

Destination countries

Among the countries from where the clients of these firms come from, Spain and the United States where named in all the interviews. Brazil, China, France and Japan where named on two of them, and Argentina, Canada, Colombia, England, Germany, India and Mexico, were named al least in one.

It is to note that Chile has commercial agreements that include Services Chapters with all these countries, except with India.

Type of activities

The most common type of service supplied by the firms interviewed is the advice in Chilean legislation, most commonly related with the preparation of foreign direct and indirect investment projects, and the development of these projects in Chile.

Another big area is the representation before Chilean courts, in cases involving Chilean law, and before arbitrations tribunals, both national and international.

In the particular case of the consulting company, the services provided include advice and reports in comparative law, and in legislation of third countries. In these cases it is frequent that the product does not involve Chilean legislation.

Agreements' effect

The increase on trade of legal services derived from the entry into force of agreements that liberalize the supply of legal services was not detected in any of the interviews.

But it was pointed out in one of the interviews that there is a link between the demand for legal services and the positioning of Chile as an investment

platform, derived from the intention of companies to be established in Chile to make investments in other Latin American countries. This and the consequential increase of businesses have had a positive effect on the demand for legal services from Chilean law firms.

c. Assessment of the services chapters negotiated by Chile

It has been said that the growth of international trade over the past decades has demanded increasingly more legal services (World Trade Organization, 2000, p. 399). A consequence of this is that companies that make international business, and the lawyers that advice them, have to deal with different jurisdictions and legislations, some of them similar with their home legal systems, and some times quite different.

As a result, the possibility to practice (both to advice and to represent) in different jurisdictions becomes progressively important. This has to do with the particular nature of the legal service, in which the personal relation between the client and the lawyer is crucial. Normally lawyers have access to critical information of their clients, such as business models, and a lot of confidential information.

In addition, the advice given by a lawyer can be more efficient when he or she knows the way things are done in the company, and he or she is familiar with its strengths, limitations and habits.

So the liberalization of legal services is important for the development of international trade of goods and even services different from legal services. But this liberalization faces different logics and realities depending on the specific markets.

There are huge legal markets such as the United States, the United Kingdom, Australia or Canada, and much more modest markets, like many developing countries, among others Chile.

This is manifested for example in the United States and the United Kingdom, where there are large law firms, the biggest ones with more than 3.000 lawyers[25]. The revenue of these firms can largely surpass the U$2.000.000.000 (two billion American dollars)[26].

The capacity of these firms to establish offices wherever is necessary, particularly in the world's big business centers (London, New York, Singapore, Paris, Hong Kong, Brussels, Frankfurt, etc.), or to send lawyers anywhere in the world to give direct advice cannot be compared with the more limited capacity of Chilean legal firms to supply their services in the mentioned way and volume.

Form another point of view, the legislations from where these big law firms come from are usually used and invoked to solve international disputes. That is the case, for example, of English law, or New York law (World Trade Organization, 2000, p. 406). This is because they have got developed legislations that accurately regulate relevant aspects of international operations, and also because their courts are reliable, efficient and predictable. This favors the international demand for legal services provided by American and English lawyers. This is also because, naturally, a lot of foreign investment comes from companies belonging to these countries, and use the services of lawyers of their nationality.

[25] Clifford Chance, one of the biggest English firms, for instance, claims to have 3.800 legal advisers. See http://www.cliffordchance.com/about_us/about_the_firm/. Baker and Mackenzie, a New York based law firm claims to have approx. 1.300 partners and 3.900 qualified attorneys. See http://www.bakernet.com/BakerNet/Firm+Profile/Key+Facts+Figures/default.htm. Chilean's biggest law firm, Carey y Cia., has around 100 lawyers. See www.carey.cl. Also GELOSO, 2004, p. 32.
[26] See "American Lawyer" web page: http://www.law.com/jsp/article.jsp?id=1202424832628.

These circumstances make the negotiation of agreements that liberalize the trade on legal services more relevant for lawyers and, particularly law firms from these countries, than it can be to the lawyers and firms from countries where markets are smaller.

This is because the obstacles reviewed in a previous section affect the ways in which these big legal markets work and develop. For example, limitations on mode three, commercial presence abroad, affect the providers that have the capacity to establish offices abroad; and whose services are demanded abroad. Restrictions on mode four have an impact on service providers that are requested and able to use this way of delivering legal services frequently.

On the other hand, and as it came up in all the interviews conducted, the provision of Chilean legal services to foreign consumers does not face significant obstacles. This is probably due to the ways in which these services are more commonly demanded by their clients and delivered by Chilean providers: mode one (cross border supply), for instance by e-mail, telephone or video-conference, and less frequently by mode four, by the presence of national lawyers in the destination countries.

This is anyway an issue common to most developing countries. For example, among the rest of developing countries, only three law firms have offices outside their home countries (Nielson & Taglioni, 2004, p. 62).

As the supply of services through modes one and two is difficult to control (Geloso, 2004, p. 10), even when there are restrictions to the provision of services through these modes, they can anyway be provided without much difficulty.

When mode four (presence of natural persons) is used to provide a service, many times professionals use tourist visas, to avoid eventual complications

derived from obtaining business visas[27] (World Trade Organization, 2000, p. 407). Then, the eventual limitations established for the entry of business persons is not a real issue for Chilean lawyers, according to the interviews. This could eventually change and turn into a problem if the number of travels abroad to provide legal services increases significantly.

It might be said that, in general, the size and characteristics of the Chilean legal services market makes that obstacles generally present for legal services markets do not affect, in relevant terms, the supply of Chilean legal services.

So, even though the regulations and disciplines contained in agreements such as the GATS, the Free Trade Agreement with the United States or the Protocol on Trade in Services between the Mercosur and Chile, theoretically address problems that trade of legal services face, they are not that useful as long as the problems are not real problems for the Chilean providers of legal services.

There are though some questions that remain unanswered. Is the way in which Chilean services are being provided by local firms and lawyers, as it has been described before, a result of the lack of deeper knowledge of the instruments that liberalize the trade on legal services? Would the business models used by Chilean legal firms change in the presence of a better knowledge of these instruments, on one side, or on the presence of better commitments from countries that, for example, receive important amounts of foreign investment from Chilean companies?

Anyhow, the assessment of this issue and the answers to these questions exceeds the scope of this work, and should be addressed and studied in a comprehensive way, involving professional associations, law firms and individual lawyers, governmental agencies, and even companies interested in

[27] This was also mentioned in the interviews.

using in their transnational business the advice and help from Chilean lawyers.

CONCLUSION

There is no doubt about the importance of legal services for international trade. It is true that legal services are, in general, secondary and dependant of the existence of, for example, trade in goods or foreign investment. Legal services are not needed if there are not international transactions. This necessarily puts legal services in the margin of international trade in terms of the amount of money involved. There will not be more costs involved in legal services that in the goods or services whose international trade demands these legal services. But they still are irreplaceable.

So the globalization needs legal services, which will usually have to be delivered in some of the ways described in article I of the GATS, because international transactions are normally complex and involve more than one jurisdiction.

But international trade in legal services encounters different obstacles that trade agreements try to avoid or eliminate.

In relation with services, there are two types of agreement that try to liberalize trade, by addressing these obstacles: the NAFTA type and the GATS type (although some agreements have in the late years mixed elements of both). Chile has signed agreements of both types, being examples of the first one the Free Trade Agreement between Chile and the United States and of the second the Protocol on Trade in Services between Chile and Mercosur.

Even though there are obvious differences between both types of agreement, and that each has its own strengths and weaknesses, the two types have the same potential to liberalize trade on services, in particular legal services. The real degree of liberalization of a given legal services

market is more related to the commitments that countries make than with the type of agreement that contains them.

But the need to liberalize trade in legal services differs from one reality to another. The characteristics of the offer that developed countries, especially some Anglo-Saxon countries such as the United Kingdom, the United States, Canada or Australia can make on legal services differ substantially from the offer of these services that developing countries such as Chile can make. This difference is based in many factors, such as the legislations frequently used to regulate international operations, the nationality of foreign investment, etc.

Chilean legal services, as concluded in this work, are provided mainly through modes one and two, and only exceptionally through mode four. When lending servicer through these modes, law firms do not encounter obstacles at the destination countries.

This difference put lawyers and law firms coming from these different places in unequal situations in front of the obstacles for legal services. Big law firms coming from Anglo-Saxon countries are constrained by some of the obstacles, like the measures that limit mode three. These measures, for example, have not been, up to now, of importance or constraining for Chilean legal services providers, as they are not in position to make relevant efforts to establish commercial presence abroad.

So this situation makes relatively less important the presence of agreements liberalizing trade on legal services for Chilean lawyers, or making efforts to take further steps in the way of liberalization, as they are not using massively the modes of supply three and four, which are the ones that can more likely face obstacles when delivered.

So to the question if the agreements that liberalize legal services are useful for Chilean lawyers and law firms, in terms of the export of their services, the answer may be that not too much, due to the fact that the way in which their services are being provided does not face real obstacles.

It is still not clear if this can be a consequence of the lack of knowledge of the opportunities that these agreements bring, or it is because of the low level of commitments from countries with whom Chile have signed agreements, or lack of some additional disciplines. Given the actual situation of the legal services market in Chile, free trade agreements do not seem very relevant for Chilean legal services providers. However, this analysis could change if Chilean legal service providers decide to use mode three or four to deliver their services.

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ANNEX

The lawyers interviewed and their respective law firms were the following:

	Lawyer	Firm	Number of lawyers (according to the web page)	Web page
1.	Cristobal Leighton R.	Vial & Palma	24	www.vialypalma.cl
2.	Gonzalo Cordero A.	Morales & Besa	35	www.moralesybesa.cl
3.	Eliel Hasson N.	- Prieto y Cía. - TLC Consulting	40	www.prieto.cl www.tlconsulting.cl

All the interviews were conducted in Spanish. The following are the questions sent to the persons to be interviewed:

Question 1 (*Modes of supply)*

According to GATS, the trade in services can be done in the following ways:

a. from the territory of one country into the territory of another country;
b. in the territory of one country to the service consumer of any other country;
c. by a service supplier of one country, through commercial presence in the territory of any other country;
d. by a service supplier of one country, through presence of natural persons of in the territory of any other country.

¿In which of these modes and in what proportion for each, in terms of revenue, your firm supplies services to foreign clients?

Question 2 *(Legal and administrative obstacles)*

¿Have you found any type of administrative or legal obstacle when providing a service through any of the modes described in Question 1?

Question 3 *(Destination countries)*

From which countries the clients of the firm come from? In what proportion, from a revenue point of view, are they distributed?

Question 4 *(Type of activities)*

What types of activities are demanded form or offered to foreign clients? (for example: advice in Chilean legislation, advice in International law, arbitration litigation, etc.).

Question 5 *(Agreements effect)*

Has there been any rise in the number or revenue of your business related to the entry in force of agreements that intend to liberalize trade in services? If the answer is no, what are the provisions that these agreements should have to make a positive impact on your business?