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The International Bar Association and Trade in Legal Services: Meta Law-Making in International Economic Law?

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THE INTERNATIONAL BAR
ASSOCIATION AND TRADE IN LEGAL
SERVICES: META LAW-MAKING IN
INTERNATIONAL ECONOMIC LAW?

*David Collins**

Abstract *This article presents the International Bar Association as a highly-influential but often overlooked non-state actor through the lens of its involvement in the standardization of Mutual Recognition Agreements for legal services. Not only do most MRAs contemplate the active involvement of professional bodies such as law societies and bar associations in their construction and monitoring, but the IBA's guidelines for MRAs also inform the content of these agreements, facilitating the practice of international law by a more highly mobile profession. This, in turn, underpins the capacity of the community of international lawyers to exercise their technical expertise to influence other non-state actors, exemplifying what may be described as the IBA's "meta-lawmaking" on the global stage. As there has been poor uptake of MRAs by developing countries, initiatives of the IBA could help establish mutual recognition for legal services in the developing world.*

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Keywords: non-state actors, trade in legal services, GATS, International Bar Association

I. INTRODUCTION

It has been said that legal scholarship has carefully avoided addressing the issue of non-state actors in international law in a systematic way. This is in part because such actors are thought to represent values that are endemic to a particular sub-regime within international law, e.g. human rights or trade,¹ rather than elements which are universal in nature. At the same time some international law scholars have warned that the global community, such as it exists, is faced with the risk of growing dispersion of power and authority away from nation-states towards non-state actors. It is thought that this will ultimately contribute to a weakening of the institution of international law itself, potentially leading to a deficit in global governance.² Conversely and perhaps more optimistically, some non-state actors may represent cohesive forces which work to establish binding international law norms, brining together the global community under the rule of law, sometimes conceived as “global” law.

One such entity has been remarkably poorly studied by legal scholars, despite its considerable if indirect involvement in international law-making is the International Bar Association (“IBA”). Addressing this gap in the literature, this article will argue that the IBA’s work, particularly in relation to facilitating trade in legal services, has the potential to lay the foundations for the creation of international law across a wide range of sub-specialisms, from commercial matters to human rights, and from procedure to substantive rules. Indeed, the technical expertise of the IBA as a professional association, with involvement in numerous international organizations, has enabled it to become a kind of “meta-law-maker”. This has been achieved in part through liberalized trade in legal services. That is to say the IBA’s focus on the empowerment of its influential constituent members has contributed to the shaping of the rule of law in the global sphere. The IBA’s global mandate may be especially valuable for legal practitioners in developing states who lack the degree of organization found among the profession in richer countries, as seen, for example, in the American Bar Association (“ABA”), the

¹ A. Bianchi, “Revitalizing the Subjects or Subjectivizing the Actors: Is that the Question?” in A. Bianchi (ed.) *Non-State Actors and International Law* (Routledge, 2009).

² J. Nijman, “Non-State Actors and the International Rule of Law: Revisiting the ‘Realist Theory’ of International Legal Personality”, in M. Noortmann and C. Ryngaert (eds.) *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate, 2010).

Law Society of England and Wales, and le Conseil des barreaux européens (“CCBE”) to give but three examples.

This article will begin by presenting the IBA as a non-traditional variety of non-state actor which plays an important role on the international stage (to complete the theatrical metaphor). It will then turn to a discussion of trade in legal services, focusing on one of the key instruments of liberalization within this sphere of economic globalization, the Mutual Recognition Agreement (“MRA”) for professional qualifications. This will lead to an analysis of the IBA’s undertakings in this regard – its efforts to standardize the contents of MRAs with a view to expanding the capacity of lawyers to practice across jurisdictions. This strategy will be depicted as an instrument of indirect law-making at the international level by fostering a professional community of international (and internationally mobile) lawyers who are agents within other global organizations. Such bodies are especially important for lawyers from developing countries seeking to expand their global influence. While this article will not examine the IBA’s institutional governance, the validity of its internal processes in terms of transparency, accountability and decision-making are identified as crucial areas for further research.

II. THE IBA AS A NON-STATE ACTOR IN INTERNATIONAL LAW

Designating an entity as a non-state actor entails significant consequences in that it exposes the relevant body to liability under international law, much as it entitles it to the protections afforded under this system of rules. More importantly for the purposes of this article, status as a non-state actor in international law can further the relevant entity’s capacity to contribute to the process of constituting the framework of rules upon which international law is based. It is this second characteristic of non-state actors which underscores the vital, and often-underappreciated role of the IBA. To a degree, this claim services a more fundamental one about international law as a whole – it is a system of principles, rules, guidelines which are shaped by those which engage with it, more so than other species of law (such as domestic law) which tend to be constituted more systemically by elected authorities and their delegates.

The dominance of non-state actors as architects of international law (as well as subjects of it) is surely in part due to the largely unintelligible nature of the concept of statehood itself which has confounded international

law scholars and jurists for more than a century.³ The concept of non-state actor is perhaps equally poorly defined. A starting point in this regard may be The International Law Commission's Articles on the Responsibility of International Organizations which broadly defines an "international organization" as one established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to states, other entities.⁴ Yet there appears to be a puzzling myopia in terms of the types of entities encompassed by non-state actors, a seemingly wider category than that of international organizations, with a clear emphasis often placed on the multinational enterprise as well as the international organization, e.g. the United Nations (UN) or the World Trade Organization (WTO) both of which consist of a large number of developing countries. It is noteworthy that Nijman's definition of non-state actor (which she ironically purported to be remarkable for its breadth) conspicuously omitted professional organizations,⁵ meaning bodies which broadly represent the interests of a group of experts with specialized training and qualifications.

The failure of public international law to accommodate professional associations as a vital category of non-state actor is problematic because professional associations of many kinds are integral to the interpretive exercises taking place in the more formal arenas of law-making, namely legislative and judicial processes. In this regard, the IBA has an especially important role which sets it apart from many other professional organizations, because of its capacity as a representative body for the legal profession across a range of sub-specialisms, geographic regions and developmental status. Of course, there are other lawyerly associations which may contribute to law-making through debate, discussion or even advocacy, some of the more powerful of which have been mentioned above. However, such processes still take place on a modest scale within a more narrowly defined sphere of influence either geographically,⁶ topically⁷ or methodologically⁸. The IBA, on the other hand, wields superior influence because of its wide scope and deep penetration, through the activities of its members, in so many other entities which have a more direct role in the shaping of international law.

³ J. d'Aspremont, *Epistemic Force in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar, 2015) at 60.

⁴ Art. 2 (a), ILC's Articles on the Responsibility of International Organizations, 2011.

⁵ "The range of possible entities includes: rebel groups, terrorist organizations, religious groups, civil society organizations, corporations, all kinds of businesses, and international organizations." Nijman above n. 2 at 97.

⁶ E.g., The American Bar Association.

⁷ E.g., The Society of International Economic Law.

⁸ E.g., The Society of Legal Scholars.

The predominance of a distinctive class of influential, internationally-minded legal professionals linked through formalized association reflects certain aspects of the phenomenon of global law noted earlier and emphasized notably by Walker.⁹ Distinct from international law, global law may be defined as follows:

*“Global law, understood as universal or general law ..., is a development that questions many of our state-centric or otherwise jurisdiction-centric premises about law as a settled form and about the grounds of its authority and legitimacy. Global law as universal or global-in-general law...is typically projected and incompletely realised, only obliquely present and of unsettled authority.”*¹⁰

Universal in scope but non-state centric and lacking the authority of formal law-making bodies like legislatures, global law appears to contemplate the significance of the IBA. It also embraces a notion of law that is, to a degree, removed from entrenched nation-based power structures, facilitating a voice within the developing world.

It is widely acknowledged that business groups are crucial in trade negotiations, for example, through *ad hoc* consultation meetings within domestic trade bureaucracies, setting agendas and influence the strategic behaviour of states,¹¹ in other words, lobbying. Commentators have argued that business or industry groups often voluntarily create reporting schemes and governance principles to improve their adaptation to an environment where authority is diffuse.¹² There is perhaps no better example of this phenomenon than in the legal services sector which is regulated by several hundred bar associations and law societies across as many jurisdictions (both nationally and sub-nationally) including in developing countries.¹³ The prevalence of soft-law making by and among non-state actors may also be ascribed to the practical need for compromises such as standard-setting and surveillance, because hard law rules may not be feasible at the state-to-state level.¹⁴ This is especially where a high degree of technical competence is required which negotiating politicians may not possess.

⁹ N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

¹⁰ *Ibid.* at 26.

¹¹ H.W. Jeong, *International Negotiation: Process and Strategies* (Cambridge University Press, 2016) at 235.

¹² C. Williams, “Civil Society Initiatives and ‘Soft Law’ in the Oil and Gas Industry”, 36 *New York University Journal of International Law and Politics* 457 (2003-2004).

¹³ For example, the Indian National Bar Association and the All China Lawyers Association.

¹⁴ A. Guzman and T. Meyer, “Soft Law”, in E. Kontorovich and F. Parisi (eds.) *Economic Analysis of International Law* (Edward Elgar, 2016) at 125.

Jouannet rightly observes that the informal nature of international legal norms originating from non-state actors “*take on hybrid forms or are at least shaped and implemented by public and private actors [and] combine the joint contributions from the state and the market, from the public and private sectors reflect[ing] the ambition to be rid of an overly rigid, excessively formal or dogmatic conception of law.*”¹⁵

At the same time, the lack of participation by the business community in the generation of international norms, as opposed to the NGO community, is thought to undermine the legitimacy of these endeavours even in their capacity as soft law rather than binding international commitments.¹⁶ The involvement of the community of international lawyers, arguably a kind of business community, in the construction of international (or global) law should therefore, be welcomed.

The lack of attention to professional associations in established definitions (let alone the serious discussion) of non-state actors in international law is more perplexing when one considers the importance that many commentators have placed on the role of international lawyers in the creation of “hard” international law. Schachter, for example, outlined the vital role performed by international lawyers in this process as follows:

*“the nonofficial professional community may have a twofold impact on the adoption of new multilateral instruments. First, it may facilitate the building of an international consensus during the preparatory stages of a legislative effort. This can be done through dissemination of studies and proposals, augmented by reports and resolutions of professional bodies. Second, the international legal community may help to achieve the acceptance of a multilateral instrument by national parliamentary and executive bodies.”*¹⁷

Others have observed robust regulatory networks within international organizations through which informal socialization among like-minded officials or other professionals crystallize into “tangible normative products”

¹⁵ E. Tourme Jouannet, *A Short Introduction to International Law* (Cambridge University Press, 2013) at 46.

¹⁶ C. Ryngaert, “Imposing International Duties on Non-State Actors and the Legitimacy of International Law”, in M. Noortmann, C. Ryngaert (eds.) *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge, 2013) at 14-15. The author cites UN Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights as an example of an initiative which was unsuccessful in part because it did not engage the business community.

¹⁷ O. Schachter, “Invisible College of International Lawyers”, 72 *Northwestern University Law Review* 217 (1977-1978) at 225.

such as guidelines and recommendations.¹⁸ Indeed it seems like these scholars must have been thinking of the IBA without actually naming it.¹⁹

As the self-described “global voice of the legal profession”, the IBA has unquestionably played a key role in preserving the rule of law and access to justice throughout the world. With a membership of more than 80,000 lawyers and with associations with close to 200 bar and law societies, the IBA is among the most influential professional organizations in the world, holding special observer status before the UN General Assembly and the UN Economic and Social Council. While largely ignored by commentators, some have acknowledged the IBA’s unique significance in world affairs. Noting the increasing depth and formalization of professional organizations (global and regional as well as general and sectoral), Walker places the IBA at the apex of the pyramid.²⁰ IBA guidelines are regularly cited by international tribunals and granted a broad degree of respect as a source of norms on matters such as professional ethics for lawyers and rules of evidence in international hearings. According to one of the IBA’s own studies, the IBA Rules on the Taking of Evidence in International Arbitration have been cited in nearly half of all international arbitration hearings around the world.²¹ Fostering the practice of law and with it the rule of law, the IBA indirectly underpins much of the economic activity that drives globalization, particularly in developing countries where the legal profession is less well-organized.²² Yet, despite this important status, the IBA remains one of the least studied international organizations in the world, leading to a significant absence of critical engagement in terms of its role in international law-making, and perhaps, equally importantly, its internal institutional mechanics and decision-making processes. To be clear, there are some examples of commentary/criticism of specific initiatives undertaken by the IBA,²³ but these tend to deal with a narrowly focused agenda relevant to a specific sphere of international law, rather than the IBA’s position as a prominent non-state actor on the international stage.

¹⁸ S. Cho, *The Social Foundations of World Trade: Norms, Community, and Constitution* (Cambridge University Press, 2015) at 79-80.

¹⁹ On the other hand, given the variety of non-State actors, it would be limiting to establish a definition which would include such an industry-specific body as the IBA.

²⁰ Walker above footnote. 9 at 33.

²¹ International Bar Association, Report on the Reception of the IBA Arbitration Soft Law Products (September 2016) at 8.

²² This author could not identify a single study into the institutional governance of the IBA, remarkable for an organization with such an influential role in global policy-making.

²³ E.g., M. Joelson, “A Critique of the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration”, *American Review of International Arbitration*, 2015.

International organizations are often assessed in terms of their effectiveness as well as their legitimacy from the perspective of functionalism. Since the organization exists to exercise functions delegated by their members, the question then becomes whether these interests are being adequately served. Such analysis tends to lead to an evaluation of the relationship between the organization and its constituent members, which are often assumed to be states. This approach has been likened to a kind of “contractualism” in which international organizations are perceived as conventional actors within international law that happen to be controlled by their member states. In other words, they are but one step removed from statehood by virtue of their collective composition of states. This approach may be further contrasted with “constitutionalism”, which posits that international organizations are autonomous normative orders which can pursue their own political projects independently.²⁴ The transposition of this theoretical framing from international organizations to a professional association such as the IBA is problematic since its constituent members are individuals or law firms, not states. Again, this illustrates that the IBA’s importance may be more accurately perceived in terms of its role as an actor in global law, drawn as it is from hybrid sources of questionable authority, rather than in public international law which tends to be conceived as the system of law governing relations between nation states and which has reasonably well articulated sources, most of which originate from traditional centres of authority in the developed world.

At this point it is apposite to consider the IBA’s stated objectives which may be found in its own constitution:

- I.1 to establish and maintain relations and exchanges between Bar Associations and Law Societies and their members throughout the world.
- I.2 to assist such Associations and Societies and Members of the Legal Profession throughout the world to develop and improve the profession’s organisation and status.
- I.3 to assist Members of the Legal Profession throughout the world, whether in the field of legal education or otherwise, to develop and improve their legal services to the public.
- I.4 to advance the science of jurisprudence in all its phases.
- I.5 by common study of practical problems to promote uniformity and definition in appropriate fields of law.

²⁴ D’Aspremont, above footnote 3 at 147.

- 1.6 to promote the administration of justice under the rule of law among the peoples of the world.
- 1.7 to promote in the execution of these objects the principles and aims of the United Nations in their legal aspects and to cooperate with, and promote coordination among, international juridical organisations having similar purposes.²⁵

From a functionalist perspective, the IBA clearly seeks to further the interests of its members (lawyers, law firms and law societies / bar associations). From a constitutionalist perspective, it aims to promote the administration of justice under the rule of law for the wider benefit of society, who are non-members. While the IBA has many tools available to achieve these goals as captured by its myriad policy statements and guidelines, perhaps the most transformative of these are its efforts to enlarge the role of lawyers in society at an intrinsic level. This task is contemplated by efforts to liberalize trade in legal services. In this regard, the goals of “establishing and maintaining relations among bar associations and law societies”, “developing and improving the profession’s organisation and status” and perhaps most crucially “improving legal services for the public” stand out. The IBA’s desire to achieve “uniformity” and “coordination” must be also emphasized as aims which have an expressly global reach. This means that the IBA is important not only for countries which have advanced legal services markets (like the US and the UK), but also for countries where the international market for legal services may be less mature but where rule of law is well-established, as in India and China.

Before considering the IBA’s strategy in relation to the expansion of trade in legal services, it is worth drawing attention to the problem of “comitology” associated with international organizations of any kind as subjects and objects of international law. Comitology embodies the concern that the creation of sub-organs within an organization may disturb its collective governance as well as obscure its overall mission. This can be exacerbated where the decision-making of many committees is not sufficiently transparent, which is almost inevitable if there are a multitude of such organs.²⁶ For the IBA, the development of policy in relation to trade in legal services, falls within the domain of the Legal Practice Division. This body seeks to promote an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of law throughout the world; to facilitate communication among its members; to provide the

²⁵ The Constitution of the International Bar Association, Art. 1.

²⁶ J. Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press, 2015) at 214.

opportunity to all its members to be active in the division through its sections, committees, for a and other groupings; and to undertake such related projects as may be approved from time to time by the division's council.²⁷ The IBA has an International Trade in Legal Services Committee which has the stated mandate to monitor the work of the WTO globally, and to provide information and guidance to bar associations and law societies to answer questions potentially raised by trade negotiators from their own countries.²⁸ This sub-unit has produced much of the material relevant to the use of MRAs to overcome some of the barriers restricting international practice opportunities for lawyers.

In light of the above, the IBA should be viewed as a non-state actor operating within international economic law at a genuinely globally level. It will be regarded in this manner for the purposes of this article.

III. TRADE IN LEGAL SERVICES

Legal services are a major sector of the economy in many developed countries as well as an enabling component of many other sectors, and an essential element of the rule of law. Many developing countries have significant legal services markets, although they tend to be less internationally focused. India, for example, has the highest number of lawyers of any country in the world although its legal services market is currently poorly liberalized on an international level. The intensifying legalization of society characterized by an ever-increasing number of regulations covering more aspects of life particularly in a commercial context,²⁹ as well as the expansion of judicial extraterritoriality, seen for example in the number of transnational courts, suggest that in the coming decades legal services will become increasingly internationalized.³⁰ In short there is a pressing and mounting need for internationally-trained and internationally mobile lawyers. It is strongly arguable that undue restrictions on this kind of professional activity may be harmful to society on many levels.

²⁷ International Bar Association, Introduction <https://www.ibanet.org/Committees/Divisions/Legal_Practice/home.aspx> (January 2019).

²⁸ International Bar Association, IBA Global Cross Border Legal Services Report, <https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx> (January 2019).

²⁹ See e.g., G. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy* (Oxford University Press, 2016).

³⁰ A. Hook, "Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services", OECD and World Bank (undated) at 11.

Although trade in legal services has increased steadily with globalization, significant barriers to the internationalization of legal practice around the world remain. This is seen particularly in developing countries, and in relation to commercial presence of foreign law firms and temporary movement of persons under Mode 3 and Mode 4 of Article I of the General Agreement on Trade in Services (GATS) respectively. Many jurisdictions maintain onerous qualification and training requirements for foreign lawyers which effectively preclude foreign market entrants, adversely affecting consumers through restricted supply and increased costs.³¹ At the same time, ensuring rigorous standards among the providers of legal services is viewed as essential to safeguard clients' interests against fraud or malpractice. Achieving an appropriate balance between these two goals in trade agreements aimed at services liberalization requires participation from professional representative bodies that are familiar with the regulatory issues faced by lawyers and how these fit within the needs of society. Although it lobbies on behalf of its membership of lawyers, since the IBA's objectives also encompass the need to uphold the rule of law and to serve the interests of the administration of justice for the benefit of clients, it is well placed to assist in international initiatives on the liberalization of trade in legal services. With regards to its work in developing countries, the IBA has specialized committees dealing with Africa, Asia Pacific, Latin America and the Arab world.

The IBA engages in many projects in relation to the creation and dissemination of international law. However, its most important impact on international law-making in terms of its broad reaching (if indirect), relates to the scope of the international legal profession itself. This means the capacity of legal professionals to practice law (both of a domestic and international nature) across international borders, and in so doing engage in international law-making activities including participation in other law-making activities of the international organizations (state and non-state) who employ them. One of the IBA's crucial instruments in this initiative are its guidelines on the standardization of Mutual Recognition Agreements for legal services.

IV. MUTUAL RECOGNITION AGREEMENTS (MRA)s AND SERVICES LIBERALIZATION

Mutual recognition is an approach to expanding market access for a given service by smoothing existing access rather than creating it where it does

³¹ See, e.g. D. Collins, *The Public International Law of Trade in Legal Services* (Cambridge University Press, 2018).

not already exist. However, for mutual recognition to function as a tool of economic integration, a state must have formally consented to opening its market to the supply of a specific kind of service through a specific mode of delivery. With the market notionally open to that mode of supply of that service, mutual recognition operates to minimize additional practical barriers relating to the qualifications of the service supplier required under the regulatory regime of the admitting state. For example, if a state has committed market access for individual foreign lawyers, but such lawyers must have a requisite level of competence in the domestic legal system, a Mutual Recognition Agreement (MRA) will validate that competence, precluding onerous requalification processes which would act as a *de facto* market access barrier. In the case of educational qualifications, mutual recognition refers both to the relevant training itself, as well as the acknowledgement of the home country's authority to certify such training and issue diplomas or other kinds of evidence of qualifications. Where mutual recognition is in place and the host country's regulatory objective is addressed by home regulation, the host country should accept the home country's regulation as equivalent. Where there is an aspect of the host country's regulatory goals which are not met by the foreign qualification, the host country can set additional requirements for granting of recognition. Such requirements must be proportionate to their purpose. One of the best-known examples of mutual recognition for professional qualifications is that of the EU which maintains a system through which the qualifications and diplomas obtained in one Member State must be recognized in another Member State.³²

Article VII of GATS, which covers mutual recognition, encourages WTO Members to accord mutual recognition through MRAs. Such instruments grant a degree of certainty and predictability for services suppliers, precluding burdensome case-by-case applications which may be time consuming and may lead to inconsistent or discriminatory treatment. They are usually framed in hortatory language, expressing signatory parties' best efforts to extend mutual recognition for services suppliers in specific services where possible. MRAs offer considerable advantages to professions such as lawyers,

³² The principle has been set out with regard to services in the Court of Justice of the EU in *Vlassopoulou: Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, Case C-340/89 (7 May 1991). Legal qualifications are recognized through this Mutual Recognition of Professional Qualifications (MRPQ) Directive of 2005 (2005/36/EC), revised in 2013. The Directive sets out the conditions for accessing the host country profession, including regulated ones, such as lawyers. These include: qualifications recognized, evidence of the level of qualification covered by the Directive to be presented by its holder; conditions for recognition, compensation measures to account for differences/inadequacies (which may include an aptitude test or adaptation period); and recognition of professional experience (including professional traineeships).

facilitating established parameters for recognition of qualifications such as law degrees and training and clarifying the conditions to practice in the host jurisdiction instead of placing the onus on the individual supplier on an *ad hoc* basis. MRAs are often done in conjunction with a formal Free Trade Agreement (FTA), although are normally agreed afterwards. MRAs which form part of an FTA become binding on the parties along with the rest of the treaty. Although they are not strictly speaking treaties themselves, the text of the MRAs must be interpreted in light of the other provisions of the agreement which they form part, pursuant to the Vienna Convention on the Law of Treaties.³³ In assessing their status as sources of international law, whether MRAs may be viewed as hard law or soft law is a matter of semantics. They typically originate from state actors (although some are concluded directly by professional bodies)³⁴ and consist of formal statements conveying rights and obligations, they bear a resemblance to a treaty, but since they tend to reflect best effort pledges rather than bright-line obligations they have the appearance of something less than binding agreements. Encouraging recognition where possible with limitations that are only imposed when necessary arguably reflects a mid-point on a continuum of legalization between hardness and softness.³⁵

The success of MRAs in liberalizing trade across all sectors has been mixed, with some studies suggesting that they are more effective for goods than for services, given the regulatory complexity of the latter.³⁶ Again it must be kept in mind that the schedule of commitments in the FTA establish the level of market access – if this is limited (as it tends to be under most service chapters of FTAs) then an MRA cannot help. And, as mentioned above, MRAs tend not to be concluded at the same time as the FTA of which they form part. The relevant provisions that govern the negotiation of the MRA under an FTA must come into force before the MRA can be finalized. This typically requires that advisory bodies informing the contents of the agreement are already established in order to approve the commitments undertaken by the relevant professional bodies and then monitor their negotiation and their compatibility with the FTA. Indeed, most mutual recognition regimes are supported by extensive technical work which leads to setting common standards and outcomes that are too specific to the given sector.

³³ Arts. 31 and 32, VCLT.

³⁴ An MRA was signed in 2009 between the National Bar Council (France) and the Québec Bar (Canada): <<http://www.barreau.qc.ca/pdf/organisation/2009-arm.pdf>> (in French).

³⁵ Guzman and Meyer, above n. 14 at 128.

³⁶ A. Correia de Brito, C. Kauffmann and J. Pelkmans, “The Contribution of Mutual Recognition to International Regulatory Co-operation”, OECD Regulatory Policy Working Papers No. 2, OECD Publishing, Paris, 2016.

As noted earlier, Article VII of the GATS encourages signatories of MRAs to adopt measures bilaterally to recognize the education and experience, licenses or certifications obtained in a particular country. Members are required to inform the WTO's Council for Trade in Services of recognition negotiations relating to professional qualifications before they enter a substantive phase. As of 2016, 139 MRAs had been notified to the WTO covering a wide range of sectors including services, although most relate to conformity assessment of goods, especially telecommunications equipment. Most of these agreements were initiated by OECD countries,³⁷ suggesting that there is greater room for use of these tools by developing countries where level services tend to be poorly liberalized under the GATS and FTAs. Article VII also states that “where appropriate *recognition should be based on multilaterally agreed criteria and that WTO Members shall work in cooperation with relevant intergovernmental and non-governmental organizations* towards the establishment and adoption of common international standards and criteria for recognition” [emphasis added]. Crucially for the purposes of this discussion, this provision appears to contemplate the involvement of industry bodies which have familiarity with the nature of the professional requirements and competences necessary for the appropriate supply of the relevant service across WTO Member States. It is worth noting that only one multilateral initiative for mutual recognition was ever been pursued under Article VII and it was in the field of accountancy – setting the foundations upon which bilateral MRAs in accountancy should be based. Non-binding WTO guidelines for MRAs in this sector were published in 1997, intending to be used by Members when negotiating MRAs with each other on a voluntary basis.³⁸

Participation of professional bodies is a feature of many FTAs' material on future MRAs. For example, the services chapter of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU provides for the establishment of a committee responsible for the implementation of the MRA to be composed of representatives of Canada and the EU in conjunction with relevant authorities and professional bodies.³⁹ Likewise, the EU-Korea FTA states that relevant representative professional bodies in the parties' respective territories will jointly develop recommendations on mutual recognition to a designated trade committee for the fulfilment of criteria applied by each party for the authorization, licensing operation and certification of service suppliers and investors, including professional

³⁷ *Ibid.*

³⁸ See, Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector: S/WPPS/4 (10 December 1998).

³⁹ Art. 11.3, CETA.

services.⁴⁰ The services chapter of the Comprehensive Progressive Trans Pacific Partnership (CPTPP) concluded among 11 Pacific Rim countries also requires that each party consult with “relevant bodies” for the purposes of developing agreements on the recognition of qualifications.⁴¹ To be sure these are not MRAs but rather the establishment of a framework for setting them up in the future. There few such examples in the developing world, with the Asia Pacific Economic Cooperation (APEC) legal services initiative as a noteworthy exception.⁴²

In addition to informing the initial terms of mutual recognition, MRAs also envision an ongoing role for professional bodies which should not be understated. The joint bodies noted above not only negotiate and approve the agreement from the outset, they must also and monitor their implementation and enforcement to ensure compatibility with the treaty going forward. These bodies must further ensure that the regulatory regimes do not diverge to such an extent over time that potential conflicts cannot be addressed – the so-called “dynamic” equivalence.

Clearly, professional associations play a key role in the establishment of rules on recognition. Whether such FTAs contemplate a role for *international* professional associations like the IBA rather than domestic ones like the Law Society of England and Wales, is less clear, but it is difficult to imagine that input from global organizations would not be as useful, if not more so, than those of a local character. It could be expected that international organizations, while less knowledgeable about jurisdiction-specific requirements, would be able to provide insight into the universal skills, qualities and competencies expected of professionals within the relevant discipline. Additionally, one might expect valuable input from an international professional organization in the context of an MRA within a mega-regional agreement like the CPTPP where involvement of multiple domestic bodies might be impractical or too idiosyncratic to secure commitment across all parties. Furthermore, it may be that national professional groups may have a different agenda from that of the government of the state in which they are situated, given that these organizations often act to preserve the monopoly of their members over the provision of services within their territories which may be under threat from foreign entrants. Guidance from an international professional association may therefore have the benefit of neutrality (or at least the perception of it), affording such bodies greater sway in the ultimate terms of the negotiated instrument.

⁴⁰ Art. 7.21(2), EU-Korea FTA.

⁴¹ Annex 10-A, 1-3, CPTPP.

⁴² APEC Legal Services Initiative, <<http://www.legalservices.apec.org/index.html>> (January 2019).

V. THE IBA AND MUTUAL RECOGNITION AGREEMENTS IN LEGAL SERVICES

It is clear from the above that professional associations are instrumental in the adoption and maintenance of MRA agreements, although it must be conceded that the extent to which professional associations of an international rather than a national dimension have been involved in the development of specific MRAs is unknown. Still, in the case of legal services, the work of the IBA in the establishment of universal norms to inform the content of existing and future MRAs in the legal services sector is worthy of attention because of the importance liberalized trade in legal services has in relation to other kinds of economic and law-making activity.

In 1998, the IBA issued its General Principles for the Establishment and Regulation of Foreign Lawyers to assist in the harmonization the regulation of legal services across the world.⁴³ At the core of this document were the Common Regulatory Principles, which consisted of the following: First, all host authorities (meaning national or subnational regulatory bodies for legal professionals) have the authority to regulate, which means they have the right to admit and monitor foreign lawyers. Second, there is an obligation of fairness and uniform treatment, meaning that regulations covering the legal profession must be non-discriminatory and based on uniformly applied, objective criteria. Flowing from this, any restrictions on practice should be based on the public interest. Third, all rules and regulations, including codes of ethics should be transparent and applied consistently. Fourth, all regulations should be administered in a way which serves the interest of clients and facilitates the effective delivery of legal services as well as the independence of the legal profession. Finally, regulations should promote access to competent legal advice, subject to appropriate safeguards given the sensitivity of client's private and commercial data. These concepts arguably embody principles enshrined in the GATS regarding non-discrimination (Article II and XVII), transparency (Article III), market access (Article XVI) and general exceptions, in particular the chapeau requirement preventing measures which are arbitrary (Article XIV). In that sense they reinforce universal international trade norms in the context of a specific profession.

Turning its attention to MRAs as instruments of trade liberalization in legal services, the IBA's report on Standards and Criteria for Recognition of the Professional Qualifications of Lawyers issued in 2001⁴⁴ outlined the mat-

⁴³ International Bar Association, IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers (adopted by the IBA Council Meeting, Vienna, 1998).

⁴⁴ International Bar Association, Recognition of the Professional Qualifications of Lawyers (adopted by the IBA Council Meeting, Istanbul, 2001).

ters which should be covered by MRAs for legal services concluded among WTO Member under Article VII of the GATS. First, the IBA asserted that the legal profession fulfils a special role in democratic societies, facilitating access to justice and upholding the rule of law. As officers of the court, lawyers are the guardians of the rights of citizens and this responsibility requires the highest standards of integrity so that there is public confidence in the justice system. Therefore, criteria for the recognition of qualifications of the practice of law should include ethical and moral qualifications in addition to intellectual ones based on the competence to supply the service. The implication here, which may be regarded as somewhat self-serving, is that the legal profession has a special status relative to other professions because of the important role lawyers play in the functioning of a society, a claim which is perhaps stronger in relation to those lawyers who represent vulnerable individuals in claims against the state than it is in the case of those who facilitate the conclusion of multinational business deals. The IBA recognized that the exclusion of assessment on the basis of moral integrity would undermine the practical value of Art VII of the GATS for the legal profession as no state would be willing to grant mutual recognition without these fundamental criteria as a baseline. The principle of mutual recognition requires that the contracting parties maintain a degree of confidence in each other's regulatory systems, which is only possible if they share similar political systems, cultures and values. While this might be the case, for example, among EU Member States, it is not necessarily true across the whole membership of the WTO, two thirds of which are developing countries, some of which do not have democratic governments, or which score poorly on corruption indices. This may be precisely why MRAs, and indeed many legal services liberalization initiatives, have shifted to the bilateral and regional context among countries which have a closer economic connection, as captured by negotiated FTAs.

The IBA also emphasized the fact that the legal profession is distinct from other forms of economic activity because it concerns substantive knowledge which is heterogenous. The education and training of legal professionals tends to relate to a particular national or even sub-national legal system, which is quite unlike, for example, the medical profession where applicable principles are based on science and therefore virtually identical from one country to the next. The IBA pointed further to the regulatory structure of the legal profession wherein the supervision of the profession is carried out often at the sub-regional or even local rather than national level, again because of the highly localized nature of the service itself. Moreover, in some cases the regulators are governmental in others they are independent professional bodies acting under delegated authority. Consequently, the IBA

urged that the phrase “competent authorities” found in the GATS Art VI on domestic regulation must be interpreted broadly. In a sense this provision should be viewed as a kind of concession on the part of the IBA as to the practical limitations of the globally mobile lawyer. The organization expressly acknowledged that uniform, worldwide recognition of legal services may be unfeasible.⁴⁵

The IBA went on to recommend a set of standards and criteria which it felt should feature in MRAs for legal services. This was done with a view to standardizing these documents and, in so doing, facilitate their conclusion in conjunction with FTAs or autonomously under GATS Article VII. While based on the above principles, the guidelines are highly pragmatic, reflecting the needs of an internationally mobile profession proficient to serve the interest of their globally-minded clients. First, such agreements should include material ensuring the home jurisdiction’s capacity to regulate and provide discipline. A host country necessarily relies heavily on the integrity and effectiveness of the system of professional regulation in place in the home country – the fact that the lawyer has been admitted to practice in the home jurisdiction enables the host jurisdiction to allow that individual to carry out the practice of law within their territory. Grounded in trust, the home state’s rules are an effective means of ensuring that applicants meet the competence and ethical standards of the host state. Secondly, the MRA should address the character and fitness of the legal practitioner. The host state needs to be satisfied that a lawyer in good standing in the home state has sufficient ethical and moral suitability to act as an agent of the court and as a champion of citizens’ rights, even if they are practicing within a restricted scope, such as home state law or international law, as in the case of the Foreign Legal Consultant designation common to many jurisdictions.⁴⁶ Third, education and practical training should be taken into account when evaluating the qualifications of the applicant, depending on the nature of the professional activities they choose to undertake. This will include a consideration of the level and duration of legal education as well as the quality of the program and the institution of learning, many of which are certified by domestic professional associations like the ABA or the Bar Standards Board in the UK. The IBA considered, as part of its commentary on education and training in MRAs, that the degree of similarity of legal systems between the home and host state should be relevant when assessing equivalence. Where the differences are more marked (for example as between common and civil

⁴⁵ This may also be construed as a concession to lawyers who are worried that their dominance may be threatened by foreign market entrants.

⁴⁶ A. Pardieck, “Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy”, 3:2 *Indiana Journal of Global Legal Studies* Article 5 (1996).

law countries), the host jurisdiction may legitimately require the completion of supplemental education or training by the applicant for the purpose of curing deficiencies in their knowledge of the law of the host jurisdiction, in keeping with the rational discretion found in GATS Article VII.

The IBA urged that states entering into MRAs for legal services should be entitled under GATS to require that recognition may be conditioned upon the completion of a specified period of experience in the practice of law. Echoing the general exceptions of GATS Article XIV, the period should not be longer than reasonably necessary to establish the ability of the individual to practice law in a competent manner and in accordance with the rules of professional responsibility. The reference to “necessary” leaves some discretion to the regulating authorities of the MRA parties, which may again be viewed as a concession to the reality that the process of recognition requires a degree of embedded flexibility. The IBA urged that failure to acknowledge the qualifications and training specified in the rules of some jurisdictions should not be viewed as a violation of the MFN obligation under Art II of the GATS. That this would be an issue at all seems implausible as the guarantee against discrimination specifies that services suppliers must be “like” – given the vast differences in legal systems it would be difficult to argue that an English solicitor is “like” a Japanese *bengoshi*, despite both being notionally legal practitioners. Still, the IBA explained that while Article VII of the GATS does not mention the expressly the criteria of morality and integrity, their application in the context of Art VII is justified by the unique status of the legal profession in society and, seemingly more convincingly, the objective differences that exist among the many domestic legal systems of the world.

The IBA additionally suggested that MRAs should include material on scope of practice limitations for foreign qualified lawyers. Such limitations should be set out as clearly as possible, with details regarding whether practice of home or host state law as well as international law are permitted, along rights of audience in courts or participation in arbitration, whether domestic or international. The MRA should also indicate what forms of association are permitted for foreign lawyers, including whether they can practice with local lawyers in firms or can be hired by them. Disciplinary matters and rules of professional conduct should also be covered by the MRA supplemented by a clear explanation of the competent authorities in charge of regulating legal services. The de-centralized regulatory structure of the legal profession in some countries can create practical problems in terms of compliance with the obligations contained in the MRA, necessitating a full description of the bodies which are to be held to its pronouncements. The emphasis here appears to be one of transparency, which is a general obligation in GATS Article III and arguably a principle of customary

international law.⁴⁷ The IBA noted that issues regarding the enforceability of the MRA will need to be addressed on a case-by-case basis in a manner that is compatible with the way the legal profession is regulated in the relevant party state. Although it did not state so expressly, it would seem as though joint committees created under FTAs for the purposes of mutual recognition would fulfil this function.

Whether the IBA has been directly involved in the negotiation of an actual MRA on legal services is unknown. Nor is it clear that any concluded MRA covering legal services have considered the IBA's guidelines, although this is highly probable. Material on trade in legal services in the Professional Services Annex of the CPTPP covers many of the issues that were raised by the IBA,⁴⁸ as does the APEC Legal Services Initiative⁴⁹ mentioned earlier. This strongly suggests that the IBA's materials were taken into consideration during the negotiation of these instruments. As there are many barriers to trade in legal services which need to be addressed, MRAs in legal services concluded under existing or future FTAs will most likely engage with many of the issues raised by the IBA guidelines. Furthermore, on a multilateral scale it is not difficult to envision a role for the IBA in negotiating and monitoring the implementation of a global MRA on legal services in conjunction with the Council for Trade in Services within the WTO.⁵⁰

VI. THE IBA AS A META-LAWMAKER

The IBA's work in relation to the facilitation of trade in legal services has the potential to build a foundation for the creation of international law across many sub-specialisms, including human rights and commerce, and involving both procedure and substantive rules. It may be challenged that such foundation-laying does not demonstrate that the IBA is a law-maker either in the sense of international law or global law as these terms are understood. The process of law formation, including the main actors involved in such processes depending on the issue under consideration (e.g. states or the WTO), is distinct from the constitutive processes by which law is formed and becomes recognized generally, at which point the law is often recognized as a "source" of law. This latter characteristic may need modification

⁴⁷ A. Bianchi (ed.), *Transparency in International Law* (Cambridge University Press, 2013).

⁴⁸ Annex 10-A, 9-10, CPTPP.

⁴⁹ Terms of Reference, APEC Legal Services Initiative, <<http://www.legalservices.apec.org/terms-of-reference.html>> (January 2019).

⁵⁰ International Bar Association, Recognition of the Professional Qualifications of Lawyers (adopted by the IBA Council Meeting, Istanbul, 2001) at 8-9.

in the modern era of global law where the classic sources⁵¹ are but some of many, and where the legitimacy is highly contested, despite the paradoxical acceptance of certain universal norms. Yet is precisely the indeterminacy of global law where both these processes have become occluded in which the IBA has risen to prominence. Scholars have identified a phenomenon within international law which may be thought of as “pan-legalism” – a multiplication of the number of classical and new sources of law from across the world, including developing countries. This is something like the global law phenomenon discussed above. Varied sources call into question their normative character and with it their effectiveness and legitimacy, particularly in terms of their predictability and stability.⁵²

MRAs framed around ongoing cooperation between states in conjunction with professional regulatory bodies, like law societies and bar associations, and encouraged through the standardization initiatives of the IBA, are a paradigmatic example of this new terrain in international law. The growing prominence of this multi-sourced law-making has been celebrated by some. Brummer, for example, applauds the turn away from treaty-based formulations of international law to an approach characterized by explicitly non-binding accords where transaction costs of negotiation are reduced and where coordination takes place between technocrats and administrative agencies, often with limited interference by political outsiders. As they are non-binding, soft law instruments like the IBA’s MRA guidelines may be amended more easily. This may allow parties to experiment and to change direction when new information emerges, or circumstances change,⁵³ for example in relation to the growing use of technology and automation in the delivery of legal services.⁵⁴ In that sense they are intrinsically suited to adoption as sources in a world governed by global law.

The ascendancy of soft law, promulgated in part through the efforts of non-state actors like the IBA and its work to standardize MRAs, may also be viewed as a manifestation what Koskenniemi has referred to as the “managerialism” of international law. This is the transformation of law to a process of broadly formulated directives created by experts for the purpose of administering international problems by means of pragmatic solutions and balanced interests.⁵⁵ Koskenniemi has criticized this “retreat” of interna-

⁵¹ E.g. as articulated in Art. 38(1)(d) of the Statute of the International Court of Justice.

⁵² Jouannet, above footnote. 9 at 48.

⁵³ C. Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (Cambridge University Press, 2014) at 18-19.

⁵⁴ See, e.g. R. Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press, 2017).

⁵⁵ M. Koskenniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization”, 9 *Theoretical Inquiries in Law* 2006 at 13.

tional law because conferring law-making authority on experts who oversee solutions to technical problems merely empowers certain groups over other ones, depending on how issues and problems are defined.⁵⁶ Thus the IBA's guidelines on MRAs, which are rather technical in nature, may be arguably said to serve the interests of the already powerful global community of lawyers, irrespective of the country in which they are located. Indeed, there are few professions composed of individuals as well-placed or influential as that of international lawyers, particularly those who serve multinational clients.⁵⁷ By enlarging the pool of qualified legal practitioners to include those with foreign qualifications, the needs of (certain) consumers are also addressed by MRAs. Likewise, the Foreign Legal Consultant designation common to many jurisdictions, tends to permit the practice of international law, with greater restriction on the practice of host state law. Whereas the former is a niche area of interest primarily to global clients (multinational enterprises) served by international law firms which are the core of the IBA's membership, the latter is subject to far greater restrictions. This maybe explained by the fact that liberalization here could encroach on the territory of established domestic suppliers, although such services may be of greater use to clients of more modest means.

The rise of the international or internationally-mobile lawyer must be viewed in conjunction with the observed "socialization" of international law that has taken place through the interactions of practitioners and scholars engaging in discourse via a shared language. The resulting "interpretive community" or "epistemic community" has created and reinforced some of the foundational doctrines of international law.⁵⁸ This group has managed to thrive despite limited progress in liberalizing trade in legal services under the GATS or FTAs in part because lacking centralized political authority, the international realm is generally characterized by uncertainty about sources of legitimacy presenting an opportunity for a range of actors to acquire *de facto* authority if they are to able to convince others of their legitimacy in creating conditions that stabilize expectations.⁵⁹

It is often thought that legal disciplinary discourses, which are often shaped through the interaction of learning and usage, offer a highly adaptable sense of continuity. In one sense, they have a resilience which allows for the conscious linkage of different stages of legal development. In another

⁵⁶ M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", 70 *Modern Law Review* 1 (2007) at 29.

⁵⁷ Another such profession is financial services, although many of these professionals also hold legal qualifications and would similarly seek to enlarge their capacity to serve international clients.

⁵⁸ D'Aspremont, above footnote. 3 at 10-13 and Walker, above footnote. 9 at 65.

⁵⁹ N. Luhmann, *A Sociological Theory of Law* (Routledge, 2nd edn., 2014).

way they offer a reference point for the responsive application of trends in legal thought to changed circumstances.⁶⁰ International lawyers are instrumental in the construction of transnational regimes that enhance this predictability, amplifying their own legitimacy.⁶¹ They are also well placed to invoke many of the universal norms that drive globalization, such as open markets or human rights,⁶² potentially expanding their client base and with it their global influence. Small units of highly specialized individuals may contribute to the development of norms within discrete practice areas.⁶³ As a global representative body of the legal profession with membership including individual lawyers, law firms and local law societies in many countries, the IBA has been monumentally productive in this process.⁶⁴

International agreements like MRAs, which strengthen the practice rights of internationally mobile lawyers, operate to entrench the dominance of a global legal profession, whether these people work as individuals or as employees or representatives of other international organizations or of states themselves.⁶⁵ In so doing, it may be suggested that the IBA has engaged in a kind of “meta-law-making.” By this it is meant that the IBA, as an association of lawyers, is concerned with the entitlements and responsibilities of the legal profession itself less so than the substantive content of any one specialism within international law. While the IBA does maintain internal divisions that advocate reforms in matters such as environmental law, corporate and criminal law, its primary function is managing the welfare of the legal profession as a whole. It empowers the agents (international lawyers) who underpin negotiations, discussions, policy-making, judicialization, contestation and formal legislation through which other international legal norms are created across a wide variety of fields e.g. the environment, human rights, armed conflict, trade and many more. Thus, in seeking to expand trade in legal services in order to advance the agenda of its members, the IBA also achieves the secondary purpose of liberalizing the rules of international trade *per se* just as it does in all fields of law in which there is an international element, such as human rights or the environment. Through this indirect action, the work of the IBA therefore cross cuts much international law-making.

⁶⁰ Walker, above footnote. 9 at 86.

⁶¹ M.C. Regan Jr., “Lawyers, Globalization and Transnational Governance Regimes”, 12 Annual Review of Law and Social Science 133 (2012).

⁶² Y. Dezalay, B.G. Garth, (eds.), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011).

⁶³ E.g., The Association of Lawyers in Intergovernmental Finance and Development Organisations (ALIFDO) <<http://alifdo.com>> (January 2019).

⁶⁴ B. Santos, *Law and Globalization from Below: Towards A Cosmopolitan Legality* (Cambridge University Press, 2005).

⁶⁵ Recall that improving the profession’s “status” is one of the IBA’s core missions: IBA Constitution Art. 1.2.

Informal rule-making by the community of international lawyers has important iterative consequences on the interactions among non-state actors. It has been suggested that international organizations interact with each other in a symbiotic manner of mutual constitution. The WTO, for example, asserts its realm of influence by relating to non-trade systems, such as those embraced by international environmental law or international human rights law. This “other reference” is vital because the organization is only able to make sense of its own narrow agenda by relating to generalized others.⁶⁶ Mutual constitution is impossible in the case of the IBA, however, because the IBA has an all-embracing legal mandate – its very purpose is to further the interests of the legal profession as broadly construed – a role which overlaps the sphere of other many other organizations as a source of legal norms (for example the WTO in the realm of international trade). In this sense the IBA will always be somewhat of an outlier in the universe of non-state actors, not simply because as a professional association it falls outside the classic understanding of an international organization, but because its object of advancing the interest of the body of international lawyers is implicitly contained in the work of all other international organizations which seek to influence international law-making, undermining its self-actualizing distinctiveness. Coming to terms with the “identity” of the IBA in this way may be problematic from the perspective of evaluating it in terms of its purpose and its effectiveness as an institution, possibly explaining why there has been a dearth of academic commentary in this area.

VII. CONCLUSION

Liberalized trade in legal services may be crucial in advancing economic globalization underpinned by the rule of law. This is especially important for developing countries which may suffer from a weaker rule of law, or even where it is present, have not opened their legal services markets to foreign suppliers. Obviously but non-trivially, enlarged trade in legal services also denotes greater professional opportunities for lawyers who practice international law or who practice domestic law but seek to do so in other jurisdictions. This has profound implications for the status and composition of the non-state actors who set the agenda for much of the technical rulemaking in the international stage. It would seem as though the jurisdiction-specific nature of legal services would likely preclude the principle of mutual recognition from ever becoming a rule of customary international law based on persistent and (near) universal state practice. Yet, by extending lawyers’

⁶⁶ Cho, above footnote. 18 at 173.

entitlement to practice across a range of jurisdictions (and in international law itself) through standardized instruments like MRAs, the IBA indirectly sets the agenda of the often highly-influential international organizations in which these professionals work. This work is poised to become important for developing countries in particular as they lack a tradition of pursuing bilateral MRAs at all, let alone in legal services. As the global representative body of the legal profession, the IBA may therefore be accurately characterized as a crucial self-affirming non-state actor in international law, or perhaps more aptly global law in the sense of universally accepted norms arising from a variety of sources including the interactions of non-state actors.

Through initiatives designed to increase lawyer's global mobility like the MRA guidelines discussed in this article, the IBA carves out ever-expanding space for its members (international lawyers) to represent, advise and interpret the norms upon which international law is based. This in turn entrenches the law-making capacity of other non-state actors who employ these individuals, with the WTO and the UN as two prominent examples. Whether or not this shift away from traditional sources of international law in favour of the more inchoate phenomenon of global law will lead to a weakening in global governance, as some have feared, was very much beyond the scope of this article. Since national legal departments responsible for the negotiation of international treaties are also comprised of lawyers who practice international law or who seek to apply the principles of their own domestic legal systems in other jurisdictions, the IBA is also instrumental in empowering the conventional actors of international law – the states themselves. In the past this has been primarily the developed states, but this may change as developing countries prosper economically and increase their participation in other international organizations. In light of this vital role as a meta-law-maker, further studies into the institutional features and decision-making processes of the IBA are needed in order to illuminate some of the informal processes sustaining much of the modern construction of international law.