FROM GATS TO APEC: THE IMPACT OF TRADE AGREEMENTS ON LEGAL SERVICES

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ABSTRACT [43 Akron L. Rev. 675 (2010)]

This article provides a comprehensive overview of the treatment of legal services in the United States' international trade agreements. Although many individuals are now familiar with the General Agreement on Trade in Services (GATS), far fewer realize that legal services are included in at least fifteen international trade agreements to which the United States is a party. This article begins by identifying those trade agreements and other developments including the 2009 Legal Services Initiative of the Asia Pacific Economic Cooperation (APEC). The article continues by explaining the structure of the GATS and comparing its provisions to the provisions found in the NAFTA and in other international trade agreements. The article includes several tables that compare the structure and content of the fifteen trade agreements applicable to legal services. The fourth section of the article reviews legal services-related implementation efforts, including GATS Track #1 developments related to the Doha Round negotiations, GATS Track #2 developments regarding the development of "any necessary disciplines," implementation efforts for other trade agreements, and developments that are indirectly related to these trade agreements. The final section of the article addresses the impact of trade agreements on U.S. lawyer

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regulation. It concludes that these trade agreements, which reflect larger developments in our society, have affected the vocabulary, landscape and stakeholders involved in U.S. lawyer regulation.

I. INTRODUCTION

It has been almost a decade since I first wrote[1] about the effect on legal services of the General Agreement on Trade in Services or the

1. Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002) [hereinafter Terry]. For my additional GATS articles, *see infra* note 3. *See also* ABA GATS-Legal Services website, http://www.abanet.org/cpr/gats/home.html.

GATS.[2] I was very pleased to be asked to write about the GATS for the inaugural symposium of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law because there have been a number of developments since my first GATS article and because my understanding of the issues is much deeper than it was a decade ago, when I first started studying them. I have not written a comprehensive overview since that first article,[3] and I am delighted to have the opportunity to now do so. Section II of this article continues with a description of the trade agreements phenomenon and identifies fifteen U.S. trade agreements that apply to legal services. Section III(A) reviews the structure of the GATS, and Section III(B) reviews the structure of the other fourteen trade agreements that apply to legal services. Section IV explains how these agreements have been implemented by focusing on GATS Track #1 developments, GATS Track #2 developments, developments directly related to other trade agreements, and other developments. Section V concludes by addressing the impact of trade agreements on U.S. lawyer regulation.

II. FROM GATS TO APEC: INTERNATIONAL TRADE AGREEMENTS APPLICABLE TO LEGAL SERVICES

Although I was asked to write and speak about the GATS and legal services for this Symposium, as Section II's heading indicates, I believe

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2. The General Agreement on Trade in Services is contained in Annex 1B to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. *General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization*, 33 I.L.M. 1125, 1167 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf [hereinafter GATS].

3. My articles on the GATS are available on my personal webpage at http://www.personal.psu.edu/faculty/l/s/lst3/publications.htm. My webpage also includes selected PowerPoint presentations about the GATS and legal services at http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm.

When asked what I recommend as an introduction to the GATS, I usually recommend my GATS limericks because they are only two pages long (plus footnotes) but provide a comprehensive look at the GATS. Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICH. ST. J. INT'L L. 635 (2007), *available at* http://www.abanet.org/cpr/gats/GATS_in_Limerick.pdf. Although I find these limericks amusing and educational, I realize that many would prefer a more traditional approach to the topic such as this article. For those who would prefer something shorter than this article, I recommend my limericks, *supra*, or the slides from the fifteen minute talk I gave at the inaugural symposium of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law; these slides were the basis for this law review article. *See* Laurel S. Terry, *From GATS to APEC: The Impact of International Trade Agreements on Lawyer Regulation* (Oct. 9, 2009), available as a link from http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm (follow the "APEC" hyperlink).

it is important to address the broader issue of legal services in international trade agreements. Many U.S. legal professionals are now aware of the fact that the GATS applies to legal services, but I suspect that most of these individuals do not realize that the U.S. has negotiated fifteen international trade agreements that apply to legal services.[4] These numbers demonstrate how routine it has become to include legal services in U.S. international trade agreements.

The practice of including services within trade agreements is of relatively recent origin. Although the major global trade agreement covering "goods" is more than sixty years old,[5] "services" have been included in international trade agreements for less than twenty years. Most commentators usually point to the 1992 North American Free Trade Act (NAFTA)[6] as the first example of an international trade agreement that applied to legal services.[7] Although the NAFTA was technically not the first U.S. international trade agreement to include "services" within its coverage, it was the first multilateral trade agreement to do so.[8] (Before the NAFTA, the United States had a trade agreement with Israel that included a "services" paragraph.[9] The U.S.

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4. For citations to these fifteen agreements, see *infra* notes 5-6, 9, and 31-41.

5. *See General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT (not GATS)]. *See also WTO, Press Brief: Fiftieth Anniversary of the Multilateral Trading System*, http://www.wto.org/english/theWTO_e/minist_e/min96_e/chrono.htm (noting that the GATT was signed in 1947 and became effective in 1948; this article reviews its history including its inclusion in the WTO system).

6. *North American Free Trade Agreement, U.S.-Can.-Mex.*, 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The NAFTA became effective Jan. 1, 1994; its signatories include the United States, Mexico, and Canada. *Id. See also* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (implementing NAFTA into U.S. law).

7. *See*, *e.g.*, Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, 2008 J. PROF. L. 189, 190-91 (2008).

8. *Id.*

9. *See Israel-United States: Free Trade Area Agreement Done at Washington*, 24 I.L.M. 653 (1985), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp [hereinafter Israel FTA]. *See also* United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (June 11, 1985). The Israel FTA took effect on Aug. 19, 1985. *See* Trade Compliance Center, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (last visited Apr. 15, 2010) (listing the United States' trade agreements). Article 16 of the U.S.-Israel FTA applies to services and states in its entirety:

> The Parties recognize the importance of trade in services and the need to maintain an open system of services exports which would minimize restrictions on the flow of services between the two nations. To this end, the Parties agree to develop means for cooperation on trade in services pursuant to the provisions of a Declaration to be made

also had a trade agreement with Canada that preceded the NAFTA, but it did not cover legal services.[10])

It is easy to understand why—both in 1992 and today—governmental officials and lawyers have wanted to include services, including legal services, within the ambit of trade agreements. For example, someone who was a government official at the time of the NAFTA negotiations has explained that services were included in the NAFTA because they were a large part of the U.S. domestic economy, they were the subject of significant international trade, and they were an area in which the United States had a trade balance advantage (unlike trade in goods).[11] When the NAFTA was signed, the services sector employed approximately 79 percent of the U.S. work force and accounted for about 52 percent of U.S. Gross Domestic Product (GDP), which was more than any other sector.[12] Internationally, services accounted for approximately 19 percent of global trade. The United States was the largest services exporter in the world, and "ha[d] been enjoying a rising surplus in services trade."[13] Thus, including services within the NAFTA was expected to have positive economic consequences—especially if it led to an 80 percent increase in services exports, as had its predecessor, the 1988 U.S.-Canada Free Trade Agreement.[14] Indeed, not only did the NAFTA apply to services, but it also focused specifically on legal services. In addition to its general chapter on "services," the NAFTA included a "Professional Services"

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by the Parties.

Israel FTA, *supra*, at Art. 16. The U.S. Government Trade Compliance Center describes the provisions on Trade in Services as "not legally binding." Because it was the first U.S. FTA to include services and because it arguably includes a commitment to "agree to develop means for cooperation," the Israel FTA is included in this article.

10. *See Canada-U.S. Free Trade Agreement*, 27 I.L.M. 271 (1988) at Article 1408, *available at* http://www.canadianeconomy.gc.ca/english/economy/1989economic.html. The "Definitions" section states: "For purposes of this [Services] Chapter: … covered service means a service listed in the Schedule to Annex 1408 and described for purposes of reference in that Annex". The services covered by this Chapter include: "[p]rofessional services, such as [listing a number of professional services, but not legal services]"); *accord* Schedule For United States: (omits Standard Industrial Classification [SIC] 81, legal services). *See also* U.S.-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851.

11. *See* Harry G Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT'L LAW. 623, 626-28 (1993).

12. *Id.* at 624.

13. *Id.* at 624-25.

14. *Id.* at 625-26. *See also* Colleen S. Morton, *The Impact of the Free Trade Agreement on the Flow of Services Between Canada and the United States*, 16 CAN.-U.S. L.J. 91, 91 (1990) (discussing services statistics in the 1980s; also discusses U.S. position in the GATS negotiations).

Annex that had three sections, one of which focused on foreign legal consultants.[15]

Today, as was true in the 1990s when the NAFTA was negotiated, services are an important economic issue for the U.S. Although current news reports often focus on issues related to trade in goods or trade in agriculture, trade in services is a significant part of the U.S. economy and is growing. For example, a July 2009 *Recent Trends in Services* government report found that "U.S. services overall, and professional services in particular, grew faster in 2007 in terms of contribution to gross domestic product, employment, and cross-border exports than the average annual rate of the preceding five-year period."[16]

Professional services are an important part of the services market. In 2007, U.S. trade in professional services accounted for 19 percent of total U.S. cross-border services exports and 18 percent of U.S. cross-border services imports;[17] it yielded a "substantial cross-border trade surplus" with U.S. exports "far exceeding" (by $30 billion) U.S. imports of professional services.[18] Because U.S. professional services suppliers are "particularly competitive in the world market,"[19] it should come as no surprise that there is strong interest in promoting their ability to continue to trade at a surplus. Professional services are also important domestically. For example, in 2007, U.S. professional service industries were responsible for 17 percent of the U.S. private-sector gross domestic product (GDP)."[20] The *Recent Trends* report found that professional service workers make up a large and growing share of the U.S. private sector workforce (22 percent) and tend to earn higher wages than workers in other sectors.[21]

Legal services are among the professional service sectors that have experienced strong growth and that have helped the U.S. trade balance. The 2009 *Recent Trends* report described U.S. legal services as "very

15. NAFTA, *supra* note 6, at Annex 1210.5. Section B of the Professional Services Annex addressed "Foreign Legal Consultants." *Id.* The NAFTA defines professional services as "services, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services provided by trades-persons or vessel and aircraft crew members . . ." *Id.* at Art. 1213.

16. UNITED STATES INTERNATIONAL TRADE COMMISSION, RECENT TRENDS IN U.S. SERVICES TRADE, 2009 ANNUAL REPORT, PUBLICATION xi (July 2009), *available at* http://www.usitc.gov/publications/332/pub4084.pdf [hereinafter Recent Trends 2009].

17. *Id.* at 2-7.

18. *Id.* at xiii.

19. *Id.* at 2-7.

20. *Id.* at xi.

21. Recent Trends 2009, supra note 16, at xi and 2-3.

competitive in the global market," noting that they accounted for 54 percent of global revenue in 2007 and comprised 75 of the top 100 global firms ranked by revenue."[22] This report also noted that U.S. legal services exports remain significantly larger than U.S. legal services imports.[23] The report offered some explanation for this growth in U.S. legal services trade, noting that there had been "increased demand for legal services resulting from globalization and economic growth in emerging markets."[24] The report also pointed out the important role of legal services in facilitating other trade, stating "[t]he professional services sector provides critical inputs to all sectors of the economy, including other services. For example, law firms provide support for commercial transactions and buyer/seller relationships."[25]

Given the "particularly competitive" nature of U.S. professional services and the "very competitive" position of U.S. legal services, since 1992 a number of U.S. government officials, lawyers, and others have been interested in including legal services in trade agreements. The GATS was signed in April 1994, not long after the NAFTA took effect.[26] The GATS differed from the NAFTA in some significant respects,[27] but it too applied to international trade in services, including

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22. *Id.* at 6-1. For additional information and statistics about globalization in general and its effect on legal services, see Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527 (2008); Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUDIES L. REV. 463, 492-495 (2005). Both articles are available at http://www.personal.psu.edu/faculty/l/s/lst3/publications.htm (follow hyperlink designating desired title).

23. Recent Trends 2009, *supra* note 16, at 6-7 to 6-8. U.S. legal services exports grew by 21 percent in 2007, increasing more rapidly than the average annual rate of 14 percent from 2002 through 2006. The report noted, however, that in 2007, U.S. legal services imports grew more rapidly than exports. Nevertheless, in 2007, the U.S. legal services trade surplus was $4.9 billion. The U.S. exported $6.4 billion in legal services and imported $1.6 billion in 2007. *Id.* at 6-7 to 6-8. Sales by foreign legal service affiliates of U.S. law firms have also exceeded purchases from U.S. legal service affiliates of foreign law firms. *Id.* at 6-13. Starting in 2006, the U.S. Bureau of Economic Affairs (BEA) began to report data for affiliated cross-border trade in legal services. *Id.* Thus, the data for 2006 and 2007, which include both affiliated and unaffiliated trade data, are not strictly comparable to the data for previous years, which include unaffiliated trade only. *Id.* For information about the differences between affiliated and unaffiliated trade, see *id.* at 6-8 Box 6-1.

24. *Id.* at 2-1, 6-1.

25. *Id.*

26. *See* Karen Dillon, *Unfair Trade?*, 4/1994 AM. LAW. 53, 54-57 (1994) (describing the last-minute December 1993 negotiations about legal services); GATS, *supra* note 2 (notes April 1994 signing date and January 2005 effective date).

27. *See infra* notes 174, 183, 194 and accompanying text (discussing some key differences). As that section explains, the NAFTA uses a "negative list" approach in which services are presumptively covered by all NAFTA provisions unless a country "opts out" by listing a particular service on its "annex." The GATS, in contrast, uses a "positive list" approach in which certain

legal services. The GATS was the first global agreement to apply to services and the United States was a proponent of including services within the new WTO agreements.[28]

The GATS, the NAFTA, and the thirteen other free trade agreements (FTAs) are available as links on the webpage of the Office of the U.S. Trade Representative (USTR).[29] The nine bilateral FTAs are (in chronological order of effective date): Israel (1985),[30] Jordan (2001),[31] Chile (2004),[32] Singapore (2004),[33] Australia (2005),[34] Morocco (2006),[35] Bahrain (2006),[36] Oman (2009),[37] and Peru (2009).[38]

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provisions of the GATS only apply if a country "opts in" by listing a particular service sector, such as legal services, on its "Schedule." *Compare* GATS, *supra* note 2, at Article XX: Schedules of Specific Commitments, *with* NAFTA, *supra* note 6, at Annex I: Reservations for Existing Measures and Liberalization Commitments.

28. *See* Terry, *supra* note 1, at 994; Broadman, *supra* note 11, at 630 ("The effort to incorporate services into the GATT's multilateral system is rooted in an initiative of the United States in the early 1980s.")

29. Office of the United States Trade Representative, Free Trade Agreements, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Apr. 19, 2010).

30. Israel FTA, *supra* note 9.

31. *U.S.-Jordan: Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, 41 I.L.M. 63 (2002), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text [hereinafter Jordan FTA]. *See also* United States-Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, 115 Stat. 243 (Sept. 28, 2001).

32. *U.S.-Chile Free Trade Agreement*, 42 I.L.M. 1026 (2003) (final text), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text [hereinafter Chile FTA]. *See also* United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (Sept. 3, 2003).

33. *U.S.-Singapore Free Trade Agreement*, 42 I.L.M. 1026 (2003), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text [hereinafter Singapore FTA]. *See also* United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (Sept. 3, 2003).

34. *United States-Australia Free Trade Agreement*, 43 I.L.M. 1248 (2004), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text [hereinafter Australia FTA]. *See also* United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, 118 Stat. 919 (Aug. 3, 2004.)

35. *United States-Morocco Free Trade Agreement*, 44 I.L.M. 544 (2005), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text [hereinafter Morocco FTA]. *See also* United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (June 17, 2004).

36. *United States-Bahrain Free Trade Agreement*, 44 I.L.M. 544 (2005), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta [hereinafter Bahrain FTA]. *See also* United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581 (Sept. 14, 2004).

37. *U.S.-Oman Free Trade Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text (last visited Apr. 16, 2010) [hereinafter Oman FTA]. *See also* United States-Oman Free Trade Agreement Implementation Act, Pub. L. No.109-283, 120 Stat. 1191 (Sept. 26, 2006).

Three more bilateral FTAs have been signed and are awaiting Congressional approval (Colombia,[39] Panama,[40] and the Republic of Korea[41]). In addition to these twelve completed bilateral FTAs, the United States either currently or in the past has participated in bilateral FTA negotiations with additional countries, including Malaysia, Thailand, and the United Arab Emirates.[42]

In addition to these multinational and bilateral agreements, the U.S. is a signatory to another regional agreement, which is the Central American-Dominican Republic Agreement (CAFTA-DR).[43] The other signatories include Costa Rica, El Salvador, Guatemala, Honduras, and

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38. *U.S.-Peru Trade Promotion Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa (last visited Apr. 16, 2010) [hereinafter Peru FTA]. *See also* United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (Dec. 14, 2007). *See also* STATEMENT OF U.S. TRADE REPRESENTATIVE SUSAN C. SCHWAB REGARDING ENTRY INTO FORCE OF THE PERU FTA (Jan. 16, 2009) (citing the Feb. 1, 2009 as effective date of the FTA per a proclamation by President Bush), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/january/statement-us-trade-representative-susan-c-schwab-r.

39. *U.S.-Columbia Free Trade Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta (Pending Congressional Approval) (last visited Apr. 16, 2010) [hereinafter pending Colombia FTA].

40. Office of the United States Trade Representative, *U.S.-Panama Trade Promotion Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa (Pending Congressional Approval) (last visited Apr. 16, 2010), [hereinafter "pending Panama FTA"].

41. Office of the United States Trade Representative, *Korea-U.S. Free Trade Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (Pending Congressional Approval) (last visited Apr. 16, 2010) [hereinafter pending Korea FTA or KORUS].

42. *See* 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (Feb. 2009), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file86_15410.pdf [hereinafter 2009 Trade Policy Agenda]. For Thailand, see *id.* at 117. The U.S. suspended FTA negotiations with Thailand in 2006. *Id.* "Although FTA negotiations remained suspended in 2008, U.S. and Thai officials continued to discuss bilateral issues . . ." *Id.* For Malaysia, see *id.* at 118. "The United States and Malaysia held two rounds of negotiations of a Free Trade Agreement in 2008. Solid progress has been made in the negotiations, which were launched in March 2006, although some significant challenges remain." *Id.* For the United Arab Emirates, see *id.* at 123. "The United States and the United Arab Emirates decided early in 2007 that the timing was not conducive to concluding bilateral FTA negotiations and have since sought to pursue trade and investment enhancement through a 'TIFA-Plus' process." *Id.*

43. Office of the United States Trade Representative, *U.S.-Dominican Republic-Central America Free Trade Agreement*, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited Apr. 16, 2010) [hereinafter CAFTA-DR]. *See also* Dominican Republic–Central America – United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (Aug. 2, 2005). The CAFTA originally was scheduled to take effect in January 2006. Since not all countries had taken the necessary action by that date, the United States used rolling implementation dates, which were announced in presidential proclamation. One can locate these proclamations by using the "search" function on the USTR's webpage and inserting CAFTA and presidential proclamation. All agreements took effect in 2006 or 2007.

Nicaragua, and the Dominican Republic.[44] The United States has tried to negotiate other regional trade agreements, including the proposed Free Trade of the Americas Agreement (FTAA) and agreements with the Middle East Free Trade Area Initiative (MEFTA), the South Africa Customs Union (SACU), and the Enterprise for ASEAN Initiative.[45] Although most of these regional negotiations currently are in abeyance, the United States remains interested in additional regional trade agreements, as well as bilateral agreements.[46]

For a number of years, the U.S. government has been statutorily required to consult with private industry groups before signing any FTAs.[47] The group responsible for advising on services, including legal services, was previously known as ISAC-13[48] and currently is known as ITAC 10.[49] It may be more difficult to adopt FTAs in the future than it

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44. *Id.* Since this agreement often is cited as CAFTA-DR, I have used "ands" to designate the Central American countries that are part of the CAFTA and an additional "and" for the Dominican Republic.

45. *See generally* 2009 Trade Policy Agenda, *supra* note 42.

46. *See id.* at 122. This document reported that "the FTAA negotiations remain suspended." It reported as following regarding MEFTA:

> In 2008, USTR continued to work with trading partners in the region to implement the MEFTA initiative. The United States and the United Arab Emirates decided early in 2007 that the timing was not conducive to concluding bilateral FTA negotiations and have since sought to pursue trade and investment enhancement through a 'TIFA-Plus' process; the first meeting of this new format was held in June 2007.

Id. at 123. For a summary about the ASEAN negotiations, *see id.* at 147 (stating that in 2006, the U.S. and "ASEAN concluded a TIFA" and in May 2008, they met to discuss "new cooperative projects for the coming year, including . . . services and investment initiatives"). It made this report regarding SACU:

> On July 16, 2008, the United States and the five member countries of the SACU—Botswana, Lesotho, Namibia, South Africa, and Swaziland—signed a Trade, Investment, and Development Cooperative Agreement [hereinafter TIDCA]. . . . Ideally, the TIDCA will help to put in place the 'building blocks' for a future FTA, which remains a longer-term objective for both the United States and [Southern African Customs Union].

Id. at 180.

47. *See* Trade Act of 1974, Pub. L. No. 93-618, § 135(c) (2), 88 Stat. 1978 (as delegated by Executive Order 11846 of March 27, 1975). *See* ITAC Homepage, http://www.ita.doc.gov/itac (last visited Apr. 16, 2010).

48. *See* Terry, *supra* note 1, at 1060-61 (quoting the ISAC-13 language and the ABA's then-current representative Peter Ehrenhaft).

49. *See* Office of the United States Trade Representative, *Industry Trade Advisory Committees (ITAC)*, *Office of the United States Trade Representative Charter of the Industry Trade Advisory Committees*, http://www.ustr.gov/about-us/advisory-committees/industry-trade-advisory-committees-itac (last visited Apr. 16, 2010); U.S. DEPARTMENT OF COMMERCE AND THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, CHARTER OF THE INDUSTRY TRADE ADVISORY COMMITTEE ON SERVICES AND FINANCE, *available at* http://www.ita.doc.gov/itac/committees/ITAC10.ServicesandFinance.asp. The current ABA representative to ITAC 10 is Timothy Brightbill. *See* Industry Trade Advisory Committee on

was during many years in the past, however, because the President currently lacks "fast track" trade promotion authority which requires Congress to vote up or down on signed FTAs, but does not permit any amendments.[50]

This article examines the legal services provisions in the fifteen bilateral and regional trade agreements cited above. The United States is a signatory to other agreements and trade initiatives that may apply to legal services, including Trade & Investment Framework (TIF) Agreements,[51] Bilateral Investment Treaties (BITs),[52] Friendship,

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Services and Finance Industries, ITAC 10, http://www.trade.gov/itac/committees/services.asp (last visited Apr. 16, 2010).

The Obama Administration has announced that it plans to re-charter the ITAC groups to prohibit registered lobbyists. *See* Posting of Norm Eisen, Special Counsel To The President For Ethics And Government Reform, *Lobbyists on Agency Boards and Commissions*, White House: The Briefing Room - The Blog (Sept. 23, 2009), http://www.whitehouse.gov/blog/Lobbyists-on-Agency-Boards-and-Commissions/ (last visited Apr. 19, 2010); Keith Koffler, *Lobbyists Stew after Being Bounced from Boards*, CQ POLITICS NEWS (Oct. 5, 2009) http://www.cqpolitics.com/wmspage.cfm?docID=news-000003216413 (last visited Apr. 19, 2010).

50. For information on trade promotion authority (TPA), see generally CAROLYN C. SMITH, TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES, CRS REPORT RS21004 (Sept. 29, 2006), *available at* http://fpc.state.gov/documents/organization/73937.pdf. TPA authority, which has been granted in various forms to successive presidents since 1934, was denied to President Clinton but was renewed for five years to President Bush under the Bipartisan Trade Promotion Authority Act of 2002. *See, e.g.*, Trade Act of 2002, 19 U.S.C. § 2902 (2002). As the CRS Report explains, TPA is intended to prevent selective amendment to an internationally-agreed document when submitted for congressional approval. Under TPA, the President is required to consult with Congress during the negotiation of a trade agreement, and Congress may hold hearings and debates, propose changes or exclusions, and "mark up" any proposal. But after an agreement is actually accepted and signed by the United States, Congress' authority is limited to an "up-or-down" vote on implementation of the agreement as U.S. law. Trade Agreements are generally not submitted as treaties requiring the advice and consent of two-thirds of the Senate (without House participation in the process). They are negotiated as Executive Agreements pursuant to advance legislative authorization and are then submitted to the entire Congress for implementation through an implementing statute such as the Uruguay Round Agreement Act of 1994 that implements the creation of the WTO. *See*, *e.g.*, Message of the President Transmitting the Uruguay Round Trade Agreements, Texts of Amendments, Implementing Bill, and Required Supporting Statements, H. R. Doc. No. 103-316 (1994); Uruguay Round Agreements Act , Pub. L. No. 103-465, 108 Stat. 4809 (codified as amended at 19 U.S.C. § 3501 (1994)). The consensus is that, without the TPA procedure, it is very difficult to obtain congressional approval of a trade agreement. *See*, *e.g.*, Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol Needham, Robert E. Lutz & Peter D. Ehrenhaft, *Transnational Legal Practice: 2006-07 Year-in-Review*, 42 INT'L L. 833, 839-840 (2008) [hereinafter Transnational Legal Practice 2006-2007]. Congress has the ability, however, to approve limited TPA applicable solely to a single agreement. *Id.*

51. *See* Office of the United States Trade Representative, Trade & Investment Framework Agreements, http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements (last visited Apr. 16, 2010); *see generally* 2009 Trade Policy Agenda, *supra* note 42.

Commerce and Navigation (FCN) agreements,[53] and other trade initiatives,[54] but this article does not address those agreements.[55] Examination of those agreements would be a useful task for someone to undertake.

The trade agreement phenomenon described in this article is not limited to the United States. Because most countries in the world are WTO members,[56] their legal services are subject to at least some provisions in the GATS.[57] Moreover, a number of these countries also have bilateral or regional trade agreements that apply to services.[58] The European Union (EU), for example, has agreements with Russia and other Commonwealth of Independent States (CIS) countries, Mexico and Chile, and ongoing negotiations with Euromed, Mercosur, Gulf Cooperation Council, Korea, India, Central America, Andean Pact, and

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52. *See* Office of the United States Trade Representative, Bilateral Investment Treaties, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (last visited Apr. 16, 2010); *see generally* 2009 Trade Policy Agenda, *supra* note 42.

53. *See, e.g.*, Treaty of Friendship, Commerce and Navigation (FCN) between the United States and the Federal Republic of Germany, 7 UST 1839, TIAS 3593 (signed at Washington, D.C., on October 29, 1954; entered into force July 14, 1956). *See also infra* note 55 (describing one U.S. lawyer's reliance on this FCN Treaty with Germany).

54. *See, e.g.*, Office of the United States Trade Representative, Other Initiatives, http://www.ustr.gov/trade-agreements/other-initiatives (last visited Apr. 19, 2010) (citing the APEC and ASEAN initiatives).

55. At least one U.S. citizen-lawyer has relied on the U.S.-Germany FCN Treaty to challenge Germany's treatment of his right to practice law in Germany. On Feb. 18, 2000, the U.S. Department of State issued a diplomatic note in connection with a case challenging Germany's ruling that a U.S. lawyer was ineligible to sit for a German bar exam (or become licensed). This diplomatic note stated, inter alia:

> Accordingly, it is the view of the Government of the United States that the MFN obligations in Article VII of the FCN apply to engaging in the practice of law in the territory of either party, and the Government of the United States is aware of no exception under the FCN that would apply in this instance, notwithstanding the obligations of the Federal Republic of Germany with respect to other EU members under applicable EU treaties. Therefore, the Government of the United States believes that Mr. Haver is entitled, pursuant to rights under the FCN, to treatment no less favorable than that accorded nationals of EU member states with respect to eligibility to sit for the examination.

See Department of State, Diplomatic Note (Feb. 18, 2000) (on file with author). *See also* E-mail from Peter M. Haver to author (Sept. 14, 2009) (on file with author).

56. *See* WTO, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 16, 2010) (stating that there were 153 WTO Members as July 23, 2008 and an additional twenty-nine Observer States (plus the Holy See) which must start accession negotiations within five years of becoming observers) [hereinafter WTO Members and Observers].

57. For information about the "automatically applicable" provisions of the GATS, see notes 113-121, *infra*, and accompanying text.

58. For the agreements cited *infra* in notes 59-62, I presume that legal services are among the services covered, but I have not independently verified that fact for each of these foreign FTAs.

with the ten members of the Association of South East Asian Nations (ASEAN).[59] Australia has signed FTAs with the United States, Singapore, Thailand, New Zealand, and ASEAN, is conducting FTA negotiations with China, Japan, Korea, Malaysia, and the Gulf Cooperation Council (Saudi Arabia, Qatar, Bahrain, Oman, Kuwait, United Arab Emirates), and is considering FTAs with India and Indonesia.[60] Canada has FTAs with Jordan, Columbia, Peru, European Free Trade Association (EFTA), Costa Rica, Chile, and Israel; and it has ongoing negotiations with Morocco, the EU, Panama, Korea, the Andean Community Countries, the Caribbean Community Free Trade Negotiations (CARICOM), the Dominican Republic, the Central America Four (CA4), India, and Singapore.[61] In September 2009, India signed trade agreements with South Korea and ASEAN.[62] As this brief overview shows, international trade agreements are now commonplace. Thus, when considering lawyer regulation issues, one must consider whether and how these agreements have affected lawyer regulation.

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59. *See*, *e.g.*, European Commission, *Economic Sectors: Services*, http://ec.europa.eu/trade/issues/sectoral/services/index_en.htm (last visited Apr. 16, 2010) (stating that the "rapidly expanding services sector is contributing more to economic growth and job creation worldwide than any other sector" and citing existing trade agreements with Russia and other CIS countries, Mexico and Chile, and ongoing negotiations with Euromed, Mercosur, Gulf Cooperation Council, India, Central America, Andean Pact, and ASEAN). Although the webpage still lists the EU has having pending negotiations with Korea, there have been reports about the conclusion of this agreement. *See EU, South Korea Sign Free Trade Accord,* 13 BRIDGES WKLY. TRADE NEW DIG. no. 36 (Oct. 21, 2009) (reporting on a new EU-Korea agreement).

60. *See* Australia Department of Foreign Affairs and Trade, Free Trade Agreements (FTAs), http://www.dfat.gov.au/trade/ftas.html (last visited Apr. 16, 2010). *See also* AUSTRALIA DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, TRADE IN SERVICES AUSTRALIA 2008 (July 2009), *available at* http://www.dfat.gov.au/publications/stats-pubs/tis-cy2008.pdf. *See also* AUSTRALIA INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL, AUSTRALIAN LEGAL SERVICES STRATEGIC GLOBAL ENGAGEMENT 2009-2012, *available at* http://www.ilsac.gov.au/www/ilsac/RWPAttach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~Final+ILSAC+export+strategy+document.PDF/$file/Final+ILSAC+export+strategy+document.PDF.

61. *See* Foreign Affairs and International Trade Canada, Negotiations and Agreements, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en#free (last visited Apr. 16, 2010) (linking to agreements with Jordan, Columbia, Peru, European Free Trade Association (EFTA), Costa Rica Free Trade Agreement, Chile and Israel and ongoing negotiations with Morocco, the EU, Panama, Korea, Andean Community Countries, Caribbean Community Free Trade Negotiations (CARICOM), Dominican Republic, Central America Four (CA4), India, and Singapore).

62. *See* International Centre for Trade and Sustainable Development, *India Signs Trade Deals with South Korea, ASEAN*, 13 BRIDGES WKLY. TRADE NEWS DIG. no. 30 (Sept. 9, 2009). For information on Indian regulations and U.S. and U.K. law firm interest in the Indian legal market, see Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57 (2010).

The 2004 U.S.-Australia Free Trade Agreement illustrates how important these international trade agreements can be as a catalyst for discussion and change. This FTA, like all of the U.S. post-GATS trade agreements except the U.S.-Jordan FTA, includes an Annex on Professional Services.[63] The two-page Professional Services Annex to the U.S.-Australia FTA *requires* the establishment of a working group to facilitate FTA activities, stating that "[t]he Parties shall establish a Professional Services Working Group, comprising representatives of each Party, to facilitate the activities listed in paragraph 1."[64] (Paragraph 1 requires the signatory countries to encourage the "relevant bodies" to develop "mutually acceptable standards and criteria for licensing and certification of professional services suppliers and to provide recommendations on mutual recognition to the Joint Committee.")[65]

The U.S.-Australia FTA not only requires the establishment of a working group, but also specifies the issues this group should consider including: procedures for fostering the development of mutual recognition arrangements among their relevant professional bodies, the feasibility of developing model procedures for the licensing and certification of professional services suppliers, and other issues of mutual interest relating to the provision of professional services.[66] The Annex further specifies that the FTA Joint Committee shall review the implementation of the Annex at least once every three years.[67]

In May 2006 in Washington D.C., representatives from the U.S. and Australian governments, bar associations, and lawyer regulatory organizations met to discuss lawyer regulatory issues.[68] The ABA Section of International Law's Committee on Transnational Legal Practice, in cooperation with the ABA Task Force on International Trade in Legal Service (ITILS), coordinated the efforts to notify and encourage the appropriate U.S. representatives to attend, including representatives from the Conference of Chief Justices (CCJ), National Conference of Bar Examiners, ABA Section of Legal Education and Admissions to the Bar, and the ABA Task Force on International Trade in Legal Services. Each country prepared briefing papers regarding its lawyer qualification rules and rules governing foreign lawyers. Although this event was the

63. Australia FTA, *supra* note 34, at Annex 10-A, Professional Services.

64. *Id.* at para. 5.

65. *Id.* at para. 1.

66. *Id.* at para. 5, 7.

67. *Id.* at para. 10.

68. *See* Transnational Legal Practice 2006-2007, *supra* note 50, at 848. This citation supports all of the information in this paragraph. *See also* Attachment #7 to May 3, 2009 Email from Robert Lutz, Agenda, U.S.-Australia Legal Services Meeting (on file with author).

first and only FTA-related legal services meeting of which I am aware, it demonstrates the potential power of these international trade agreements to bring important stakeholders to the table.

In my view, the U.S.-Australia FTA has been a useful tool for the Australian legal profession and the Australian government to use to express their strong interest in opening global legal markets[69] and in having the U.S. legal market more accessible to Australian lawyers. In addition to the FTA meeting described above, the Australian government and legal profession have engaged directly with numerous U.S. stakeholders. For example, they have sent delegates to meet with the CCJ and with representatives from the highest courts in Georgia, Delaware, New York, and California.[70] While the Australians might have contacted these U.S. entities and individuals even in the absence of an FTA, an FTA undoubtedly can serve as a useful "conversation starter."

The Australian interactions with U.S. regulators demonstrate the potential power of personal interactions, exchanges, and conversations. For example, in addition to the FTA meeting described above, Australian representatives attended the CCJ's Annual Meeting in February 2006.[71] After that meeting, the CCJ adopted two resolutions supportive of Australian lawyers interested in gaining practice rights in

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69. Australia has demonstrated in many ways its interest in opening global legal markets. For example, it has chaired the "Friends of Legal Services" group in the World Trade Organization; this group facilitated the development of the "Collective Requests" described in greater detail *infra* note 255. Australia submitted a set of draft "disciplines" for the legal services sector; this was one of the few sector-specific disciplines proposed by WTO Members. *See* WTO Working Party on Domestic Regulation, *Communication from Australia: Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34, (Sept. 5, 2005) *available at* http://www.abanet.org/cpr/gats/aus_disp.pdf [hereinafter Australian Legal Services Proposed Disciplines]. As a final example, the July 2009 APEC Draft Report described *infra* note 87 at 166, included a section on the Australian approach to the regulation of foreign lawyers, stating:

> Australia is keen to promote the liberalisation of trade in legal services internationally and share its experience to assist others in progressively opening the legal services market to suit their particular circumstances. Australia maintains a hospitable foreign lawyer regulatory system consistent with the 'Full Licensing' and 'Limited Licensing' approaches advocated in the International Bar Association Statement of General Principles for the Establishment and Regulation of Foreign Lawyers. . . .

Id.

70. *See* Terry et al., *Transnational Legal Practice 2006-2007*, *supra* note 50, at 849. The Conference of Chief Justices (CCJ) consists of the highest judicial officer in each U.S. jurisdiction—typically the Chief Justice of the state supreme court. Conference of Chief Justices, About CCJ, http://ccj.ncsc.dni.us/about.html (last visited Apr. 16, 2010).

71. *See* Terry et al., *Transnational Legal Practice 2006-2007*, *supra* note 50, at 849. The Australians are not the only foreign lawyer representatives to be invited to a CCJ meeting. CCBE representatives attended 2006 and 2007 CCJ meetings. *See id.* at 849, n. 92.

the U.S. through easier access to local bar examinations and recognition of home country qualification.[72] In October 2007, following visits by a Delaware Supreme Court justice to the Australian Law Council's Annual Meeting and visits by Australian Law Council representatives and government officials to Delaware, the Delaware Supreme Court adopted a foreign legal consultant (FLC) rule and included foreign lawyers in its amended Rule of Professional Conduct 5.5 to allow temporary practice by foreign lawyers and by foreign in-house counsel.[73] Australian representatives also met with Georgia regulators to discuss the possibility of a lawyer discipline cooperation protocol and initiatives that might provide Australian lawyers with a greater opportunity to sit for the Georgia bar examination; Georgia's waiver rule now allows foreign lawyers to apply for admission even though they have not attended an ABA-accredited law school.[74] In August 2009, after

72. *See* Conference of Chief Justices, Resolution 7 Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations (Feb. 2007) (last visited Apr. 16, 2010), http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html [hereinafter Resolution 7]; Conference of Chief Justices, Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar (Feb. 2007), http://ccj.ncsc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html (last visited Apr. 16, 2010) [hereinafter Resolution 8]; Conference of Chief Justices, Resolution 4 Regarding Adoption of Rules on the Licensing and Practice of Foreign Legal Consultants (Aug. 2006), http://ccj.ncsc.dni.us/resol4RuleAdoptionForeignConsultants.html (last visited Apr. 16, 2010) [hereinafter Resolution 4].

73. *See* Terry et al., Transnational Legal Practice 2006-2007, *supra* note 50, at 849.

74. *Id. See* RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN GEORGIA, Part F, Section 5 (Rev. Sept. 2, 2009) (" . . . The Board to Determine Fitness, with respect to rules contained herein pertaining to it and the Board of Bar Examiners with respect to rules contained herein pertaining to it may, for good cause shown by clear and convincing evidence, waive any rule contained herein"). This waiver rule is subject to certain limited exceptions relating to the payment of fees and re-grading of the bar exam. Georgia's waiver process is set forth in a document titled, BOARD OF BAR EXAMINERS BOARD TO DETERMINE FITNESS OF BAR APPLICANTS WAIVER PROCESS & POLICY (Adopted Apr. 8, 2005; revised July 29, 2008; approved by Supreme Court of Georgia Sept. 3, 2008), *available at* http://www.gabaradmissions.org/pdf/waiverprocess.pdf. As part of the waiver process, an applicant is required to submit a "Dean's letter." The instructions explain that:

> A "Dean's" letter, which is a statement from a Dean or the Dean's designee on the faculty at an ABA-approved law school analyzing the legal education received and stating whether or not it is the equivalent of an ABA-approved legal education (Guidelines for Dean's letter is on our web site). The Guidelines for Dean's Letter provide direction on the purpose and scope of the Dean's Letter. The Dean or Dean's designee who authors the Dean's letter should be thoroughly familiar with the Waiver Process and Policy and the Guidelines for Dean's Letter before writing and submitting the letter.

See Georgia Board of Bar Examiners, INSTRUCTIONS AND CHECKLIST FOR FILING PETITION FOR WAIVER OF EDUCATIONAL REQUIREMENTS OF THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN GEORGIA Part B, Section 4, para. 6, *available at*

multiple discussions with Law Council of Australia representatives and multiple drafts, the CCJ adopted a resolution and a protocol regarding information exchange and cooperation concerning lawyer admission and discipline; these developments might have happened without the U.S.-Australia FTA, but the FTA certainly encourages discussion and agreement.[75]

The last development discussed in this section of the article is the Legal Services Initiative of the Asia-Pacific Economic Cooperation, known as APEC. This article is entitled "From GATS to APEC" not only because APEC is the most recent development, but because, in my view, it is potentially very significant for legal services. This significance is particularly noteworthy in light of the fact that:

> APEC is the only inter governmental grouping in the world operating on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Unlike the WTO or other multilateral trade bodies, APEC has no treaty obligations required of

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http://www.gabaradmissions.org/pdf/checklist.pdf.

75. *See* Conference of Chief Justices, Resolution 13 In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies (Aug. 2009), http://ccj.ncsc.dni.us/InternationalResolutions/resol13.html (last visited Apr. 16, 2010); *see also* Protocol For The Exchange Of Information Between [State Admitting Authority] And The Law Council Of Australia, http://ccj.ncsc.dni.us/InternationalResolutions/ProtocolAustralia.pdf (last visited Apr. 16, 2010). In addition to its "whereas" clauses, this resolution states:

> NOW, THEREFORE, BE IT RESOLVED that the Conference encourages the competent bar admission and lawyer disciplinary bodies in each United States state, territory, and the District of Columbia (American jurisdiction) to consider entering a voluntary, reciprocal, cooperative protocol with the LCA that, consistent with the proposed protocol attached to this resolution, calls for establishing a process for providing information regarding:
>
> 1. The key elements of the American jurisdiction's legislation, professional rules, admission rules, rules relating to practicing certificates and other requirements related to admission to practice and lawyer discipline;
>
> 2. The qualifications and professional standing of and the status of any disciplinary proceedings involving a lawyer admitted in the American jurisdiction upon the request of the LCA;
>
> 3. Any sanction imposed on or complaint regarding violation of a professional regulation regarding an Australian lawyer who is practicing in the American jurisdiction.
>
> BE IT FURTHER RESOLVED that the Conference will use its best efforts to enable the above described cooperation, in particular by:
>
> 1. Providing to the LCA and regularly updating a list of names and addresses of the bar admissions and disciplinary bodies in each American jurisdiction;
>
> 2. Distributing to its members the list of the names and addresses of the Australian bar admission and lawyer disciplinary bodies that it receives from the LCA; and
>
> 3. Facilitating, if called upon, communications between U.S. and Australian bar admission and lawyer disciplinary bodies.

Id.

> its participants. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis.[76]

APEC consists of twenty-one countries.[77] The APEC Secretariat is located in Singapore.[78] Each year, a different country is designated as the "Host Economy," which serves as the APEC Chair and is responsible for chairing a number of different meetings in the Host Economy.[79] APEC Members conduct their work through various committees. Legal services issues are handled by the "Group on Services (GOS)," which is a subcommittee of the Committee on Trade and Investment (CTI). Reprinted below is an excerpt from the structure table found on APEC's webpage:[80]

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76. *See* Asia-Pacific Economic Cooperation, *About APEC*, http://www.apec.org/apec/about_apec.html (last visited Apr. 16, 2010).

77. *See* Asia-Pacific Economic Cooperation, *Member Economies*, http://www.apec.org/apec/member_economies.html (last visited Apr. 16, 2010). APEC Members include: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States, and Vietnam.

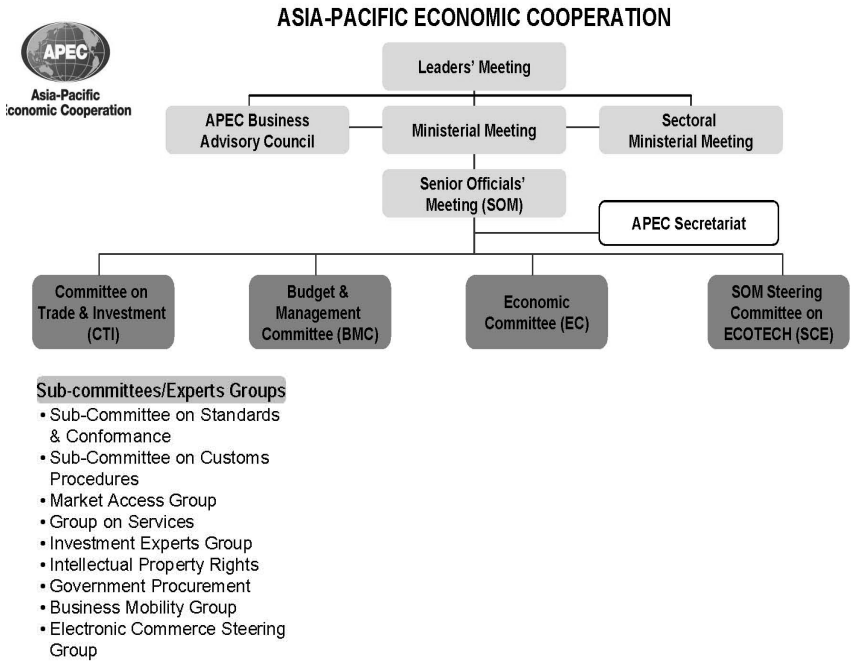
78. Asia-Pacific Economic Cooperation, *Secretariat*, http://www.apec.org/apec/about_apec/apec_secretariat.html (last visited Apr. 16, 2010).

> [The APEC Secretariat] operates as the core support mechanism for the APEC process. It provides coordination, technical and advisory support as well as information management, communications and public outreach services. The APEC Secretariat performs a central project management role, assisting APEC Member Economies and APEC fora with overseeing more than 250 APEC-funded projects.

Id.

79. *See* Asia-Pacific Economic Cooperation, *How APEC Operates*, http://www.apec.org/apec/about_apec/how_apec_operates.html (last visited Apr. 16, 2010) (indicating that the Host Economy will host the annual Economic Leaders' Meeting, selected Ministerial Meetings, Senior Officials Meetings, the APEC Business Advisory Council and the APEC Study Centres Consortium); APEC, *The APEC Host Economy*, http://www.apec2009.sg/index.php?option=com_content&view=article&id=24&Itemid=34 (last visited Apr. 16, 2010) (listing the past and future Host Economies).

80. *See* Asia-Pacific Economic Cooperation, *APEC Structure*, http://www.apec.org/apec/about_apec/structure.html (follow "APEC Structure – Detailed" hyperlink) (last visited Apr. 19, 2010). I have included this chart because of the time it took me to determine what "SOM" (Senior Officials' Meeting) referred to in APEC documents. This excerpt omits the industry dialogues box, the box listing the location of ministerial meetings, and the listing of working groups and special task groups of the SOM Steering Committee on ECOTECH.



APEC has become increasingly important to legal services because, as the WTO's Doha negotiations faltered (as discussed infra in Section IV(A),[81] some countries turned to APEC as a forum for continuing discussions of legal services trade issues.[82] This new forum is a significant one because the twenty-one APEC countries represent approximately 40 percent of the world's population, 54 percent of world GDP and 43 percent of world trade.[83] Moreover, because the United States will be the APEC "Host Economy" in 2011, with meetings throughout the country that the United States will have to organize, APEC is likely to be increasingly important to the U.S. government in the near future.[84]

81. *See infra* note 261 and accompanying text.

82. *See, e.g.*, Australian Government, Department of Foreign Affairs and Trade, *Asia-Pacific Economic Cooperation (APEC) and Australia*, http://www.dfat.gov.au/apec/index.html (last visited Apr. 16, 2010) (APEC is "the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region").

83. *See* Asia-Pacific Economic Cooperation, *About APEC*, http://www.apec.org/apec/about_apec.html (last visited Apr. 16, 2010).

84. *See, e.g.*, Asia-Pacific Economic Cooperation, *The APEC Host Economy*, *supra* note 79 (lists the United States as the host economy for 2011); U.S. Department of State, PUBLIC NOTICE 6428: APEC 2011 LEADERS' MEETING, 73 Fed. Reg. 69715 (Nov. 19, 2008) (seeking cities and

In May 2008, APEC's Trade and Investment Committee approved an ambitious legal services initiative originally drafted by Australia;[85] later that year, APEC members agreed to fund this initiative.[86] The government of Australia has been coordinating the implementation of this initiative with the assistance of a Steering Committee that consists of governmental representatives from Australia, Canada, Chinese Taipei, New Zealand, Peru, Singapore, and the United States.[87] The APEC Legal Services Initiative identified several ways in which it would try to facilitate the provision of services in foreign and international law.[88] The APEC planners envisioned a four-stage process that included:

1. Developing an inventory of APEC Member economies' regulatory regimes for licensing lawyers, including the regulation of foreign lawyers and their right to provide legal services in foreign law and to work in association with host-economy legal professionals;
2. Holding a capacity-building workshop for legal services regulators and government representatives to: share experiences

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hotels to host the Nov. 20-21, 2011 APEC concluding meetings and noting that over 20,000 participants are expected); U.S. National Center for APEC, APEC INVADES THE U.S. 17, *available at* http://www.apbo-conference.com/process.php?file=presentations/AsiaWide-Lynn_Turk-APEC_Invades_the_US.pdf (identifying the meetings that will be held in the United States in 2011).

85. *See* Asia-Pacific Economic Cooperation, *Chair's Summary Record of Second Committee on Trade and Investment Meeting in Arequipa, 25-26 May 2008*, 2008/SOM3/CTI/002 at para. 10-11, http://aimp.apec.org/Documents/2008/CTI/CTI3/08_cti3_002.doc. This summary states:

> The Convenor also sought the Committee's endorsement of the following decisions from GOS [the Group on Services]: GOS approved a new project proposal, "APEC Legal Services Initiative, seeking 2009 ASF funding (*see* 2008/SOM2/CTI/005). The proposal entails the conduct of an inventory of existing requirements and procedures for accepting of foreign lawyers throughout APEC economies and the holding [of] a capacity building workshop with legal professionals, regulators and government representatives to ensure the project responds to the needs and information gaps in APEC economies. The proposal also calls for the development of an electronic repository similar to what was done for the APEC Engineers project . . . . The Committee endorsed the two requests from GOS . . .

Id.

86. *See* Asia-Pacific Economic Cooperation, Summary Conclusions of the APEC Budget and Management Committee Meeting, APEC Secretariat, Singapore (Oct. 20-21, 2008), at 7 and Annex 8, p. 3, *available at* http://www.apec.org/apec/documents_reports/budget _management_committee/2003.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/committees/bmc/mtg/2003/pdf.Par.0025.File.v1.1.

87. IAIN SANDFORD, APEC LEGAL SERVICES INITIATIVE, REPORT FOR WORKSHOP 166 (July 21, 2009) (on file with author) [hereinafter APEC Consultant's July Draft Report]. Although many of the items prepared for the Singapore Legal Services Initiative Workshop are on the Internet, this report does not appear to be.

88. *See* ASIA-PACIFIC ECONOMIC COOPERATION, APEC PROJECT PROPOSAL: PROFESSIONAL SERVICE INITIATIVE: LEGAL SERVICES FACESHEET, CONSOLIDATED TEXT FINAL (on file with author).

on the regulation of foreign lawyers, identify best practice models, hear the requirements of, and engage with, clients of transnational legal services, and work towards satisfying the needs and information gaps in APEC economies in the availability of fully integrated legal services;

3. Building on the outcomes of the workshop, identifying best practice models in the licensing and regulation of foreign lawyers, and including that information in an electronic repository together with an inventory of current legal services regulatory information and regulatory body contacts from across APEC economies (ideally to be hosted on the APEC website); and
4. Developing an APEC Legal Services Framework to facilitate a network for discussion, sharing of information and identification of best practices for reducing impediments to the provision of services in foreign and international law between APEC Member economies.[89]

In order to accomplish the first stage, in May 2009, APEC circulated a questionnaire to its members.[90] In July 2009, a consultant retained by APEC issued a 178-page draft report that summarized the questionnaire responses.[91] The draft report contained an inventory of

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89. APEC Consultant's July Draft Report, *supra* note 87, at 165-66.

90. *Id.* at 5-6, 168 (the questionnaire is included as Schedule 3); *see* APEC, *Legal Services Initiative – Questionnaire*, 2009/CTI2/GOS/009 (May 21, 2009), http://aimp.apec.org/Documents/2009/GOS/GOS2/09_gos2_009.doc.

91. Asia-Pacific Economic Cooperation, Consultant's July Draft Report, supra note 87, at 5. The terms of reference specified the following scope for the research consultant:

> The consultant will develop an inventory of APEC Member economies' requirements and procedures for the licensing of lawyers, with a focus on the regulation of foreign lawyers. Tasks include:
>
> i). project manage the research and collation of data on the regulatory schemes for the licensing of lawyers across the APEC Member economies with an emphasis on:
>
> - the rights and licensing of foreign lawyers to provide services in foreign and international law, and
> - rights for foreign lawyers to work in association with host economy lawyers.
>
> ii). compile information on the legislative or other basis for each APEC Member economies' foreign lawyer regulatory regime, including a description of the relationship among relevant institutions.
>
> iii). catalogue the contact details and website, if any, for each APEC Member economies' regulating body.
>
> iv). catalogue the contact details and website, if any, for the peak professional body in each APEC Member economies' regulatory jurisdictions.
>
> v). undertake a comparison between Member economies' regulatory arrangements and assess the extent to which each Member economies' regulatory regime for foreign lawyers is consistent with the 'Limited Licensing Approach' in the

relevant regulatory frameworks from the responding APEC economies and sub-national jurisdictions. Although a number of U.S. states responded, many did not.[92]

The consultant's final report is dated August 2009 and is substantially similar to the draft report.[93] The draft and final reports summarized the data using a table that listed jurisdictions' responses on four kinds of regulatory issues, including whether a jurisdiction: 1) has a rule permitting fly-in, fly-out (temporary) practice,[94] 2) provides for limited licensing of foreign lawyers, 3) allows foreign lawyers to seek full licenses to practice the law of the jurisdiction, and 4) allows a foreign lawyer to enter commercial association with local lawyers or local firms.[95] These reports also included URLs and contact information for the relevant regulators in each jurisdiction.

The Background section in the Consultant's reports included more detail about the key objectives of the APEC Legal Services Initiative:

1. Build capacity and skill levels across APEC economies in the:
   - provision of legal services in foreign and international law, and
   - regulation of foreign lawyers.

International Bar Association Statement of General Principles for the Establishment and Regulation of Foreign Lawyers adopted in June 1998 (copy attached).
vi). ensure that electronic and paper-based reporting and records management meet relevant APEC requirements regarding form and content.
vii). attend a workshop in Singapore in July 2009 and present outcomes of research.

Id.

92. *Id.* *See also* APEC GROUP ON SERVICES, IAIN SANFORD ED., APEC LEGAL SERVICES INITIATIVE: INVENTORY OF REQUIREMENTS AFFECTING PRACTICE OF FOREIGN LAW IN APEC JURISDICTIONS (August 2009) (on file with author). [hereinafter APEC Final Inventory August 2009]. The U.S. response rate was relatively low; in the August 2009 APEC Final Inventory, thirty-seven U.S. jurisdictions were not included in the August 2009 final inventory (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Kansas, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands). *Id.* at 91-166. In contrast, thirty-three non-U.S. jurisdictions responded, with seven non-U.S. jurisdictions having no entry in the final inventory (New South Wales, Northern Territory, South Australia, Tasmania, East Malaysia, Peru, and Russia).

93. *See* APEC Final Inventory August 2009, *supra* note 92.

94. The terms "fly-in, fly-out" and "FIFO" are used to refer to temporary practice by a lawyer in a foreign jurisdiction in which the lawyer is not admitted. Thus, the ABA Model Rule for Temporary Practice by Foreign Lawyers, *infra* note 272, is sometimes referred to colloquially as the ABA's FIFO rule.

95. APEC Final Inventory August 2009, *supra* note 92, at 5, 9-13.

> 2. Increase transparency of the regulation of the legal professions, with a focus on foreign lawyers, through the development of an electronic database and repository containing current regulatory information with links to relevant regulatory bodies across APEC economies.
> 3. Develop a Legal Services Framework across APEC economies to:
> - facilitate a network of legal services bodies, and
> - identify best practice models for reducing impediments to the provision of services in foreign and international law.
> 4. Share experiences of and identify benefits flowing from open foreign lawyer regulatory regimes.[96]

On July 29-30, 2009, in Singapore, in conjunction with APEC's Ministerial Meeting, APEC held a capacity building workshop, which was the second step envisioned in the Legal Services Initiative.[97] The Singapore Workshop materials included the program, a speaker list, a document list, and nine papers, including papers focusing on lawyer regulation in the United States, Chile, Singapore, and Mexico.[98] These materials included the IBA's 1998 *Statement of General Principles for the Establishment and Regulation of Foreign Lawyers*, an analysis of the survey (inventory) results[99] and an Australian submission that laid out "6 Principles for the Liberalisation of Trade in Legal Services."[100] (APEC

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96. *Id.* at 172 (Schedule 2).

97. *See*, *e.g.*, ASIA-PACIFIC ECONOMIC COOPERATION, DOCUMENT LIST SUBMITTED BY: APEC SECRETARIAT, APEC LEGAL SERVICES INITIATIVE WORKSHOP, SINGAPORE 30-31 JULY 2009, 2009/SOM2/GOS/WKSP/000, *available at* http://aimp.apec.org/Documents/2009/GOS/WKSP1/09_gos_wksp_000.doc [hereinafter APEC Singapore document list]; ASIA-PACIFIC ECONOMIC COOPERATION, APEC LEGAL SERVICES INITIATIVE WORKSHOP, SINGAPORE 30-31 JULY 2009, PROGRAM, SUBMITTED BY: AUSTRALIA, 2009/SOM2/GOS/WKSP/001, *available at* http://aimp.apec.org/Documents/2009/GOS/WKSP1/09_gos_wksp_001.doc.

98. *See* APEC Singapore Document List, *supra* note 97.

99. *See* MINTER ELLISON, INVENTORY OF CURRENT REGULATORY REGIMES ACROSS APEC, 2009/SOM2/GOS/WKSP/007 (30-31 July 2009), *available at* http://aimp.apec.org/Documents/2009/GOS/WKSP1/09_gos_wksp_007.pdf.

100. *See* AUSTRALIA INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL (ILSAC), 6 PRINCIPLES FOR THE LIBERALISATION OF TRADE IN LEGAL SERVICES, 2009/SOM2/GOS/WKSP/003 (30-31 July 2009), *available at* http://aimp.apec.org/Documents/2009/GOS/WKSP1/09_gos_wksp_003.pdf. These six principles are:

> 1. Formal recognition, on reasonable terms, of the right to practise [sic] home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (e.g., a minimum number of years of professional experience or a refusal to recognise concurrent practice rights

documents, including the documents from the 2009 Singapore meeting, are available from the APEC Meeting Documents Database, which allows one to search by keywords, by APEC group, or by document number.[101])

Although the timetable for the Legal Services Initiative's third stage—the APEC Legal Services Framework—is not set forth in the consultant's reports, the Initiative certainly began on a fast timetable. This article is entitled "From GATS to APEC" because of this fast timetable, because of the United States' host role in 2011, and because of the potential significance of APEC members agreeing to a "legal services framework" and "best practices" guidelines.

In sum, it is important to realize that U.S. legal services are covered by many more international trade agreements than simply the GATS and the NAFTA. The United States has signed nine bilateral free trade agreements that apply to legal services, with three more agreements signed and awaiting Congressional approval. U.S. regional trade agreements include not just the NAFTA, but also the CAFTA-DR. Because the U.S. is engaged in ongoing trade negotiations, there are likely to be additional agreements in the future. Moreover, initiatives such as the APEC Legal Services Initiative are likely to have an impact, even if APEC works on a consensus basis, rather than on the basis of binding agreements. Finally, it is important to know that many other countries have trade agreements that apply to legal services. This is a worldwide phenomenon and is not just limited to the United States.

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where the foreign lawyer's home country is a federal jurisdiction).

2. Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.

3. Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.

4. The right to practise [sic] local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through a transparent process.

5. Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.

6. Formal recognition of the right to prepare and appear in an international commercial arbitration.

Id.

101. *See* Asia-Pacific Economic Cooperation, *APEC Meeting Documents*, http://aimp.apec.org/MDDB/default.aspx (last visited Apr. 17, 2010). Documents from 2003 or earlier are not found in the database, but are located on this website: APEC, *Documents and Reports*, http://www.apec.org/apec/documents_reports.html (last visited Apr. 17, 2010).

Thus, both currently and in the future, it will be important to be aware of these agreements and their provisions when thinking about lawyer regulation issues. As set forth in greater detail in Section V, *infra*, I believe that international trade agreements already have had an impact on U.S. lawyer regulation and are likely to continue to do so in the future.

III. THE STRUCTURE OF INTERNATIONAL TRADE AGREEMENTS APPLICABLE TO LEGAL SERVICES

This article analyzes the fifteen U.S. free trade agreements that are applicable to international trade in legal services. While these trade agreements have much in common, they are not standardized and vary in both small and large respects from one another.[102] Consequently, although one can talk in general about "international trade agreements," ultimately the language of the particular trade agreement will control and must be consulted.

It is beyond the scope of this article to comprehensively address each of the trade agreements that applies to legal services.[103] Nevertheless, if one understands the types of provisions that typically are included in an FTA, then it will be easier to focus on the specific language found in a particular trade agreement. Because of its global scope and its early appearance, this article will begin with provisions in the GATS in order to illustrate the structure commonly found in international trade agreements. Readers who are familiar with trade agreement provisions may wish to skip to section III(B) *infra*, which summarizes some of the provisions found in other U.S. trade agreements, or section IV, *infra*, which discusses their implementation. For those new to this topic, however, it seemed important to include explanatory material about commonly occurring trade agreement provisions.

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102. For an example of some of the variances in these FTAs, see *infra* notes 162-171 and accompanying text.

103. In order to write this article, I asked my research assistant to prepare a single document that included the relevant provisions from each of the signed trade agreements. (This includes the three agreements awaiting Congressional approval.) This document is several hundred pages long, illustrating the difficulty in providing a detailed analysis in this article of the specific provisions in all of the FTAs applicable to legal services.

A. The Structure of the GATS

The World Trade Organization was created by documents signed in 1994 that took effect in 1995.[104] The WTO currently has 153 members and a number of "observers" who plan to become members.[105] WTO headquarters are located in Geneva and administrative support is provided by the Secretariat, which has a staff of more than 650.[106] WTO documents are available in an extensive database that one may search by keywords, by WTO group, or by document number.[107]

The GATS is one of several subsidiary agreements or "annexes" to the agreement that created the WTO; to be specific, it is Annex 1B to the agreement that created the WTO.[108] The GATS has 38 "articles" and a

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104. *Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [WTO Agreement].

105. *See* WTO Members and Observers, *supra* note 56.

106. *See* World Trade Organization, *What is the WTO*, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Apr. 17, 2010). *See also* WTO, *Overview of the WTO Secretariat*, http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Apr. 17, 2010) [hereinafter "WTO Secretariat"].

> Since decisions are taken by Members only, the Secretariat has no decision-making powers. Its main duties are to supply technical and professional support for the various councils and committees, to provide technical assistance for developing countries, to monitor and analyze developments in world trade, to provide information to the public and the media and to organize the ministerial conferences.

Id.

107. *See*, *e.g.*, World Trade Organization, Documents Gateway, http://www.wto.org/english/docs_e/docs_e.htm (last visited Apr. 17, 2010). This webpage includes a link to the "Documents Online" database. The WTO has several web pages in which it has already structured the search so that you can just click on the link provided. *See*, *e.g.*, WTO, *The Services Council, its Committees and Other Subsidiary Bodies,* http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm (last visited Apr. 17, 2010) (allowing a reader to search for annual reports, minutes, or working documents of various WTO services groups); WTO, *Services Database,* http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (providing pre-set searches that allow you to look for all or part of a particular country's Schedule of Specific Commitments or for all commitments in a particular sector); ABA, *Legal Services Commitments of Other Countries During the 1994 GATS Uruguay Round*, http://www.abanet.org/cpr/gats/uruguay.html (last visited Apr. 17, 2010) (includes links to the WTO Secretariat's "predefined" reports showing the legal services commitments of developed countries, developing countries, transition countries, and least developed countries) [hereinafter GATS Legal Services Commitments].

For information on what the symbols on WTO documents mean, how to read them, and how to search using them, see Terry, *supra* note 1, at 1023-1025, *available at* http://www.abanet.org/cpr/gats/wto_docs.pdf.

108. There are a number of additional annexes including, for example, Annex 1C, Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Annex 2, Dispute Settlement Understanding. *See* WTO, *Legal Texts*, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Apr. 17, 2010).

number of "annexes."[109] This paper will not address every provision of the GATS, but will instead review those provisions that are cited most often in legal services discussions.

It is useful to think of the GATS as having four categories of provisions. The first category consists of those GATS provisions that apply to all 153 WTO members by virtue of their membership in the WTO. Because most countries are WTO Member States, legal services in most countries are subject to at least some provisions in the GATS.[110] The second category of GATS provisions consists of those provisions that a country "opts into" by placing a particular service sector, such as legal services, on a document called its "Schedule of Specific Commitments" ("*Schedule*").[111] (A country files its *Schedule* when it joins the WTO. Those countries, such as the United States, who were founding members of the WTO filed this document in 1994. Countries that joined later filed their *Schedules* at the time of their accession.[112]) The third category consists of the two GATS provisions that required future action by WTO Members—in the legal services context, this "future action" has come to be referred to as GATS Track #1 and GATS Track #2. The fourth GATS category consists of one subsection of one rule; this subsection gave countries the ability to create most favored nation (MFN) exemptions when they joined the WTO. Each of these four categories of provisions—1) automatic obligations; 2) optional obligations; 3) future obligations; and 4) the MFN exemption—are discussed below.

In my experience, in the legal services context, the automatically applicable GATS provisions that are cited most often are: Article II (Most-Favoured-Nation Treatment), Article III (Transparency), Article VII (Recognition), and Article XIV (General Exceptions). The "most-favored nation" provision found in Article II requires that all WTO members be treated as equals.[113] Thus, when dealing with other

109. *See generally* GATS, *supra* note 2.

110. *See* WTO Members and Observers, *supra* note 56.

111. *See* LAUREL TERRY AND JONATHAN GOLDSMITH, GATS [GENERAL AGREEMENT ON TRADE IN SERVICES]: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS 16-24 (2002), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf [hereinafter IBA GATS Handbook] (includes a discussion of Schedules).

112. For the WTO's compilation of the legal services commitments on WTO founding members Schedules, see GATS Legal Services Commitments, *supra* note 107.

113. GATS, *supra* note 2, at Art. II (1). This article states: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." *Id.*

countries who are WTO Members, a country may not discriminate among them (unless an exception applies).[114] The "transparency" provision in Article III consists of five paragraphs; its requirements include, *inter alia*, the obligation to "publish promptly . . . all relevant measures of general application . . ."; to respond to requests for specific information; and to establish one or more inquiry points to provide specific information to other WTO Members.[115] The "recognition" provision found in Article VII addresses the issue of one WTO country "recognizing" the qualifications of service providers from another WTO Member.[116] It consists of five paragraphs, a number of which contain "soft" provisions rather than mandatory provisions.[117] For example, Article VII (1) states: "[A] Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously."[118]

While much of GATS Article VII is precatory, it contains a few mandatory provisions, such as the requirement that countries notify the WTO[119] if they enter into negotiations to develop a mutual recognition agreement and the requirement that the country "afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it."[120] The final "automatic" provision that I have highlighted is the "exceptions" provision found in Article XIV; among other things, it

114. *Id.* The primary exceptions are if a country filed an MFN exemption, described *infra* notes 149-150, 163, and accompanying text, or if a country favors a WTO Member who is part of an economic integration agreement that satisfies GATS Article V. Article V is what allowed one EU Member State to give preferential treatment to lawyers from new EU Member States at the time of the EU's recent expansions from fifteen to twenty-five and then to twenty-seven members.

115. *See* GATS, *supra* note 2, at Art. III.

116. *Id.* at Art. VII.

117. *Id.* As used in this law review article, the term "soft" refers to the "light touch" nature of the provision in question. Soft provisions are either permissive or require best efforts, but not a particular result. As used in this article, the term "soft" does not refer to "soft law," which is the phenomenon in which otherwise nonbinding agreements assume something close to the force of law because of the ways in which they are implemented. *See, e.g.,* Laurel S. Terry, *An Introduction to the Financial Action Task Force and the FATF's 2008 Lawyer Guidance*, 2010 J. PROF. LAW. (2010) (forthcoming) at n. 13 and accompanying text.

118. *See* GATS, *supra* note 2, at Art. VII (1).

119. Id. at Art. VII((4)(a) (requiring notification of the WTO Council for Trade in Services within twelve months of the date a recognition agreement takes effect); *see also* WTO Secretariat, *supra* note 106.

120. GATS, *supra* note 2, at Art. VII (2).

permits a country to adopt measures that are "necessary to protect public morals or to maintain public order," provided that such measures are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."[121]

The second category of GATS provisions consists of the *optional* obligations that a country assumes for those services that it has placed on its *Schedule of Specific Commitments*. In other words, a country has to "opt in" to this second category of provisions on a sector-by-sector basis. (As is described in greater detail *infra*, countries make their optional sector-by-sector commitments according to four different modes of supply by which the service is delivered.[122]) In 1994, when the GATS was finalized, approximately forty-five countries, including the United States, "opted in" by listing legal services on their *Schedules*.[123] The vast majority of the twenty-five countries that have joined the WTO subsequently, such as China, also have included legal services on their *Schedules*.[124] Once a country "opts-in," it cannot modify or withdraw those commitments without providing compensation to any WTO Member damaged by the change.[125]

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121. *Id.* at Art. XIV. For additional information on the meaning of the language, one can consult the "Analytical Index" on the WTO webpage; this A-Z alphabetical index collects all of the WTO jurisprudence on particular topics. *See* WTO, *WTO Analytical Index: General Agreement on Trade in Services*, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_e.htm (last visited Apr. 17, 2010). *See also* American Law Institute, Legal and Economic Principles of World Trade Law, Preliminary Draft No. 3 (Apr. 15, 2010) [hereinafter ALI World Trade Law, Draft 3].

122. *See infra* notes 125-26 and accompanying text.

123. *See* WTO Council for Trade in Services, *Background Note by the Secretariat: Legal Services*, S/C/W/43 at 16 (July 6, 1998), *available at* http://www.abanet.org/cpr/gats/bkground_note.pdf (lists forty-five countries, which treats the European Union as one member) [hereinafter WTO Legal Services Background Note]. *See also id*. at 26-30 (tables categorize WTO Members' legal services commitments); GATS Legal Services Commitments, *supra* note 107; Laurel S. Terry, *Table Showing Legal Services Commitments in the 1994 Uruguay Round* (undated, in the CD Rom materials of the 2007 ABA Sec. of Int'l L. Spring Meeting, May 4, 2007), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Table%20Showing%20Legal%20Services%20Commitments%20in%20the%201994%20Uruguay%20Round.pdf (categorizing the GATS legal services commitments by CPC). For more information on the CPC system, see *infra* note 140.

124. *See Recent Trends 2009*, *supra* note 16, at 6-16. According to this report, "[o]f the 25 countries that have acceded to the WTO since 1995, all but two have made commitments in legal services." *Id.* The Report noted that Mongolia had not made commitments in legal services and Tonga's services schedules were not available. *Id.*

125. *See* GATS, *supra* note 2, at Art. XXI (Modification of Schedules). It provides, *inter alia*:

> 1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have

In order to understand a WTO Member's *Schedule of Specific Commitments* and the sectors in which that Member "opted in," one must realize that a country's commitments will be expressed in terms of four different "modes of supply." These "modes of supply" stem from GATS Article I (2), which defined "trade in services" as the supply of a service:

> (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.[126]

Thus, when WTO Members make their opt-in category-two commitments, they do so according to these four modes of supply. (The discussion of the Australian *Schedule*, which is reprinted *infra,* will explain the modes of supply in greater detail.)

In my experience, in the legal services sector, the second-category, opt-in provisions that are discussed most often are Article VI (Domestic Regulation), Article XVI (Market Access), Article XVII (National Treatment), and Article XVIII (Additional Commitments). Although this article will discuss all four of these sections, it is worth noting that the middle two (market access and national treatment) are usually discussed most often. All of these provisions are briefly described in the paragraphs that follow.

> elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.
> (b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.
> 2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.
> (b) Compensatory adjustments shall be made on a most-favoured-nation basis.

Id. See *infra* notes 151-58 and accompanying text for a discussion of remedies.

126. GATS, *supra* note 2, at Art. I (2).

GATS Article VI, entitled "Domestic Regulation," is unusual in that some of its provisions appear to be automatically applicable whereas other sections appear optional and apply only to those services found on a country's *Schedule.* For example, Article VI(1) requires that, in "*sectors where specific commitments are undertaken*, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."[127] Article VI(2), on the other hand, seemingly applies to all service sectors, regardless of whether they are listed on a country's *Schedule*; subject to certain exceptions, it requires countries to have procedures for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.[128]

GATS Article XVIII, entitled "additional commitments," allows a country to assume additional, optional obligations in specified sectors.[129] This is where the United States, for example, listed some of the details of its foreign legal consultant rules.[130] Some commentators have seen underutilized possibilities in this category of obligations and have suggested, for example, that the additional commitments column might provide a venue to encourage countries to adopt ethical "choice of law" provisions for legal services in order to avoid the so-called "double deontology" problem.[131]

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127. GATS, *supra* note 2, at Art. VI (1) (emphasis added). *See also Id.* at Art. VI (3) (requiring under "scheduled" services that an applicant be notified of the decision concerning an application within a reasonable period of time after the submission of an application).

128. *Id.* at Art. VI(2)(a) and (b).

129. GATS, *supra* note 2, at Art. XVIII. This article states in its entirety: "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.") *Id.* In my view, it is not easy to determine the type of provisions that should be placed in the "Additional Commitments" column because it is not easy to determine what kinds of provisions are subject to scheduling under Articles 16 or 17. *See generally* Symposium, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services, 2003 THE PROF. LAW.* 83 (2004) [hereinafter Terry, But What Will the Disciplines Apply To?].

130. *See infra* note 142 (U.S. consolidated legal services schedules).

131. *See, e.g.*, Email from Laurel S. Terry, Member, IBA WTO Working Group to Jonathan Goldsmith, Member, IBA WTO Working Group (March 4, 2005) (on file with author).

> I'm not sure the "additional commitments" column should be limited to market access or national treatment issues. So long as a resolution/reference paper involves a foreign lawyer choice of law rule, I don't see what's wrong with bringing it up in the WTO. The reason why I suggested the WTO is that a choice of law provision only works if it is widely adopted and virtually uniform and the WTO seemed like the most practical mechanism for achieving those two things.

Although Articles VI and XVIII are important, the most important opt-in provisions are undoubtedly the market access and national treatment provisions. The "market access" provision identifies specific (and rather technical) prohibited actions.[132] *If* a country has listed a specific service sector on its *Schedule*, *then* it may not do any of Article XVI's prohibited actions *unless* the country has *reserved* the right to do so on its *Schedule*.[133] This reservation or limitation may come in the form of a statement of measures a country currently has and intends to continue using or wants to be able to use in the future or by the inclusion of the word "unbound" in the market access column. (The word "unbound" means that the country is choosing not to be bound by *any* of the market access obligations). While some of Article XVI's market access provisions are clearly inapplicable to legal services, one can imagine how a number of them might apply to legal services.[134]

Id. *See also* Laurel S. Terry, *Introducing the "Double Deontology" Problem: The Intersection of Legal Ethics and Globalization: Choice of Law Issues*, (Amsterdam, May 6, 2009), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm (follow appropriate hyperlink). This author's suggestion that the IBA should formulate a "choice of law" rule for ethics rules and then encourage WTO Member to use the "additional commitments" column to indicate their willingness to use this "choice of law" approach was not well-received because of the perceived difficulty of reaching a consensus on the choice of law rule and because of the variety of ways in which such rules are implemented in different jurisdictions.

132. GATS, *supra* note 2, at Art. XVI. This article prohibits:

> (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.

Id.

133. The ability to create reservations or limitations is set forth in Article XVI(1), which states: "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."

134. *See*, *e.g.*, GATS, *supra* note 2, at Art. XVI (a) ("[L]imitations on the number of service suppliers whether in the form of . . . monopolies"); *id.* at Art. XVI (e) ("measures which restrict or

The "national treatment" obligation found in GATS Article XVII is a much more general provision than the market access provision. The national treatment provision in Article XVII states—in essence—that a country may not discriminate between its own service providers (i.e., its own lawyers) and the service providers of other countries, except as noted on the country's *Schedule*.[135] Thus, this provision does not prohibit discrimination against foreign lawyers, but it does prohibit discrimination that is not listed on a country's *Schedule*.[136] The limitation (or ability to continue discriminating between national providers and the providers from other WTO Member States) must be listed on a country's *Schedule*; the limitation may come in the form of a statement of the rules (*i.e.*, measures) that a country currently has that it intends to continue using or wants to be able to use in the future or by the inclusion of the word "unbound" in *either* the market access or national treatment column.[137] As noted previously, the word "unbound"

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require specific types of legal entity or joint venture through which a service supplier may supply a service").

135. *See* GATS, *supra* note 2, at Art. XVII. This national treatment provision states:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Id.

136. One such exception might be Article V–Economic Integration of the GATS, *supra* note 2. See *supra* note 114 for an example of when Article V has been used.

137. A WTO Member that lists "unbound" in the market access column does not need to include it again in its national treatment column. GATS, *supra* note 2, at Article XX(2) ("Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well"). *See also* WTO, Services: Schedules, *Guide to reading the GATS schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Apr. 17, 2010) [hereinafter WTO Guide].

> All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.

Id.

means that the country is choosing not to be bound by *any* of market access and/or national treatment obligations.

Reprinted below is an excerpt from the legal services portion of Australia's *Schedule of Specific Commitments*.[138] It should be noted that Australia, like most countries, chose to make both "horizontal commitments" that applied to all service sectors and sector-specific commitments, including commitments for the legal services sector.[139] The excerpt below is taken from the legal services commitments section, rather than the horizontal commitments section of Australia's *Schedule*. This excerpt provides a visual illustration that shows how legal services may be scheduled, including the manner in which market access and national treatment exemptions might be listed:

138. General Agreement on Trade in Services, *Australia - Schedule of Specific Commitments*, GATS/SC/6 (Apr. 15, 1994).

139. The principles for interpreting horizontal commitments are the same as the principles for interpreting sector-specific commitments. *See generally* WTO Guide, *supra* note 137.

SECTOR-SPECIFIC COMMITMENTS

Modes of supply :

WTO Services Database Output

1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Australia			
	1. Business Services		
	A. Professional Services		
a) Legal services	1) None	1) None	
Home country law, including public international law (CPC 861**)	2) None	2) None	
	3) Natural persons practising foreign law may only join a local law firm as an employee or as a consultant and may not enter into partnership with or employ local lawyers	3) At least one equity partner in a firm engaged in advising on foreign law matters must be a permanent resident (NSW, Victoria); at least one equity partner in a foreign law firm must be resident for a minimum period of 180 days per calendar year (Queensland)	3) Joint offices involving revenue-sharing between foreign law firms and Australian local law firms are permitted in NSW, Victoria, Queensland and Tasmania subject to the foreign law firms satisfying certain requirements, including in relation to liability, standard of conduct and professional ethics
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section	

In this excerpt from Australia's *Schedule*, the left hand column identifies the services sector (or portion thereof) for which the country is assuming the GATS's optional obligations.[140] The second column from

140. The Australian *Schedule* refers to "CPC 861." Countries have used different approaches in describing the legal services sector (or subsector) in which they intend to make GATS commitments; this topic could be the basis for an entirely separate law review article. Many WTO Members used the categories found in the United Nations' Central Product Classification (CPC) system. For more information on the CPC system (and the competing classification systems), see Laurel S. Terry, *Materials Submitted to the Technical Subgroup (TSG) of the Expert Group on International Economic and Social Classifications*, TSG/27 (Oct. 18, 2004), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/27-IBA_un_documents.pdf (including hyperlinks to the CPC and other legal services classification documents referred to above). For the accompanying presentation, visit: http://www.personal.psu.edu/faculty/l/s/lst3/ presentations%20for%20webpage/ un_classification_terry.pdf (last visited Apr. 17, 2010) [hereinafter Terry, UN Classification Materials]. To see how WTO Members used the CPC when scheduling their legal services commitments, *see* GATS Legal Services Commitments, *supra* note 107; Terry, *Table Showing Legal Services Commitments in the 1994 Uruguay Round*, *supra* note 123 (sorting commitments by CPC-level). Of those countries that originally acceded to the WTO and are listed in the WTO Secretariat's predefined GATS Legal Services Commitments cited *supra* note 107, six countries, including the United States, made their commitments with no mention of the UN CPC 861 category, twelve countries used a UN CPC 4- or 5-digit code, six countries cited all or part of UN CPC 861 or 861+ (with or without further explanation), eleven countries cited UN CPC 861, but with qualifying language, and eight countries listed UN CPC 861 without qualification.

At least one county has used the CPC system when submitting its "requests" to the United States; New Zealand asked the United States to make legal services commitments for all of CPC 861. *See* GATS Requests By State, *infra* note 246, at 9 ("With regard to legal services, extend

the left shows Australia's limitations on its legal services market access commitments. In other words, this column creates exceptions to Australia's obligation to comply with GATS Article XVI with respect to the legal services sector it scheduled. The column third from the left identifies the limitations Australia placed on its obligation to provide national treatment (*i.e.*, equal protection) to foreign lawyers. The final column is where Australia listed its "additional commitments."

In examining the legal services excerpt of the Australian *Schedule*, one can see that the numbers 1 through 4 appear in the market access and national treatment columns and that words are listed after these numbers. These numbers are important because they convey information about the nature of Australia's market access and national treatment limitations (*i.e.,* its limitations or "except as otherwise noted" provisions). These numbers show that Australia has made different commitments for each of the four modes of supplying legal services. The words after each number represent the limitations for that particular mode of supply. The words following the number "1" in the "market access" column reflect Australia's Mode 1 commitments that apply

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Sectoral coverage to whole of CPC 861. Where there is no existing commitment on sub-sectors of CPC 861, schedule full commitments on modes 1, 2, and 3, and Mode 4 commitments as requested in the horizontal section.")

There are a number of resources that offered assistance to WTO Members with respect to the scheduling of legal services. These resources include a WTO Secretariat Sectoral Classification paper, the IBA's legal services "terminology" resolution, and a paper submitted by a number of WTO countries, including the United States, that relied on this IBA resolution. *See* WTO, *SERVICES SECTORAL CLASSIFICATION LIST*, Note by the Secretariat, MTN.GNS/W/120 (July 10, 1991) [hereinafter WTO Secretariat Sectoral Classification Paper]; WTO Council for Trade in Services Special Session, Committee on Specific Commitments, *Communication From Australia, Canada, Chile, The European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu And The United States, Joint Statement on Legal Services,* TN/S/W/37 S/CSC/W/46 (Feb. 24, 2005) (recommending terminology to use for legal services offers) [hereinafter Friends of Legal Services Terminology Paper]; International Bar Association (IBA) Resolution Regarding the Terminology to Use in "Track 1" of the GATS (Adopted San Francisco, 2003) [hereinafter IBA Terminology Resolution]. All of these "classification" documents (and others) are available on the ABA-GATS Webpage. *See* ABA, *Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations*, http://www.abanet.org/cpr/gats/track_one_class.html (last visited Apr. 17, 2010).

The United States's partial loss in the Antigua gambling dispute shows the potential importance of the manner of scheduling services; in that case, the United States argued that it had not intended to "schedule" gambling services and should not be bound, but the WTO Appellate Body disagreed. *See* United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services, Appellate Body Report, WT/DS285/AB/R para. 373(B) (Apr. 7, 2005), *available at* http://www.abanet.org/cpr/gats/gambling_case.pdf ("upholds, albeit for different reasons, the Panel's finding that subsector 10.D of the United States' Schedule to the GATS includes specific commitments on gambling and betting services"). *See also infra* notes 156-158 and accompanying text (describing the gambling case in more detail).

whenever the legal service itself crosses the border into Australia (such as through an email or fax). Its Mode 2 commitments apply to a situation in which an Australian client leaves the country and goes elsewhere to obtain legal services. Its Mode 3 commitments address the right of foreign entities, such as a foreign law firm partnership, to own "establishments" in Australia that provide legal services. (Mode 3 does not address the question of who actually provides the legal service, but instead deals with the issue of entity ownership.) Its Mode 4 commitments state whether and how a foreign legal service provider (such as a European or U.S. lawyer) may physically enter Australia in order to provide legal services. Thus, as the GATS requires, the commitments in the Australian *Schedule* are made according to these four modes of supply, and this is why the market access and national treatment columns each contain listings under the headings 1 through 4.

The legal services excerpt of the Australian *Schedule*, reprinted above, uses the words "none" and "unbound." In this context, the word "none" means that for the service sector specified (such as legal services), the country completing the *Schedule* has placed no "limitations" (*i.e.*, no exceptions or qualifications) on its market access or national treatment obligations. In other words, for the specified sector and mode, Australia has agreed to comply fully with GATS Articles XVI and XVII. The word "unbound," in contrast, means that for the listed service sector, the country has taken on no market access or national treatment obligations for that particular mode of supply. Thus, in the *Schedule* excerpt above, Australia has written "none" in the Mode 1 market access column, which means that for the type of legal services scheduled, it has not placed any limits on the ability to send a legal product such as a fax or email advice letter into Australia. On the other hand, Australia has written "unbound" in the Mode 4 market access column, which means that with respect to Mode 4 legal services (foreign lawyers physically going into Australia), it has not assumed any market access or national treatment obligations.[141] The words "none" and "unbound" represent the two extremes, with the former signaling that a country has not qualified in any respects its market-access and national-treatment obligations and the latter indicating that a country has assumed no market-access or national-treatment obligations. The middle ground between these two extremes happens when a country writes out the

141. In addition to the sector-specific promises in their *Schedules*, most if not all WTO Members made "horizontal commitments" that apply to all service sectors. The Australian legal services excerpt in this law review article includes only a portion of Australia's legal services sector commitments and none of its horizontal commitments.

qualifications, conditions, or limitations it wants to put on its market-access and national-treatment obligations. Some limitations are short, whereas others are quite long. For example, the legal services portion of the U.S. *Schedule* took twenty pages, most of which was devoted to spelling out state-by-state limitations on market access and national treatment obligations with respect to the rights of foreign lawyers to practice their home country law in the United States.[142]

In sum, this second category of GATS provisions includes some of the most important and most frequently referenced provisions in the GATS, namely the market access and national treatment provisions. One cannot understand this second category of opt-in provisions without understanding that the decision to opt-in will be made on a sector-by-sector basis and that, within a sector, such optional commitments will be made according to four "modes of supply." This means that a WTO Member can condition or limit the degree to which it has "opted in." As one commentator once remarked to me, a country that puts legal services on its *Schedule* can still discriminate against foreign lawyers, it just has to be transparent about that fact.

The *third category* of GATS provisions consists of the two GATS articles that required future action. GATS Article XIX required WTO members, within five years of the effective date of the GATS (1995), to begin negotiations to further liberalize trade in services.[143] GATS Article VI(4) required WTO members to develop "any necessary disciplines" to ensure that domestic regulation measures do not create unnecessary barriers to trade.[144]

This first ongoing obligation, which is the Article XIX obligation to engage in negotiations for further liberalization, currently is taking place under the auspices of the Doha Round trade negotiations. In the legal

142. *See* General Agreement on Trade in Services, *The United States of America Schedule of Specific Commitments*, GATS/SC/90 at 15-34 (April 15, 1994), http://www.abanet.org/cpr/gats/legal_services_1994.pdf (showing eighteen pages of the U.S. *Schedule* were devoted to the "consultancy on law of jurisdiction where service supplier is qualified as a lawyer (subject to certain additional conditions)").

143. GATS, *supra* note 2, at Art. XIX(1):

> In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

144. GATS, *supra* note 2, at Art. VI (4).

services context, these developments are sometimes referred to as GATS Track #1 activities.[145] If the Doha Round negotiations are successfully concluded, WTO Members will revise their *Schedules* to reflect the new specific commitments that result from those negotiations.

The second ongoing obligation is based on GATS Article VI(4). In the legal services context, it is sometimes referred to as GATS Track #2. GATS Track #2 "disciplines," if developed, would apply to selected U.S. domestic measures that affect the qualification, licensing, or technical standards applicable to foreign lawyers.[146] To be more specific, Article VI(4) requires WTO Members to consider developing "any necessary disciplines" to ensure that domestic regulation measures do not create unnecessary barriers to trade:

> 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.[147]

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145. *See generally* ABA GATS Webpage, http://www.abanet.org/cpr/gats/home.html (using the Track #1 and Track #2 language); Terry *et al.*, *Transnational Legal Practice 2006-2007*, *supra* note 50, at 836-838. The current round of negotiations is known as the Doha Round after the city in which these negotiations commenced.) For additional information on the manner in which these negotiations have been conducted, see *infra* Section IV(A).

146. GATS, *supra* note 2, at art. VI(4).

147. *Id.* Determining exactly *which* measures disciplines would apply to is a very complicated subject. *See* Terry, *But What Will the Disciplines Apply To?*, *supra* note 129. In general, in the GATS context, WTO Members seem to view as mutually exclusive those "measures" that should be "scheduled" as market access and national treatment measures and those measures that would be subject to domestic regulation disciplines developed pursuant to Article VI:4. *Id.* I am not aware of anything that defines the term "discipline" or "disciplines" as used in the GATS (or the GATT). In the trade world generally, the word "discipline" or "disciplines" has been used to refer to "provisions" or obligations or requirements on the one hand. *See. e.g.*, ALI WTO Law, Draft 3, *supra* note 121, at 10, 16, 23, n.74 ("[I]t was agreed that domestic measures enforced at the border should be considered to be covered by the [national treatment] discipline, and not by the discipline regarding [quantitative restrictions]"). "Disciplines" also has been used as a way to refer to "disciplining" or providing consequences to someone for their actions. *Id*. at 118 ("Is it the purpose of the GATT to discipline Members in this sense?").

In my view, WTO Members have a mandatory obligation to "consider" the development of these kinds of domestic regulation disciplines, but no obligation to adopt them.

In sum, the third category of GATS provisions are those provisions that required future action. GATS Article XIX, also known as Track #1, required WTO Members to commence progressive liberalization negotiations within five years of the effective date of the GATS. GATS Article VI(4), also known as Track #2, required WTO Members to discuss the adoption of "any necessary disciplines."

The fourth and final category of GATS provisions consists of GATS Article II(2), which gave WTO Members the ability to create MFN exemptions. As noted earlier, one of the most basic premises of the GATS is the most favored nation (MFN) clause, which requires that all WTO Members be treated equal to each other.[148] At the time a country joined the WTO, however, it had the option of exempting itself—on a limited time basis—from the MFN requirement.[149] In the legal services sector, only eight of the initial WTO Members opted out of the MFN requirements.[150]

One final point worth noting is the issue of remedies. Unlike the "investment" chapter in the NAFTA,[151] the GATS does not have an "investment" chapter and does not create a private cause of action for individuals, but must be enforced through a dispute resolution process

148. GATS, *supra* note 2, at Art. II(1).

149. GATS, *supra* note 2, at Art. II(2) ("A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions").. In addition to the Article II(2) exemptions, GATS Members may rely on Article V to give preferential treatment to those WTO Members who are part of an economic integration unit. *See supra* note 114 (noting that Article V is what allowed one EU Member State to give preferential treatment to lawyers from the new EU Member States after the expansion from fifteen members).

150. *See* Legal Services Background Note*, supra* note 123, at 16. The Secretariat's note stated that of the original WTO Members, four WTO Members have MFN exemptions in legal services and four other Members have exemptions in professional services (which includes legal services). These eight countries are: Brunei Darussalam, Bulgaria, Dominican Republic and Singapore (legal services MFN exemptions) and Costa Rica, Honduras, Panama, and Turkey (professional services MFN exemptions).

151. *See* NAFTA, *supra* note 6, at ch. 11. The investment chapter has proved controversial because it allows an individual (foreign) investor to challenge governmental action. *See*, *e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 383-86 (2003). For an example of a NAFTA case that generated controversy within the legal profession, see *In re* Arbitration between Raymond L. Loewen v. United States, No. 04-2151 (D. D.C) (2005) (mem. op.), *available at* http://naftaclaims.com/Disputes/USA/Loewen/Loewen-Circuit_Court_Decision-31-10-05.pdf.

requiring a government-to-government complaint.[152] Annex 2 to the Agreement Establishing the WTO creates the dispute resolution system that applies to the GATS.[153] Under this system, the ultimate arbiter of claims is the WTO Appellate Body.[154] It cannot compel action by a WTO Member, but it can rule under GATS Article XXIII that one WTO Member is entitled to use retaliatory trade sanctions against another WTO Member that has acted in a manner inconsistent with its GATS commitments.[155] GATS Article XXI is also relevant to the "remedies" issue; that article allows a WTO Member to modify its *Schedule*, starting three years after it took effect, provided that Member makes "compensatory adjustments" in its Schedule based on negotiations with affected Members. Thus, a WTO Member that has "lost" a dispute before the Appellate Body might choose to modify its *Schedule of Specific Commitments*, in which case new commitments in other sectors might be expected under GATS Article XXI. The goal of Article XXI negotiations is to maintain a level of commitments in a Member's *Schedule* comparable to those prior to the negotiations. Under both the Article XXI compensation process and Article XXIII retaliatory sanctions, the sector affected may be different than the sector that was the subject of the Appellate Body dispute.

An example that illustrates both of these "remedies" is the U.S.-Antigua cross-border gambling and betting dispute. The WTO Appellate Body found that the United States had made specific commitments that included cross-border gambling and betting and that the United States had laws inconsistent with those commitments. A WTO arbitration panel ultimately found that Antigua and Barbuda were entitled to retaliate under Article XXIII by suspending $21 million of their intellectual property obligations to the United States, which was a different sector than was involved in the case. After the Appellate Body decision, the United States announced that pursuant to Article XXI, it planned to modify its specific commitments related to gambling. Eight

152. *See* GATS, *supra* note 2, at Art. XXI (Modification of Schedules); *id.* at Art. XXIII (Dispute Settlement and Enforcement).

153. WTO, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. *See also* WTO, *Dispute Settlement*, http://www.wto.org/english/tratop_E/dispu_e/dispu_e.htm (last visited Apr. 17, 2010).

154. *See supra* note 153.

155. GATS, *supra* note 2, at Art XXIII(2) ("If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU").

Members undertook compensatory adjustment negotiations with the United States under GATS Article XXI; several of these negotiations are now complete and involve commitments in sectors other than gambling.[156]

In the context of legal services, the remedies issue is not completely without controversy. Although the USTR has issued a Fact Sheet on state sovereignty indicating that the GATS does not override the states' ability to regulate,[157] the U.S. WTO enabling legislation arguably

156. This footnote supports all of the statements in this paragraph. For information about remedies and the gambling case, see Office of the United States Trade Representative, Request for Public Comment on the Negotiations for Compensatory Adjustments to U.S. Schedule of Services Commitments Under WTO General Agreement on Trade in Services (GATS) in Response to Notice of the United States of Intent To Modify Its Schedule Under Article XXI of the GATS, 72 Fed. Reg. 38846 (July 16, 2007) (Eight WTO Members – Antigua and Barbuda, Australia, Canada, Costa Rica, the European Communities, India, Japan and Macao, notified the United States of their intent to seek compensation as a result of the U.S. modification of its GATS schedule to reflect its original intent); USTR, Statement by USTR Spokeswoman Gretchen Hamel on Gambling (Dec, 17, 2007), http://ustraderep.gov/Document_Library/Press_Releases/2007/December/Statement_by_USTR_Spokeswoman_Gretchen_Hamel_on_Gambling_printer.html (last visited Apr. 17, 2010) (announcing compensation agreement with the EU, Canada, and Japan regarding the gambling case; the agreement involves sectors other than gambling but did not involve legal services); *see also* International Economic Law and Policy Blog, Some Gambling Updates: Compensation and Arbitration, http://worldtradelaw.typepad.com/ielpblog/2007/12/some-gambling-u.html (last visited Apr. 17, 2010) (collecting news reports regarding compensation in the gambling case).

For information about the Article XXIII retaliatory sanctions remedy in the gambling case, see WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrator, WT/DS285/ARB 78 (Dec. 21, 2007) ("Accordingly, the Arbitrator determines that Antigua may request authorization from the DSB, to suspend the obligations under the TRIPS Agreement mentioned in paragraph 5.6 above, at a level not exceeding US$21 million annually"); *see generally* WTO, *Dispute Settlement: Dispute DS285, United States — Measures Affecting the Cross-Border Supply Of Gambling and Betting Services*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Apr. 17, 2010) (includes links to dispute documents).

I originally had in the text of this "remedies" discussion a reference to a *Wall Street Journal* news article that used legal services liberalization as an example of the type of compensation the EU might seek following the WTO gambling case. *See* John W. Miller, *EU Service Firms Could Gain U.S. Access Thanks to Internet Gambling Case*, WALL ST. J., Aug. 23, 2007, at A2. A USTR representative suggested that this was a poor example to use because of the news article's imprecise and possibly misleading language about compensation and its suggestion that Article XXI could be used to compel state changes in legal services. I ultimately agreed with this viewpoint and removed the text's reference to this news article, but this exchange illustrates the sensitivity of the remedies issue and the difficulty of using accurate and precise language.

157. This fact sheet is no longer on the USTR's active website, but a copy is available in its archives. *See* USTR, Fact Sheet: State Sovereignty and Trade Agreements: The Facts (Apr. 14, 2005), *available at* http://web.archive.org/web/20071024160141/www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file870_7578.pdf. *See also*, USTR Response to IGPAC Memorandum on the Updated U.S. GATS Submission (June 30, 2005), http://www.forumdemocracy.net/downloads/ USTR%20June%2030,%202005.pdf.

permits the federal government to bring a declaratory judgment action against a state to compel change.[158] To date, there have been no legal challenges to this authority of which I am aware, and my impression is that key stakeholders are trying to work together, rather than creating confrontations. The issue, however, is clearly a sensitive one.

As this summary has shown, the GATS has four distinct categories of provisions. The first category consists of the generally applicable provisions that become binding when a country joins the WTO. The second category consists of opt-in provisions that apply only if a country listed a particular services sector on its *Schedule of Specific Commitments* and only to the extent spelled out in that *Schedule*. The third category of GATS provisions consists of Articles VI(4) and XIX, which require future action in the form of negotiations about progressive liberalization (Track #1) and negotiations about "disciplines" (Track #2). The final category of GATS provisions is the ability of a country, when it joined the WTO, to create an MFN exemption.

> USTR would like to highlight that we fully concur with the [Intergovernmental Policy Advisory Committee (IGPAC)] in this view, and wish to emphasize that the GATS clearly respects the sovereign right of WTO Members to regulate services and to introduce new regulations, as detailed below. Domestic laws, regulations, qualification requirements and other standards that apply to domestic service suppliers will also apply to foreign service suppliers, so federal, state, and local governments fully preserve their right to regulate.

Id. For additional information on IGPAC, see USTR, Intergovernmental Policy Advisory Committee (IGPAC), http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/intergovernmental-policy-advisory-committee-i. *See also* Margaret Mikyung Lee, Legal Services in the World Trade Organization (WTO) and U.S. Effect, CRS Report to Congress, RS22949 (Sept. 12, 2008), *available at* http://assets.opencrs.com/rpts/RS22949_20080912.pdf.

> Any substantive Doha Round concessions or any agreement to a legal services discipline by the United States would obligate it, under GATS Article I (3) (a), to take reasonable measures to ensure that each of its political subdivisions observes such agreements. This could pose federalism issues, since the rules governing practice in a state are a matter for the highest court of a state or for its legislature and not traditionally a matter for federal legislation or policy. The U.S. Trade Representative (USTR) does not make WTO commitments with which the United States is not in a position to comply. This is the reason the current schedule of commitments notes obligations in terms of which states have certain requirements, such as in-state residency for licensure.

Id.

158. *See, e.g.*, Uruguay Round Agreements Act (URAA) § 102(b)(2)(A), 19 U.S.C. § 3512(b)(2)(A) (1994). It reads:

> No State law, or the application of such a State law, may be declared invalid as to any person or circumstances on the ground that the provision or application is inconsistent with any of the [WTO agreements], except in an action brought by the United States for the purpose of declaring such law or application invalid.

Id. Although this legislation arguably permits a federal lawsuit to compel state action, I have never heard USTR representatives advocate this option.

B. The Structure of Other U.S. International Trade Agreements Applicable to Legal Services

The prior subsection discussed some of the key features of the GATS. This subsection discusses the other fourteen trade agreements the United States has signed. It is beyond the scope of this article to exhaustively review these agreements. Rather, this section highlights some of the key features of those agreements and compares their structure to the structure of the GATS and the NAFTA. As noted earlier, however, in order to comment accurately on any particular FTA, one would need to examine its specific language.

As a preliminary matter, it is worth noting that, although there are many similarities among the GATS and the fourteen additional FTAs, there are variations in both their content and numbering system. Thus, while one always will want to look for the "Services" chapter within a particular FTA, one cannot be certain ahead of time where one will find it. For example, in some FTAs, the "Services Chapter" is found in Chapter 11, whereas in others, it will be Chapter 12.[159] *Second*, one cannot be sure where one will find a particular kind of provision within the "Services" Chapter. For example, in some FTAs, the domestic regulation provision is Article 7 of the "Services" chapter, whereas in other FTAs, it is Article 8.[160] *Third*, it is worth noting that these FTAs differ significantly in terms of how easy it is to locate a specific kind of provision within the FTA. Some FTAs have hot-linked tables of contents, whereas other FTAs are much more difficult to work with because the USTR webpage links to a single PDF document that is sometimes several hundred pages long.[161] *Fourth*, although one often finds identical language in different FTAs, one cannot be confident that the same kinds of provisions will always use identical or even substantially similar language. Whenever the language of similar provision differs, one must evaluate whether those differences change the meaning of the provision or are simply grammatical changes. For example, while many of the FTAs have provisions regarding transparency,[162] MFN,[163] recognition,[164] domestic regulation,[165] market

159. *See* Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text.

160. *Id.* (It is also found in articles 10, 11 and 12, depending on the FTA.)

161. *Compare*, *e.g.*, Australia FTA, *supra* note 34, (the table of contents includes a hotlink for each chapter), *with* the Singapore FTA, *supra* note 33 (the webpage includes a hotlink to a single 236-page PDF document).

162. *See* the citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. As those tables show, the transparency provision appears in different locations in different FTAs, except for the Israel and Jordan FTAs, which do not have transparency sections. Much of the

access,[166] national treatment,[167] implementation,[168] and general exceptions[169] that are quite similar, these provisions are not identical.[170]

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language in these transparency provisions is nearly identical. For example, although there are a few word differences in the opening paragraph (changing "their" to "its"), these paragraphs are substantially similar in the FTAs. Furthermore, each FTA except those with Australia (and Israel and Jordan) has nearly identical language at the closing of the introductory section, stating that "…to the extent possible, each Party shall allow a reasonable period of time between publication of final regulations and their effective date." The Australia FTA adds language in the closing provision that states: "… [t]o the extent possible, each Party shall provide notice of the requirements of final regulations prior to their effective date." Each FTA also has a supplementary section that describes in detail publication, notice and provision of information, administrative proceedings, and review and appeal requirements. Interestingly, the earlier agreements (Chile, Singapore, and Australia) do not have anti-corruption sections in their supplemental transparency chapters. This anti-corruption section can be found in all agreements since the Morocco FTA (Eff. 1-2006).

163. *See* the citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. All of the FTAs except the Israel and Jordan FTAs, have a "Most Favored Nation (MFN) provision." These provisions are identical, except for the Peru and the pending Colombia FTAs, which use slightly different language. Whereas the other FTAs state ". . . treatment no less favorable . . . to service suppliers of a non-Party," the Peru and pending Colombia FTAs state, ". . . treatment no less favorable . . . to service suppliers of any other Party or any non-Party." *Id.*

164. For a comparison of the recognition provisions, see *infra* notes 183-92.

165. For a comparison of the "domestic regulation" provisions, see *id*.

166. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. All of the FTAs except the Israel FTA included a market access provision. With the exception of the Jordan FTA, which incorporates by reference GATS Article XVI (a-f), the market access provisions in these FTAs are substantially similar. With one very minor exception, each of the FTAs except Jordan and Israel uses the same language in its subsections when defining what constitutes market access violations. The one exception is that Singapore's subsection (a) states "limit" whereas the other FTAs use the language "(a) impose limitations on . . . ." Although the subsections are identical with this one exception, there are slight, but in my view, insignificant differences in the introductory language before the subsection. Thus, Chile's Market Access provision begins "[n]either Party may, either on the basis of a regional subdivision or on the basis of its entire territory, adopt or maintain measures that: . . . ." whereas Singapore's introductory wording states, "A Party shall not adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that . . . ." Australia's introductory wording states "[n]either Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that . . . ."

167. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. All of the FTAs except the Israel FTA included a national treatment provision. With the exception of the Jordan FTA, which incorporates by reference GATS Article XVI (a-f), and the Australia FTA, the national treatment provisions are substantially similar. The Australian FTA omits the second paragraph that is found in the other FTA national treatment provision. In the other FTAs, the omitted second section explains the purpose of the first section and states:

> 2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to service suppliers of the Party of which it forms a part.

Id.

168. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. All of the FTAs have sections that require ongoing work to implement the agreements. The GATS has the Track 1 and Track 2 requirements found in Articles VI:4 and XIX, discussed *supra* notes 143-47

Finally, it is worth noting that some FTAs have "side agreements" applicable to legal services that one must search for in order to have a complete understanding of the FTA.[171]

As the tables that follow illustrate, all but two of these fourteen additional agreements include many of the same kinds of provisions as

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and accompanying text. *See* 235-319 and accompanying text (discussing implementation. The NAFTA not only has Annex 1210.5, but also Article 2001 and Annex 2001.2, the former of which creates the NAFTA Free Trade Commission and the latter of which specifies the committees and working groups. The Israel and Jordan agreements have a section entitled "Joint Committee," the pending Korea FTA provides for implementation work in Annex 12-A and creates a "Joint Committee" in Article 22. All of the other FTAs have a section entitled "Implementation" in their "services" chapter. *Id.* All of the agreements except the GATS require an annual meeting or consultation. *Id.* *See also infra* note 328 and accompanying text (citing the differing implementation language).

169. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. GATS Article XIV(a) includes the following "exceptions," which are relevant to legal services:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order; …
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

Id. All of the FTAs except NAFTA and the Israel FTA incorporate by reference these provisions of GATS Article XVI. For example, Article 21.1(2) of the Singapore FTA, *supra* note 33, states:

> For purposes of Chapters 8, 9, and 14 (Cross Border Trade in Services, Telecommunications, and Electronic Commerce, GATS Article XIV (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in GATS Article XIV (b) include environmental measures necessary to protect human, animal, or plant life or health.

The one-paragraph services portion of the Israel FTA predated the GATS and does not include a general exceptions section. NAFTA Article 2101(2): states:

> General Exceptions . . . 2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in: …Chapter Twelve (Cross-Border Trade in Services). . . shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.

See citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text.

170. *See supra* notes 162-69.

171. *See infra* notes 214-15 and accompanying text and citations in Terry Tables 1a-1d, *infra* at notes 219-33.

the GATS.[172] (The two exceptions are the 1985 U.S.-Israel FTA, which has a single paragraph devoted to services, and the 2001 U.S.-Jordan FTA, which has four paragraphs devoted to services.[173]) Thus, if one understands the structure of the GATS, it should be relatively straightforward to understand the structure of the other trade agreements. Despite these similarities, however, there are some important differences between the GATS and some of these agreements. Because these FTAs sometimes follow the lead of the NAFTA, rather than the GATS, it is useful to begin by comparing the GATS and the NAFTA.

In my view, the most significant difference between the GATS and the NAFTA is the fact that the NAFTA uses a "negative list" opt-out approach to legal services, whereas the GATS uses a "positive list" opt-in approach. This difference affects the second category of GATS obligations described earlier.[174] Under a positive list approach, the market access, national treatment, and other "optional" provisions apply only insofar as the country has affirmatively placed the legal services sector on its *Schedule*. This is referred to as a "positive list" approach because a country must affirmatively opt in, on a sector-by-sector basis, to the additional obligations in the GATS. In contrast to the GATS's positive list approach, the NAFTA uses a "negative list" approach in which all of the NAFTA's provisions apply to all service sectors except as otherwise specified in the "annexes" attached to the end of the agreement.[175] This is referred to as a "negative list" approach because a country must specify the sectors that it does *not* want to be bound, as opposed to the GATS's positive approach in which a country specifies the sectors in which it *does* want to be bound.

With two exceptions, all of the other FTAs follow the NAFTA model, rather than the GATS model, and use a negative list approach.[176] The first exception is the 1985 Israel FTA; its one-paragraph services

172. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text (all but the Israel and Jordan FTA include transparency, most-favored nation (MFN), recognition, exceptions, domestic regulation, national treatment and market access provisions).

173. *See* Jordan FTA, *supra* note 31, at Art. 3; Israel FTA, *supra* note 9, at Art. 16 (quoting the entire services paragraph).

174. *See supra* notes 122-38 and accompanying text.

175. NAFTA, *supra* note 6, at Art. 1108: Reservations and Exceptions.

> Articles 1102, 1103, 1106 and 1107 do not apply to: (a) any existing non-conforming measure that is maintained by …a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2 . . .

Id.

176. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text (all but the Israel and Jordan FTA use a "negative" list approach).

provision uses neither a positive list nor a negative list approach.[177] The second exception is the 2001 U.S.-Jordan FTA, which was the first FTA after the GATS and NAFTA.[178] Annex 3.1 of the U.S.-Jordan FTA is a Services Schedule that looks strikingly similar to the GATS Schedule and affirmatively lists the sectors, including legal services, for which the United States intends to be bound.[179]

If an FTA uses an opt-out negative list approach, rather than an opt-in positive list approach, that agreement's exceptions will be particularly important because the default assumption of a negative list approach is that all services are covered. The NAFTA and the negative list FTAs include language in their final text and in their accompanying annexes that create "standstill" provisions;[180] these are called "standstill" provisions because they create exceptions for existing lawyer regulations. For example, Article 10.6 of the U.S.-Australia FTA is entitled "non-conforming measures" and states that the national treatment, MFN, market access, and local-presence requirements do not apply to non-conforming measures of a local level of government or to those measures of the central or regional government that are set forth in the Schedule to Annex I.[181] The last page of the U.S.-Australia Annex I

177. *See* Israel, FTA, *supra* note 9.

178. *See* Jordan FTA, *supra* note 31.

179. *Id.* at Annex 3.1.

180. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text (all but the GATS, Israel and Jordan FTAs include a "non-conforming measures" section and annexes that create "standstill" provisions. The Singapore Annexes are found after Chapter 8; the other annexes are found at the end of the agreement's final text).

181. The "standstill" provision in the U.S.-Australia FTA provides as follows:

> ARTICLE 10.6 : NON-CONFORMING MEASURES.
>
> 1. Articles 10.2, 10.3, 10.4, and 10.5 do not apply to:
>
> (a) any existing non-conforming measure that is maintained by a Party at:
>
> i. the central level of government, as set out by that Party in its Schedule to Annex I;
>
> ii. a regional level of government, as set out by that Party in its Schedule to Annex I; or
>
> iii. a local level of government;
>
> (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
>
> (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.2, 10.3, 10.4, or 10.5.
>
> 2. Articles 10.2, 10.3, 10.4, and 10.5 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities as set out in its Schedule to Annex II.

Australia FTA, *supra* note 34, at Art. 10.6.

Schedule states an exclusion for all sectors (thus including legal services) for existing state regulations.[182]

In sum, an important difference among trade agreements is whether they use a positive list approach, such as the GATS and the Jordan FTA, or a negative list approach, such as the NAFTA and all other subsequent agreements. The negative list agreements include "standstill" provisions that apply to state lawyer regulations. Although there are similarities among these agreements, one must always check the agreement text and its Schedules or Annexes in order to determine the scope of the United States' obligations.

A second significant difference between the GATS and the NAFTA is the fact that the NAFTA does not contain any sections labeled "recognition" or "domestic regulation," although similar concepts are included in a NAFTA article entitled "licensing and certification."[183] All

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182. *Id.* at Annex I-United States-12, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file350_3425.pdf . Page 12 of this Annex contains this exemption:

> Sector: All Sectors
> Obligations Concerned: National Treatment (Articles 10.2 and 11.3)
> Most-Favored-Nation Treatment (Articles 10.3 and 11.4)
> Local Presence (Article 10.5)
> Performance Requirements (Article 11.9)
> Senior Management and Boards of Directors (Article 11.10)
> Level of Government: Regional
> Measures: All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico

Id.

183. *Compare* GATS, *supra* note 2, at Art. VI (Domestic Regulation) and Art. VII (Recognition), *with* NAFTA, *supra* note 6, at Art. 1210 (Licensing and Certification). NAFTA Art. 1210 provides:

> Article 1210: Licensing and Certification
> 1. With a view to ensuring that any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party does not constitute an unnecessary barrier to trade, each Party shall endeavor to ensure that any such measure:
>
> (a) is based on objective and transparent criteria, such as competence and the ability to provide a service;
> (b) is not more burdensome than necessary to ensure the quality of a service; and
> (c) does not constitute a disguised restriction on the cross-border provision of a service.
>
> 2. Where a Party recognizes, unilaterally or by agreement, education, experience, licenses or certifications obtained in the territory of another Party or of a non-Party:
>
> (a) nothing in Article 1203 shall be construed to require the Party to accord such recognition to education, experience, licenses or certifications obtained in the territory of another Party; and

> (b) the Party shall afford another Party an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in that other Party's territory should also be recognized or to conclude an agreement or arrangement of comparable effect.
>
> 3. Each Party shall, within two years of the date of entry into force of this Agreement, eliminate any citizenship or permanent residency requirement set out in its Schedule to Annex I that it maintains for the licensing or certification of professional service providers of another Party. Where a Party does not comply with this obligation with respect to a particular sector, any other Party may, in the same sector and for such period as the noncomplying Party maintains its requirement, solely have recourse to maintaining an equivalent requirement set out in its Schedule to Annex I or reinstating:
>
> (a) any such requirement at the federal level that it eliminated pursuant to this Article; or
>
> (b) on notification to the non-complying Party, any such requirement at the state or provincial level existing on the date of entry into force of this Agreement.
>
> 4. The Parties shall consult periodically with a view to determining the feasibility of removing any remaining citizenship or permanent residency requirement for the licensing or certification of each other's service providers.
>
> 5. Annex 1210.5 applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers.

Id. Annex 1210.5 states:

> Section A General Provisions
>
> Processing of Applications for Licenses and Certifications
>
> 1. Each Party shall ensure that its competent authorities, within a reasonable time after the submission by a national of another Party of an application for a license or certification:
>
> (a) where the application is complete, make a determination on the application and inform the applicant of that determination; or
>
> (b) where the application is not complete, inform the applicant without undue delay of the status of the application and the additional information that is required under the Party's law.
>
> Development of Professional Standards
>
> 2. The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission.
>
> 3. The standards and criteria referred to in paragraph 2 may be developed with regard to the following matters:
>
> (a) education - accreditation of schools or academic programs;
>
> (b) examinations - qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
>
> (c) experience length and nature of experience required for licensing;
>
> (d) conduct and ethics - standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;
>
> (e) professional development and re-certification - continuing education and ongoing requirements to maintain professional certification;
>
> (f) scope of practice - extent of, or limitations on, permissible activities;

of the FTAs except the Jordan and Israel FTAs follow the GATS model, rather than the NAFTA model and have a section titled either "recognition" or "mutual recognition."[184] With the exception of the pending Korea FTA, which has added an additional paragraph, these recognition provisions are substantially similar.[185] In my view, these recognition obligations are rather "soft."[186] For example, the U.S.-Morocco FTA states:

> (g) local knowledge - requirements for knowledge of such matters as local laws, regulations, language, geography or climate; and
> (h) consumer protection - alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers.
>
> 4. On receipt of a recommendation referred to in paragraph 2, the Commission shall review the recommendation within a reasonable time to determine whether it is consistent with this Agreement. Based on the Commission's review, each Party shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time.
>
> Temporary Licensing
>
> 5. Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service providers of another Party.
>
> Review
>
> 6. The Commission shall periodically, and at least once every three years, review the implementation of this Section.

Id.

184. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. Except for the NAFTA and the Israel FTA, all of the FTAs generally follow the GATS model. The CAFTA-DR, Panama, Bahrain, Morocco, and Chile FTAs refer to "mutual recognition" whereas Singapore, Australia, Oman, Peru, Colombia, and Korea are entitled "recognition." The Jordan FTA incorporates the GATS recognition provision by reference when it states "[t]he provisions of GATS that shall be construed to give rise to rights and obligations under this Article are: Article …VII:1 & 2…" *Id.* at Art. 3(C)(ii). It is beyond the scope of this article to address the degree to which the differing language creates differences in the substantive obligations. For the NAFTA language, see NAFTA, *supra* note 6, at Art. 1210 (Licensing and Certification). The one-paragraph "services" section of the Israel FTA, *supra* note 9, does not have a section entitled "recognition." Although there is a separate paragraph (Art. 12) in the Israel agreement is entitled "LICENSING," it seems to apply only to goods, not services.

185. *Id.* With the exception of the pending Korea FTA, all FTAs have substantially similar recognition provisions, with only minor differences. For example, the pending Panama FTA states: "4. Neither Party may accord recognition in a manner that would constitute a means of discrimination between countries…." whereas the Chile FTA states "4. A Party shall not accord recognition in a manner which would constitute a means of discrimination between countries…"

The pending Korea FTA differs from the others in that it includes an additional subsection that states: "3. On request of the other Party, a Party shall promptly provide information, including appropriate descriptions, concerning any recognition agreement or arrangement that the Party or relevant bodies in its territory has concluded."

186. *See generally* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text; *see supra* note 117 (discussion of the meaning of "soft" as used in this article).

> ARTICLE 11.9: MUTUAL RECOGNITION
> 1. For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing, or certification of services suppliers, and subject to the requirements of paragraph 4, a Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country, including the other Party and non-Parties. Such recognition, which may be achieved through harmonization or otherwise, may be based on an agreement or arrangement with the country concerned or may be accorded autonomously.[187]

On the issue of domestic regulation, all of the FTAs (except the very short services paragraph in the Israel FTA[188]) have again followed the GATS model rather than the NAFTA model. The Jordan FTA incorporates the GATS by reference;[189] the other FTAs have a section labeled "domestic regulation" as does the GATS, rather than a section entitled "licensing and certification" as does the NAFTA.[190] With the exception of the pending Korea FTA, these FTA provisions are substantially similar.[191] On the issue of domestic regulation

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187. Morocco FTA, *supra* note 35, at Art. 11.9.

188. *See supra* note 9 (quoting the entire services paragraph in the Israel FTA).).

189. *See* Jordan FTA, *supra* note 31, at Art. 3(2) (c) (ii) ("The provisions of GATS that shall be construed to give rise to rights and obligations under this Article are: Articles . . . VI:1, 2, 3, 5, 6").

190. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. For example, the Peru FTA, *supra* note 38, states:

> Article 11.7: Domestic Regulation
> 1. Where a Party requires authorization for the supply of a service, the Party's competent authorities shall, within a reasonable time after the submission of an application considered complete under its laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the Party's competent authorities shall provide, without undue delay, information concerning the status of the application. This obligation shall not apply to authorization requirements that are within the scope of Article 11.6.2.
> 2. 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, each Party shall endeavor to ensure, as appropriate for individual sectors, that such measures are:
> (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; and
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

See infra note 193 for the text of this paragraph.

191. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. Except for the pending Korea FTAs, the only difference in the domestic regulation provisions is the manner in which the possessive is expressed. The Chile-Bahrain FTAs state " . . . the competent authorities *of the Party* shall provide . . . " The Oman and subsequent FTAs state " . . the *Party's competent authorities* shall provide . . . " (emphasis added).

"disciplines,"[192] all of the FTAs except Korea, Jordan, and Israel state that if GATS "disciplines" are adopted, the FTA parties will conduct negotiations on whether to incorporate those provisions into the FTA.[193] Thus, U.S. FTAs follow the lead of the GATS, rather than the NAFTA, with respect to both recognition and domestic regulation provisions.

A third significant difference between the NAFTA and the GATS is the fact that the NAFTA contains a professional services appendix or "Annex," whereas the GATS does not.[194] NAFTA Annex 1210.5, which is the "Professional Services Annex," is found at the end of NAFTA's Chapter 12, rather than at the end of the entire agreement in the section labeled "Annexes."[195] Annex 1210.5 consists of three parts: Annex 1210.5(A) is titled "General Provisions," Annex 1210.5(B) is titled Foreign Legal Consultants, and Annex 1210.5(C) is titled Civil Engineers.[196]

The domestic regulation provision in the pending Korea FTA is significantly different than the domestic regulation provisions in the other FTAs. The second paragraph of the pending Korea FTA, for example, added and removed language. The new language states "while recognizing the right to regulate and to introduce new regulations on the supply of services in order to meet national policy objectives." The language that was eliminated stated: "(b) not more burdensome than necessary to ensure the quality of the service[.]" *Compare*, *e.g.*, Peru FTA, *supra* note 38, at Art. 11.7: Domestic Regulation, *with* the pending Korea FTA, *supra* note 41, at Art. 12.7.

192. The issue of GATS "disciplines" is discussed *supra* in notes 146-47 and accompanying text. For information about the ongoing disciplines negotiations, see *infra* notes 282-319 and accompanying text.

193. *See* the citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. For example, the Peru FTA, *supra* note 38, states:

> If the results of the negotiations related to Article VI:4 of the GATS (or the results of any similar negotiations undertaken in other multilateral fora in which each of the Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties shall coordinate on such negotiations, as appropriate.

Id. at Art. 11.7(3). The pending Korea FTA omits the last sentence's requirement that "[t]he Parties agree to coordinate on such negotiations, as appropriate." Pending Korea FTA, *supra* note 41, at Art. 12.7(3). The Israel FTA doesn't mention domestic regulation or disciplines. The Jordan FTA incorporates by reference all of GATS Article VI, except Article VI:4, which is the "disciplines" portion of the GATS domestic regulation provision.

194. *Compare* GATS, *supra* note 2, *with* NAFTA, *supra* note 6, at Annex 1210.5.

195. *See generally* NAFTA, *supra* note 6. The text on the official NAFTA webpage, which is the link provided by the USTR, uses hyperlinks to each chapter. Thus, one would not know that Annex 1210.5 exists unless one clicks on the hyperlink for Chapter 12, which is the Services chapter.

196. NAFTA, *supra* note 6, at Annex 1210.5. For a discussion of the General Provisions in other FTA Annexes, see *infra* note 199. Section B of the NAFTA Annex 1210.5, which is the section on foreign legal consultants, consists of seven paragraphs, including an opening paragraph, two paragraphs under the heading "Consultations with Professional Bodies," and four paragraphs under the heading "Future Liberalization." The NAFTA Annex has special sections for legal and engineering services. These are two of the very few services singled out in the FTAs. The

With the exception of the very short 2001 Jordan FTA, all of the trade agreements negotiated after the GATS and NAFTA have followed the NAFTA approach and have included a Professional Services Annex.[197] All but one of these Annexes, however, differ from the NAFTA Annex because they do not include a subsection devoted to foreign legal consultants.[198]

Although these Professional Services Annexes are not identical, they all address similar topics and have similar content. For example, seven FTA Annexes have a General Provisions section that consists of five paragraphs.[199] These five-paragraph annexes typically begin by *requiring* the signatory governments to *encourage* the relevant bodies "to develop mutually acceptable standards and criteria for licensing and certification" of foreign service providers and to "to provide

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Professional Services Annexes for Chile and Peru follow the NAFTA model in that they include a subsection on temporary licensing of engineers, with the Chile FTA including an additional appendix section on civil engineers. The pending Colombia FTA includes a subsection on temporary licensing of engineers, and the pending Korea FTA Appendix references in Section 12-A-1 engineering, architectural and veterinary services as the sectors to which the recognition and temporary licensing provisions apply. The pending Korea FTA Annex also includes a section on express delivery services. *See* the citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text.

197. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text.

198. The Annex in the Chile FTA is the only FTA Annex other than NAFTA that includes a separate section on foreign legal consultants. *Compare* NAFTA, *supra* note 6, at Annex 1210.5(B) *and* Chile FTA, *supra* note 32, at Art. 11.9(B), *with* the other citations found in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text.

199. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text for CAFTA-DR, Chile, Singapore, Morocco, Bahrain, Oman and Panama, all of which have five paragraphs. To illustrate the difficulties in analyzing and comparing these FTAs, consider the variations found in the first sentence of the last paragraph in the General Provisions section of these seven FTA Annexes:

- 1. The Commission shall review the implementation of this Annex at least once every three years. (CAFTA-DR)
- 2. The Commission shall periodically, and at least once every three years, review the implementation of this Section. (Chile)
- 3. The Joint Committee shall, at least once every three years, review the implementation of this Section. (Singapore)
- 4. At least once every three years, or annually at either Party's request, the Joint Committee shall review the implementation of this Annex. (Morocco)
- 5. The Joint Committee shall, at least once every three years, review the implementation of this Annex. (Bahrain)
- 6. The Joint Committee shall review the implementation of this Annex at least once every three years. (Oman)
- 7. The Commission shall review the implementation of this Annex at least once every three years. (Panama)

While these variations appear insignificant, one must examine them carefully in order to make that determination. Accordingly, it is beyond the scope of this footnote to address all of the Annex differences in detail or explain whether the language differences are significant.

recommendations on mutual recognition" to a Joint Committee created by the FTA.[200] The professional service annexes usually continue by suggesting that recognition may take into account education, examinations, experience, conduct and ethics, professional development and recertification, scope of practice, local knowledge, and consumer protection.[201] The third paragraph directs the Joint Committee to review the recommendation within a reasonable time "to determine whether it is consistent with this Agreement."[202] After this review, each country "shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time."[203] The fourth paragraph urges consideration of temporary licensing.[204] The fifth paragraph requires that representatives meet at least once every three years to review the implementation of the professional services annex.[205] (As Section IV of this article explains *infra*, the only FTA meeting devoted exclusively to legal services of which I am aware was a meeting held pursuant to the U.S.-Australia FTA.[206]) Some of the longer professional services annexes,[207] such as the US-Australia FTA described earlier, make such a meeting more likely by requiring the formation of a Working Group on Professional Services, by specifying some of its tasks, and by requiring periodic consultations regarding its progress.[208] Even though the requirements in the longer annexes are

200. *See, e.g.*, Singapore FTA, *supra* note 33, at Annex 8C, Professional Services, Development of Professional Standards, para. 1.

201. *Id.* at para. 2.

202. *Id.* at para. 3.

203. *Id.*

204. *Id.* at para. 4 ("Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service providers of another Party.").

205. *Id.* at para. 5.

206. *See supra* note 68 and accompanying text.

207. NAFTA Annex 1210.5(A) was six paragraphs long. The non-engineering portion of the pending Korea FTA is eight paragraphs long, the non-engineering portion of the Australia FTA is ten paragraphs long, and the non-engineering portions of the Peru and pending Colombia FTAs are eleven paragraphs long. *See* citations in Terry Tables 1a-1d, *infra* notes at notes 219-33 and accompanying text.

208. The FTAs with Peru, Colombia, and Australia all require the formation of a Working Group on Professional Services. *See, e.g.*, Australia FTA, *supra* note 34, at Annex 10-A, Professional Services. This Annex included the following mandatory language:

> WORKING GROUP ON PROFESSIONAL SERVICES
>
> 5. The Parties *shall establish* a Professional Services Working Group, comprising representatives of each Party, to facilitate the activities listed in paragraph 1.
>
> 6. In pursuing this objective, the Working Group *shall consider*, as appropriate, relevant bilateral, plurilateral and multilateral agreements relating to professional services.

more formal and detailed, the short and long annexes seem to share the same basic approach.

One final difference between the GATS and the NAFTA is the fact that the NAFTA includes a "local presence" provision, whereas the GATS does not.[209] The NAFTA local presence provision states "[n]o Party may require a service provider of another Party 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 provision of a service."[210] The very-short Israel and Jordan FTAs omit this provision, but all of the remaining FTAs follow the NAFTA's lead and include a "local presence" provision.[211] This provision potentially could be relevant to legal services, especially in states, such as New Jersey, that have a bona-fide office requirement as a condition of holding a law license, if the "standstill" provisions, for some reason, did not apply.[212]

Although most of the provisions found in U.S. international trade agreements applicable to legal services are found in either the GATS or the NAFTA, there are some provisions in the post-GATS FTAs that do

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> 7. The issues that the Working Group *should consider*, for professional services generally and, as appropriate, for individual professional services, include:
>
> (a) procedures for fostering the development of mutual recognition arrangements between their relevant professional bodies;
>
> (b) the feasibility of developing model procedures for the licensing and certification of professional services suppliers; and
>
> (c) other issues of mutual interest relating to the supply of professional services.

Id. (emphasis added). *See also* the citations to the professional services annex in Terry Tables 1a-1d, *infra* notes 219-33.

209. *Compare* GATS, *supra* note 2, *with* NAFTA, *supra* note 6, at Art. 1205.

210. NAFTA, *supra* note 6, at Art. 1205.

211. *See* citations in Terry Tables 1a-1d, *infra* notes 219-33 and accompanying text. The language in these agreements is substantially similar, but not identical. Chile, Morocco, Bahrain, Oman, Australia, Panama (pending), and Korea (pending) all say: "Neither Party may require a service supplier of the other Party 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 Singapore FTA begins "[a] Party shall not require . . ." and the CAFTA-DR, Peru and Colombia (pending) agreements begin "[n]o Party may require. . . ." *Id.*

212. *See supra* notes 180 and 182 and accompanying text. *But see*, *e.g.*, New Jersey Court Rules (2009), Rule 1:21-1(a)

> Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and, except as provided in paragraph (d) [lawyers for federal government agencies] of this Rule, maintains a bona fide office for the practice of law.

Id.

not appear in either of those agreements.[213] For example, the Singapore FTA has a side agreement stating that degrees from four U.S. law schools will be recognized for purposes of admission to the Singapore Bar; Singapore currently recognizes law degrees from those who graduate in the top 40 percent of their class at Harvard, Columbia, New York University and the University of Michigan.[214] The U.S.-Peru trade agreement includes a side letter on state measures in which the United States agrees to review, for certain identified jurisdictions (California, D.C., Florida, New York, New Jersey and Texas), permanent residency and citizenship requirements for certain sectors, including legal services.[215] Although some commentators have suggested that the U.S.-Australia FTA authorized additional visas for Australian professionals, this is not a binding provision in the Agreement itself, but Australians are now eligible for a greater number of temporary business visas.[216]

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213. *See* citations in Terry Tables 1a-1d, *infra* at notes 219-33 and accompanying text. *See, e.g.*, Peru FTA, *supra* note 38, at Side Letter on State Measures, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file180_9512.pdf [hereinafter U.S.-Peru Side Letter]; Columbia FTA, *supra* note 39, at Side Letter on State Measures, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file68_10158.pdf.

214. *See infra* note 327 and accompanying text.

215. *See*, *e.g.*, U.S.-Peru Side Letter, *supra* note 213. This Side Agreement states in part:

> Upon entry into force of the Agreement, the United States will initiate a review of state-level measures for the states of New York, New Jersey, California, Texas, and Florida and the District of Columbia in the following services subsectors: engineering; accounting; architecture; legal services; nursing; dentistry; medical general practitioners; and paramedics. The United States will review measures requiring permanent residency or citizenship and this review will be completed one year after the date of entry into force of the Agreement. The United States will inform the Government of Peru of the results of the review pursuant to Article 11.13 (Implementation).

See also pending Colombia FTA, *supra* note 39, Side Agreement on State Measures, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file68_10158.pdf (also requesting a review of legal services state measures in California, D.C., Florida, New York, New Jersey, and Texas for citizenship and permanent residency requirements). These two Side Agreements, however, are quite different than the Morocco TPA Side Letter on State Measures, which does not ask for a review of any specific state measures but instead sets forth the agreement about cooperation and technical assistance . *See* U.S.-Morocco TPA, *supra* note 35, Side Letter on State Measures, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file309_3840.pdf . (Although this Side Letter is hot-linked under the Investment Chapter, it also applies to Chapter 11, the Services Chapter).

216. *See, e.g.*, Australia FTA, *supra* note 34, at Ch. 10 Side Letter on Immigration, *available at* http://tcc.export.gov/static/AFTA.sideletters.chapter10.immigration.pdf (the link on the USTR website is incorrect). This Side Letter from the USTR stated, *inter alia*: "I have the honor to confirm the following understanding reached by the Governments of the United States and Australia regarding the Agreement: No provision of this Agreement shall be 'construed as imposing any obligation on a Party regarding its immigration measures." *Cf.* 8 USC § 1101(15)(E)(3) (making Australians eligible for the E3 visa category:

The still pending U.S.-Republic of Korea agreement includes a provision that if a signatory believes that a particular rule creates a material impediment to a signatory's service suppliers, that country can request a consultation with respect to the state measure of concern.[217] In short, several of the United States' international trade agreements applicable to legal services include unique provisions.

Although the USTR has used some standardized templates when negotiating trade agreements,[218] this article demonstrates that there can be significant variations from year to year and agreement to agreement. Thus, the only way to determine the scope of a particular agreement is to carefully study the agreement itself. The tables that follow should make that task easier by indicating the relevant provision in each of the existing trade agreements applicable to legal services. Although these tables might have been organized alphabetically, I have chosen to organize them chronologically so that it is easier to see the patterns of development.

> solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title.

Cf. 22 C.F.R. § 41.51 (treaty trader, treaty investor, or treaty alien in a specialty occupation). *See also* Terry *et al.*, *Transnational Legal Practice 2006-2007*, *supra* note 50, at 849.

217. *See* Pending Korea FTA, *supra* note 41, at Annex 12-C, Consultations Regarding Non-Conforming Measures Maintained by a Regional Level of Government. This Annex states in part:

> If a Party considers that an Annex I non-conforming measure applied by a regional level of government of the other Party creates a material impediment to a service supplier of the Party, an investor of the Party, or a covered investment, it may request consultations with regard to that measure. The Parties shall enter into consultations with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate.

Id.

218. During summer 2009, the Obama administration sought comments on whether modifications should be made to the existing model bilateral investment treaty (BITs). *See* Department Of State, Office of the United States Trade Representative, Public Notice 6693, *Notice of Public Meeting and Opportunity to Submit Written Comments Concerning the Administration's Review of the U.S. Model Bilateral Investment*, 74 Fed. Reg. 34071 (July 14, 2009).

TERRY TABLE 1A: COMMON PROVISIONS IN THE EXISTING GLOBAL AGREEMENT AND IN THE REGIONAL MULTILATERAL U.S. TRADE AGREEMENTS

	GATS[219] (Effective 1-1995)	**NAFTA[220] (Eff. 1-1994)**	**CAFTA-DR[221] (Eff. 2006 & 2007)**
Transparency	Article III: Transparency	—	Article 11.7: Transparency in Developing and Applying Regulations and Chapter. 18
MFN Provision	Article II: Most-Favoured-Nation Treatment	Article 1103: Most-Favored-Nation Treatment	Article 11.3 Most-Favored-Nation Treatment
Recognition Section	Article VII: Recognition	— [But see Article 1210 : Licensing and Certification]	Art. 11.9: Mutual Recognition
Exceptions	Article XIV: General Exceptions	Article 2101: General Exceptions	Chapter 21 (Incorporates GATS Art. XIV)
Domestic Regulation	Article VI: Domestic Regulation	— [But see Article 1210 : Licensing and Certification	Article 11.8: Domestic Regulation
Positive Or Negative List Approach? [Opt-in v. Opt-out]	Positive (Article XX: Schedules of Specific Commitments)	Negative (Annex I: Reservations for Existing Measures and Liberalization Commitments)	Negative (Article 11.13 Specific Commitments is similar to the GATS's "additional commitments)

219. *See* GATS, *supra* note 2.
220. *See* NAFTA, *supra* note 6.
221. *See* CAFTA-DR, *supra* note 43.

	GATS[219] (Effective 1-1995)	**NAFTA[220] (Eff. 1-1994)**	**CAFTA-DR[221] (Eff. 2006 & 2007)**
National Treatment-Market Access	Article XVI: Market Access and Article XVII: National Treatment	Article 1202: National Treatment and Article 1207 : Quantitative Restrictions	Article 11.2: National Treatment and Article 11.4: Market Access
"Standstill Provisions"	—	Art. 1206: Reservations, Chapter Twenty-One: Exceptions, and Annexes	Art. 11.6: Non-Conforming Measures and Annex I and II
Local Presence	—	Art. 1205: Local Presence	Article 11.5: Local Presence
Is There a Professional Services Annex?	—	Annex 1210.5: Professional Services	Annex 11.9: Professional Services
Ongoing Work or Joint Committee	— [But see Art. VI:4's obligation to consider "any necessary disciplines"]	Article 2001 + Annex 2001.2 and Annex 1210.5: Prof. Services	Art. 11.11: Implementation and Annex 11.9: Prof. Services
Investment Chapter	—	Chapter Eleven: Investment	Chapter 10: Investment
Other	—	—	—

TERRY TABLE 1b: COMMON PROVISIONS IN EXISTING BILATERAL U.S. FREE TRADE AGREEMENTS APPLICABLE TO LEGAL SERVICES

	Israel[222] (Eff.8-85)	**Jordan[223] (Eff. 12-2001)**	**Chile[224] (Eff. 1-2004)**	**Singapore[225] (Eff. 1-2004)**	**Australia[226] (Eff. 1-2005)**
Transparency	—	—	Article 11.7: Transparency in Development and Application of Regulations and Chapter 20	Article 8:12: Transparency in Development and Application of Regulations and Chapter 19	Article 10.8 : Transparency in Development and Application of Regulations and Chapter 20
MFN Provision	—	—	Article 11.3: Most-Favored-Nation Treatment	Article 8.4 : Most-Favored-Nation Treatment	Article 10.3: Most-Favoured -Nation Treatment
Recognition Section	—	Art. 3(2)(c) incorporates GATS Art.VII:1-2	Article 11.9: Mutual Recognition	Article 8.9: Recognition	Article 10.9: Recognition
Exceptions	Article 7 incorporates GATS	Art. 3(2)(c) incorporates GATS Art. XIV and Art. 12: Exceptions	Chapter 23: Exceptions	Article 21:1 General Exceptions	Chapter 22: General Provisions and Exceptions
Domestic Regulation	—	Art. 3(2)(c) incorporates GATS Art. VI:1, 2, 3, 5, 6	Article 11.8: Domestic Regulation	Article 8.8: Domestic Regulation	Article 10.7 : Domestic Regulation
Pos./Neg. List Approach? [Opt-in v. Opt-out]	—	Positive Annex 3.1: services schedules	Negative	Negative	Negative

222. *See* Israel FTA, *supra* note 9.
223. *See* Jordan FTA, *supra* note 31.
224. *See* Chile FTA, *supra* note 32.
225. *See* Singapore FTA, *supra* note 33.
226. *See* Australia FTA, *supra* note 34.

	Israel[222] (Eff.8-85)	**Jordan[223] (Eff. 12-2001)**	**Chile[224] (Eff. 1-2004)**	**Singapore[225] (Eff. 1-2004)**	**Australia[226] (Eff. 1-2005)**
National Treatment and Market Access	—	Article 3(2) and 3(2)(c) incor-porates GATS Art. XVI &XVII	Article 11.2: National Treatment and Article 11.4: Market Access	Article 8.3: National Treatment and Article 8.5: Market Access	Article 10.2 : National Treatment and Article 10.4: Market Access
"Standstill Provisions"	—	—	Article 11.6: Non-Conforming Measures and Annex I and II	Article 8.7: Non-Conforming Measures and Annex 8A, 8B, & Schedules	Article 10.6: Non-Conforming Measures and Annex I and II
Local Presence	—	—	Article 11.5: Local Presence	Article 8.6: Local Presence	Article 10.5: Local Presence
Is There a Professional Services Annex?	No	No	Annex 11.9: Professional Services (§§A&B)	Annex 8c: Professional Services	Annex 10-A: Professional Services
Ongoing Work or Joint Committee	Article 17: Joint Committee	Article 15: Joint Committee	Article 11.10: Implementation and Annex 11.9: Prof. Services	Article 8.13: Implementation and Annex 8c: Prof. Services	Article 10.13: Implementation and Annex 10-A: Prof. Services
Investment chapter	—	—	Chapter 10: Investment	Chapter 15: Investment	Chapter 11: investment
Other	Article 16: Trade in Services	Article 3: Trade In Services	Side Letter on Professional Services	Side Letter on Legal Services	—

TERRY TABLE 1c: COMMON PROVISIONS IN EXISTING BILATERAL U.S. FREE TRADE AGREEMENTS APPLICABLE TO LEGAL SERVICES

	Morocco[227] (Eff. 1-2006)	**Bahrain[228] (Eff. 8-2006)**	**Oman[229] (Eff. 1-2009)**	**Peru[230] (Eff. 2-2009)**
Transparency	Article 11.8: Transparency in Development and Application of Regulations and Chapter 18	Article 10.8: Transparency in Development and Application of Regulations and Chapter 17	Article 11.8: Transparency in Development and Application of Regulations and Chapter 18	Article 11.8: Transparency in Development and Application of Regulations and Chapter 19
MFN Provision	Article 11.3: Most-Favored-Nation Treatment	Article 10.3: Most-Favored-Nation Treatment	Article 11.3: Most-Favored-Nation Treatment	Article 11.3: Most-Favored-Nation Treatment
Recognition Section	Article 11.9: Mutual Recognition	Article 10.9: Mutual Recognition	Article 11.9: Recognition	Article 11.9: Recognition
Exceptions	Chapter 21: Exceptions	Chapter 20: Exceptions	Chapter 21: Exceptions	Chapter 22: Exceptions
Domestic Regulation	Article 11.7: Domestic Regulation	Article 10.7: Domestic Regulation	Article 11.7: Domestic Regulation	Article 11.7: Domestic Regulation
Positive Or Negative List? [Opt-in v. Opt-out]	Negative	Negative	Negative	Negative
National Treatment-Market Access	Article 11.2: National Treatment and Article 11.4: Market Access	Article 10.2: National Treatment and Article 10.4: Market Access	Article 11.2: National Treatment and Article 11.4: Market Access	Article 11.2: National Treatment and Article 11.4: Market Access
"Standstill Provisions"	Article 11.6: Non-Conforming Measures and Annex I and II	Article 10.6: Non-Conforming Measures and Annex I and II	Article 11.6: Non-Conforming Measures and Annex I and II	Article 11.6: Non-Conforming Measures and U.S. Annex I and II

227. *See* Morocco FTA, *supra* note 35.
228. *See* Bahrain FTA, *supra* note 36.
229. *See* Oman FTA, *supra* note 37.
230. *See* Peru FTA, *supra* note 38.

	Morocco[227] (Eff. 1-2006)	**Bahrain[228] (Eff. 8-2006)**	**Oman[229] (Eff. 1-2009)**	**Peru[230] (Eff. 2-2009)**
Local Presence	Article 11.5: Local Presence	Article 10.5: Local Presence	Article 11.5: Local Presence	Article 11.5: Local Presence
Is There a Professional Services Annex?	Annex 11-B: Professional Services	Annex 10-B: Professional Services	Annex 11.9: Professional Services	Annex 11-B: Professional Services
Ongoing Work or Joint Committee	Article 11.12: Implementation and Annex 11-B: Professional Services	Article 10.12: Implementation and Annex 10-B : Professional Services	Article 11.13: Implementation and Annex 11.9: Professional Services	Article 11.13: Implementation and Annex 11-B: Professional Services
Investment chapter?	Chapter 10: Investment	—	Chapter 10: Investment	Chapter 10: Investment
Other	Side Letter on State Measures [iCh. 10];	Side Letter on Immigration [Ch. 10]	Side Letter On Immigration [iCh. 11]	Side Letter on State Measures [Ch. 11]

TERRY TABLE 1d: COMMON PROVISIONS IN PENDING U.S. BILATERAL FREE TRADE AGREEMENTS APPLICABLE TO LEGAL SERVICES

	Columbia[231] (Congressional approval pending)	**Panama**[232] (Congressional approval pending)	**Republic of Korea (KORUS)**[233] (Congressional approval pending)
Transparency	Article 11.8: Transparency in Development and Application of Regulations & Chap.19	Article 11.7: Transparency in Development and Application of Regulations & Chap. 18	Article 12.8: Transparency in Development and Application of Regulations & Chap. 21
MFN Provision	Article 11.3: Most-Favored-Nation Treatment	Article 11.3: Most-Favored-Nation Treatment	Article 12.3: Most-Favored-Nation Treatment
Recognition Section	Art. 11.9: Recognition	Art. 11.9: Mutual Recognition	Art. 12.9: Recognition
Exceptions	Chapter 22: Exceptions	Chapter 21: Exceptions	Chapter 23: Exceptions
Domestic Regulation	Art. 11.7: Domestic Regulation	Art. 11.8: Domestic Regulation	Article 12.7: Domestic Regulation
Positive Or Negative List Approach?	Negative	Negative	Negative
National Treatment-Market Access	Article 11.2: National Treatment and Article 11.4: Market Access	Article 11.2: National Treatment and Article 11.4: Market Access	Article 12.2: National Treatment and Article 12.4: Market Access
"Standstill Provisions"	Art. 11.6: Non-Conforming Measures and Annex I and II	Art. 11.6: Non-Conforming Measures and Annex I and II	Art. 12.6: Non-Conforming Measures, Annex I and II and Annex 12-C
Local Presence	Article 11.5: Local Presence	Article 11.5: Local Presence	Article 12.5: Local Presence
Is There a Professional Services Annex?	Annex 11-B: Professional Services	Annex 11.9: Professional Services	Annex 12-A: Professional Services

231. *See* Colombia Pending FTA, *supra* note 39.
232. *See* Panama Pending FTA, *supra* note 40.
233. *See* Korea Pending FTA, *supra* note 41.

	Columbia[231] (Congressional approval pending)	**Panama**[232] (Congressional approval pending)	**Republic of Korea (KORUS)**[233] (Congressional approval pending)
Ongoing Work or Joint Committee	Art. 11.13: Implementation and Annex 11-B: Professional Services	Art. 11.14: Implementation and Annex 11.9: Professional Services	Art. 22.2(4): Joint Committee and Annex 12-A: Professional Services
Investment chapter	Chapter 10	Chapter 10	Chapter 11
Other	Side Letter on State Measures [in Ch. 11]	—	—

As these Tables illustrate, the U.S. trade agreements applicable to legal services use a similar structure. For any given issue, however, it will be important to consult the specific provision in question.

IV. IMPLEMENTATION OF THE GATS AND OTHER TRADE AGREEMENTS

The adoption of the international trade agreements applicable to legal services has triggered a number of responses and events. Some of these "implementation" events are directly related to GATS Track #1 (required liberalization negotiations), some are directly related to GATS Track #2 (disciplines on domestic regulation), some are directly related to a particular agreement, and some are more general responses to the trade agreements phenomenon. It is beyond the scope of this article to discuss these implementation events in detail, especially since a number of them have been discussed in other articles.[234] This section, however, will refer briefly to some of the legal-services related events that have followed in the wake of the GATS.

A. GATS Track #1 Developments

The implementation activities related to GATS Track #1, which required future progressive liberalization negotiations, include "background" or procedural developments, as well as actual negotiation documents. The first category includes a number of official WTO

234. *See*, *e.g.*, Transnational Legal Practice, 2006-2007, *supra* note 50; Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol A. Needham, Jennifer Haworth McCandless, Robert E. Lutz, & Peter D. Ehrenhaft, *Transnational Legal Practice: 2008 Year-in-Review*, 43 INT'L L. 943 (2009) [hereinafter 2008 Transnational Legal Practice]. *See also* the eight Bar Examiner updates found on the ABA GATS webpage, http://www.abanet.org/cpr/gats/articles.html (last visited Apr. 17, 2010).

documents that set forth the negotiation procedures and deadlines, many of which have been missed.[235] Some of the more important background documents include a WTO Secretariat[236] paper on the legal services sector,[237] an International Bar Association (IBA) resolution on the proper terminology to use during the legal services negotiations,[238] a "terminology" document from several WTO Members, which was based in large part on the IBA's resolution,[239] a WTO Secretariat paper on the

235. Because of missed deadlines and evolving understandings, there are a number of different documents that set forth the proposed timetables and procedures for the services negotiations (including legal services). These documents include (in chronological order) two documents that were adopted in March 2001 in order to fulfill the mandate of GATS Article XIX. *See* WTO, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92 (March 28, 2001); WTO, Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93 (March 29, 2001). In November 2001, the GATS 2000 negotiations were incorporated within the new Doha Development Agenda round of negotiations, which included goods and agriculture, as well as services. The Doha Round, as it has come to be called, established new deadlines. *See* WTO, [Doha] Ministerial Declaration Adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001) (WTO Member States agreed to submit their initial "requests" on June 30, 2002, and their initial "offers" on March 31, 2003). Several years later, WTO Members revised these deadlines. *See* WTO, Doha Work Programme, WT/L/579 (Aug. 2, 2004) (Section 1(e) of the decision states that revised services "offers should be tabled by May 2005."). After this deadline was missed, WTO Members set new deadlines. *See* WTO, Doha Work Programme [Hong Kong] Ministerial Declaration, WT/MIN(05)/DEC ¶¶ 25-27 and Annex C (Dec. 2005) (Annex C, para. 11 stated that the collective requests should be filed by Feb. 28, 2006, revised offers by July 31, 2006, with final draft schedules due by Oct. 31, 2006). In 2008, the Chair of the WTO Council for Trade in Services, after consultations with WTO Members, issued a document that listed Oct. 15, 2008 as the deadline for revised offers and Dec. 1, 2008 as the deadline for the final draft schedules of commitments. *See* WTO COUNCIL FOR TRADE IN SERVICES, SPECIAL SESSION, ELEMENTS REQUIRED FOR THE COMPLETION OF THE SERVICES NEGOTIATIONS, NOTE BY THE CHAIRMAN, Job (08)/79 para. 7-8 (July 17, 2008), *available at* http://www.tradeobservatory.org/library.cfm?refID=103205 [hereinafter July 2008 Chair's Report]. This July 2008 document built upon work memorialized in WTO COUNCIL FOR TRADE IN SERVICES, REPORT BY THE CHAIRMAN: ELEMENTS REQUIRED FOR THE COMPLETION OF THE SERVICES NEGOTIATIONS, TN/S/33 (May 26, 2008). All of the items cited in this footnote are on the ABA GATS-Legal Services Track 1 Webpage, http://www.abanet.org/cpr/gats/track_one.html (last visited Apr. 17, 2010) (follow the appropriate hyperlink under the subheading "WTO and Other Documents that Provide Guidance in Making GATS Commitments").

In addition to these documents outlining deadlines and procedures, there were several documents that addressed the technical issues of the manner in which legal services should be scheduled. *See generally supra* note 140 (citing, *inter alia*, the WTO Sectoral Classification Paper and the Friends of Legal Services Terminology Paper).

236. *See* WTO Secretariat, *supra* note 106.

237. *Legal Services Background Note*, *supra* note 123.

238. IBA Terminology Resolution, *supra* note 140.

239. WTO Friends of Legal Services Terminology Paper, *supra* note 140. Australia and the European Union had submitted earlier suggestions about recommended legal services terminology; these papers presumably were superseded by the Friends of Legal Services Terminology Paper. *See* ABA GATS classification webpage, *supra* note 140, http://www.abanet.org/cpr/gats/track_one_class.html (last visited Apr. 17, 2010) (follow links to these papers).

request-offer process,[240] a conference on the same topic,[241] and several Organization of Economic Cooperation and Development (OECD) documents, including advice on the "request-offer" format traditionally used during WTO negotiations.[242]

Most of the ongoing GATS negotiations have taken place using the "request-offer" format. In this format, each WTO Member may send a "request" to another WTO Member (country) in which the requestor asks for specific changes to the specific commitments found in the recipient's *Schedule of Specific Commitments*. Most requests are treated as confidential government documents.

In contrast to a GATS "request," an "offer" sets forth the commitments that a country is prepared to put on its revised *Schedule of Specific Commitments*. Because of the MFN provision in the GATS, an offer extends the proposed liberalization to all WTO Members and not just a particular "requestor." A country's "offer" can be "decoupled" from its requests; this means that its offer does not necessarily match its "requests."[243] Thus, a country might, for example, "request" greater access in the legal services sector than it is prepared to "offer," but it might offset this by having a favorable offer in another service sector, such as accounting services (or even in agriculture).

The original deadline for "requests" was June 30, 2002. The United States "requests" *to other countries* concerning legal services are considered confidential government-to-government documents, but the USTR has prepared an unclassified summary for the ABA GATS-Legal

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240. *See* WTO Seminar on the GATS, *Technical Aspects of Requests and Offers, Summary of Presentation by the WTO Secretariat*, (Feb. 20, 2002), *available at* http://www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc.

241. *Id.* For additional Secretariat papers relevant to the GATS, see Laurel Terry, *Selected WTO Secretariat Papers [Analyses]*, http://www.personal.psu.edu/faculty/l/s/lst3/selected%20secretariat%20papers.htm (last visited Apr. 17, 2010).

242. Massimo Geloso Grosso, OECD Trade Policy Working Paper No. 2, *Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services*, TD/TC/WP(2003)40/FINAL (June 14, 2004), http://www.abanet.org/cpr/gats/track_one.html (last visited Apr. 17, 2010) [hereinafter OECD, Managing Legal Services Request-Offer Negotiations].

The Organization of Economic Cooperation and Development (OECD) consists of thirty of the most developed countries in the world. It currently is considering applications from several more countries. *See* OECD, *About OECD,* http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Apr. 17, 2010). The OECD brings together the governments of countries committed to democracy and the market economy from around the world to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries' economic development, and contribute to growth in world trade. It also shares expertise and exchanges views with more than 100 other countries. *Id.*

243. *See*, *e.g.*, IBA GATS Handbook, *supra* note 111, at 49.

Services webpage.[244] The United States' redacted sample "request" refers to a "reference paper" and indicates that if WTO Member States agree with the provisions of the "reference paper," they could indicate this in the "Additional Commitments" column of their *Schedules of Specific Commitments*. The reference paper focused heavily on the right to employ and partner with foreign lawyers.[245]

The requests to the United States *from other countries* are also confidential documents, but Public Citizen has posted a leaked copy on its website. Seven WTO Members submitted "requests" for specific changes in U.S. legal profession rules.[246] For example, the EC has

244. An Unclassified Summary of the Legal Services "Requests" Filed by the U.S. (June 30, 2002), *available at* http://www.abanet.org/cpr/gats/us_request.doc.

245. *Id. See also* Sydney M. Cone III, *Legal Services and the Doha Round Dilemma*, 41 J. WORLD TRADE 245, 256-258 (2007) (describing the reference paper and the reaction to it).

246. *See* Public Citizen, GATS Requests by State, *available at* http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf [hereinafter GATS Requests by State]. General requests begin on page 1. Requests regarding business services, which include legal services, are listed on pages 3-9; state-specific requests are listed alphabetically and begin on page 35. The seven countries that made legal services "requests" to the United States (under the "business services" heading starting on page 3) include Australia, EC, Japan, Mexico, New Zealand, Pakistan, and Switzerland. Australia, for example, "requested" the United States to "make commitments under Article XVIII to ensure that in all States a foreign lawyer can establish a commercial presence and practice home country, international and third country law (where qualified) without having to qualify to practice host country law." *Id.* at 3. The EU requested that with "regard to market access for the provision of legal services through Modes 1, 2, and 3, remove the measure under which the supply of services through a qualified U.S. lawyer is restricted to natural persons." *Id.* at 4. It also requested that for "all states, extend sectoral coverage of commitments to consultancy on international public law and on law of jurisdiction where the service supplier or its personnel are qualified lawyers." *Id.* Japan requested "that a Japanese patent attorney (benrishi) in the U.S. be authorized to serve as a representative for a client in patent application procedures to the Japan Patent Office. Japan also requests that attorney-client privilege be given to a Japanese patent attorney (benrishi)." *Id.* at 6. Japan also requested that: "With regard to market access and national treatment for the provision of legal services through Modes 3 and 4, Japan requests that qualifications as a lawyer or as an accredited foreign lawyer acquired in a specific State or District be recognized by all other States and District." Its third legal services request asked that:

> commitments be made by all States and District on legal services supplied by a foreign lawyer on home country law where the service supplier is qualified as a lawyer, and also requests that the minimum practicing experience requirement for services on applicants' home country law should not exceed three years in total and should not require 3 consecutive years of experience.

Id. Its fourth request asked that "additional commitments be made by all States and District to permit the supply of legal services on international law and third country law, by foreign lawyers provided that, in the case of third country law, they obtain written legal advice from an attorney qualified in that jurisdiction." *Id.* Mexico's request asked that with "regard to market access and national treatment for the provision of legal services (practice as or through a qualified U.S. lawyer) through Modes 1, 2, 3, and 4, eliminate all restrictions." *Id.* at 8. It also requested that "[w]ith regard to market access for the provision of legal services (consultancy on law of jurisdiction where

requested that foreign legal consultants also be allowed to practice third-country law and international law, which would be in addition to their practice of home country law.[247] Although seven WTO Members made legal services requests to the United States, not all of these countries included state-specific "requests" and of those that did, not all targeted the same states.[248]

The United States has made several different "offers" that include legal services provisions; the most recent offer was filed May 31,

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service supplier is qualified as a lawyer) through Mode 4, commit without restrictions." *Id.* New Zealand, like Japan, had four legal services requests directed to the U.S. They were:

> [1] [w]ith regard to legal services, extend Sectoral coverage to whole of CPC 861. Where there is no existing commitment on sub-sectors of CPC 861, schedule full commitments on modes 1, 2, and 3, and mode 4 commitments as requested in the horizontal section. [2] With regard to existing commitments, remove all limitations on modes 1,2, and 3. New Zealand makes no further mode 4 request subject to a revised horizontal commitment. [3] Where aspects of service provision are unbound, schedule commitments with no [market access] or [national treatment] limitations. [4] Remove requirement for prior practice requirements when licensing as foreign legal consultant in the United States.

Id. at 9. Pakistan requested "that the United States undertake full commitments under Mode 3 and 4 for market access and national treatment." *Id*. Switzerland asked the United States to "Streamline commitments in the legal services subsector." *Id.* Some of the business services requests that did not mention legal services specifically might nevertheless apply to legal services. For example, Brazil's requests asked the United States to "clarify its commitments on Business Services inscribed in its schedule of specific commitments resulting from the Uruguay Round also apply to subfederal level (to the States)." *Id.* at 3.

247. *Id.* For a comparison of the ABA Model Foreign Legal Consultant rule, *infra* note 270, and the FLC rules in various states, see Carole Silver and Nicole DeBruin, *Comparative Analysis of United States Rules Licensing Legal Consultants* (May 2006), *available at* http://www.abanet.org/cpr/mjp/silver_flc_chart.pdf.

248. *See* GATS Requests by State, *supra* note 246. The state-by-state requests section, which begins on page 35 of the PDF document, shows legal services requests directed to all fifty states plus the District of Columbia. The identity of the requester varies, however. The countries listed in parentheses requested changes in the legal services rules in the following states: Alabama (EC), Alaska (Australia and EC), Arizona (EC), Arkansas (EC), California (Australia), Connecticut (Australia), Colorado (EC), Delaware (EC), District of Colombia (EC), Florida (Australia), Georgia (Australia), Hawaii (Australia), Idaho (EC), Illinois (Australia), Indiana (EC), Iowa (EC), Kansas (EC), Kentucky (EC), Louisiana (EC), Maine (EC), Maryland (EC), Massachusetts (EC), Michigan (Australia, EC), Minnesota (Australia, EC), Mississippi (EC), Missouri (EC), Montana (EC), Nebraska (EC), Nevada (EC), New Hampshire (EC), New Jersey (Australia, EC), New Mexico (EC), New York (EC), North Carolina (EC), North Dakota (EC), Ohio (Australia, EC), Oklahoma (EC), Oregon (Australia), Pennsylvania (EC), Rhode Island (EC), South Carolina (EC), South Dakota (EC), Tennessee (EC), Texas (Australia, EC), Utah (EC), Vermont (EC), Virginia (EC), Washington (Australia, EC), West Virginia (EC), Wisconsin (EC), and Wyoming (EC).

By way of example, the Australian requested California to "remove the restriction under which the practice of third-country law is not permitted." *Id.* The EU requests to the District of Columbia noted that "market access to the provision of legal services through mode 4 is subject to the establishment of an in-state office. The EC requests commitments for all states as referred to in the section 'horizontal commitments.'" *Id.*

2005.[249] The proposed new commitments in this offer include the addition of eight foreign legal consultant rules, as well as several other changes.[250] A number of other countries have made "legal services" offers. The Australian law firm Minter Ellison regularly prepares a summary of the legal services offers; this list is posted on the ABA GATS-Legal Services webpage.[251] Unlike WTO Members' "requests," which mostly were confidential, a number of "offers" are public documents.[252]

In December 2005 at their Hong Kong Ministerial Conference,[253] WTO members agreed on a document that encouraged members to try a new "plurilateral" or "collective" requests process in the hope that the new procedure might help achieve more progress for the services negotiation.[254] Thus, in February 2006, a number of countries, informally known as the "Friends of Legal Services," issued a "Collective Requests" document that identified items they would like to request from the others."[255] This document included a cover page, an

249. *See* WTO Council for Trade in Services*, United States Revised Services Offer*, TN/S/O/USA/Rev.1 (** 2005), http://www.ustr.gov/webfm_send/1085. The legal services portion of this offer is available at http://www.abanet.org/cpr/gats/legal_svcs_offer.pdf [hereinafter May 2005 U.S. Legal Services offer]. Previous U.S. offers include a March 31, 2003 offer (available at http://www.abanet.org/cpr/gats/legal_svcs.pdf) and a December 2000 proposal. *See* WTO Council for Trade in Services, *Communication from the United States, Legal Services*, S/CSS/W/28 (Dec. 18, 2000). All of these offers area available on the ABA GATS Track #1 Webpage, supra note 235, http://www.abanet.org/cpr/gats/track_one.html.

250. *See* May 2005 U.S. Legal Services offer, *supra* note 249 (the FLC offer lists FLC rules in Arizona, Indiana, Louisiana, Massachusetts, Missouri, New Mexico, North Carolina, and Utah).

251. *See* Minter Ellison, *WTO Services Negotiations – Derestricted Offers Relating to Legal Services as Revised to 31 July 2009*, *available at* http://www.abanet.org/cpr/gats/derestricted.pdf [hereinafter Minter Ellison legal services offer list].

252. *Id.*

253. *See* WTO, *Ministerial Conferences*, http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Apr. 17, 2010) [hereinafter Ministerial Conferences]. The Ministerial Conference is the WTO's "topmost" or highest-level decision-making body. *Id.* It usually meets every two years. *Id.* It was established by the agreement creating the WTO. *Id.* The prior ministerial conferences have been held in Geneva (Nov. 30 - Dec. 2, 2009); Hong Kong (Dec. 13-18, 2005); Cancun (Sept. 10-14, 2003); Doha (Nov. 9-14, 2001); Seattle (Nov. 30 - Dec.3, 1999); Geneva (May 18 & 20, 1998); and Singapore (Dec. 9-13, 1996). *Id.* The WTO's Ministerial Conferences webpage includes links to each Ministerial Conference and the accompanying reports and "declarations." *Id.*

254. *See* Hong Kong Ministerial Declaration, *supra* note 235, at para. 25-27 and Annex C at para. 7 and 11b. Paragraph 7, for example, stated: "In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services.")

255. S*ee* WTO, *Australia, Canada, the EC, Japan, New Zealand, Norway and the USA: Collective Request—Legal Services* (Feb. 28, 2007), *available at* http://www.tradeobservatory.org/library.cfm?refID=78740 [hereinafter Collective Requests].

introductory section, a purpose section, the actual requests, and two model schedules.[256] The requests paragraph contained three parts: the first section set forth the scope of the requests,[257] the second section identified the limitations to be removed, [258] and the third section asked

256. *Id.* *See also id*. at Model Schedule Legal Services, Option A, *available at* http://www.uscsi.org/publications/papers/collective/optionA.pdf and *id*. at Model Schedule Legal Services, *available at* Option B, http://www.uscsi.org/publications/papers/collective/optionB.pdf?refID=78788.

257. *Id.* at para. 3(a). It said, in pertinent part:

> Please make new or improved commitments under Articles XVI, XVII and XVIII of the GATS that would allow foreign lawyers and law firms to provide legal services covering laws of multiple (foreign, domestic and international) jurisdictions by:
>
> • making commitments covering all modes of service delivery, including in all Mode 4 categories with a special emphasis on coverage for lawyers in the categories of contractual service suppliers and independent professionals;
>
> • permitting foreign lawyers a right to provide legal services in foreign law and international law, subject to no significant impediments;
>
> • permitting foreign lawyers/law firms to establish, with a view to providing legal services in domestic, foreign and international law, through:
>
> − partnership and other forms of commercial association between foreign and domestic lawyers/law firms, with freedom to negotiate fee and profit sharing arrangements; and
>
> − employment of domestic lawyers.
>
> • permitting foreign lawyers to prepare and appear in legal arbitration and conciliation/mediation proceedings in foreign and international law; and
>
> • permitting foreign law firms to use a firm name of their choice, respecting customs or usage of the host country. (This commitment is to be reflected in the Additional Commitments column).
>
> Where Members are able to comply with the above elements they should also consider permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in domestic law.
>
> Where Members grant a right for foreign lawyers to provide legal advisory services in foreign and international law (foreign legal consultants) on a temporary basis, without meeting normal accreditation requirements, we request that Members make commitments reflecting that right.

Id. (footnote omitted). *See infra* note 260 for an explanation of the footnote included in paragraph 3(a) of this document.

258. Collective Requests, *supra* note 255, at para 3(b).This section said:

> Please remove to the greatest extent possible the following limitations where they are currently scheduled in Members' market access and/or national treatment columns:
>
> • Commercial presence and residency requirements for Modes 1 and 2, particularly for the practice of foreign law and international law;
>
> • Limitations that restrict partnership or other forms of commercial association or collaboration between foreign lawyers/law firms and domestic lawyers/law firms;
>
> • Limitations that restrict or prevent recruitment by foreign lawyers/law firms of lawyers admitted/licensed to practise domestic law;

that any MFN exemptions be removed.[259] The United States signed the legal services Collective Requests document, although it exempted itself from one provision.[260]

Since the date of the legal services Collective Requests, the Doha negotiations have mostly faltered.[261] At the time this article was written,

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> • All forms of economic needs tests;
> • Nationality and prior residency requirements, particularly for the practice of foreign law and international law;
> • Foreign capital limitations;
> • Prior experience requirements for the practice of foreign law and international law;
> • Prohibitions or limitations on the establishment of foreign law firms, particularly for the practice of foreign law and international law, including limitations on establishing direct branches of foreign law firms and discriminatory limitations on the types of legal entity allowed for the commercial presence of foreign law firms (foreign firms should be able to establish in any form available to domestic suppliers);
> • Quantitative restrictions on the number of offices that can be established, including numerical ceilings on foreign lawyers.
>
> We further request that all Members give due consideration to ensuring clarity, certainty, comparability and coherence in the scheduling and classification of commitments through adherence to, inter alia, the Scheduling Guidelines pursuant to the Decision of the Council for Trade in Services dated 23 March 2001. In particular, we would encourage Members to remove any limitations such as qualifications requirements and procedures which have been incorrectly scheduled under either the market access or national treatment columns.

Id.

259. *Id.* at para. 3(c).

260. The document states that the United States "is not a requesting Member, but shall be deemed a recipient" with respect to the element that asks recipients to make "commitments covering all modes of service delivery, including in all Mode 4 categories." *Id.* at n.1 (referring to para. 3(a)).

261. *See*, *e.g.*, Terry et al, *Transnational Legal Practice 2006-2007*, *supra* note 50, at 837 (describing suspension of the Doha Round negotiations); Terry et al., *2008 Transnational Legal Practic*e, *supra* note 234, at 948-49.

One of the most difficult issues, which has had a spillover effect onto the services negotiations, is the issue of agriculture. *See*, *e.g.*, *Services Talks Gear Up for November Sessions*, 13 BRIDGES WKLY. TRADE NEWS DIG. 35 (Oct. 14, 2009) ("But officials indicated that the services talks could go nowhere in the absence of significant progress in other areas of the Doha Round trade talks – namely the negotiations on agriculture and industrial goods."); *Doha: Close, But Not Enough*, 12 BRIDGES WKLY. TRADE NEWS DIG. 27 (Aug, 7, 2008)

> For the third summer in a row, a push for breakthrough WTO accords on agriculture and manufacturing trade has ended in failure. The collapse of talks among trade ministers on 29 July makes it virtually impossible for governments to conclude a deal in the Doha Round of trade talks in the foreseeable future.

Id. Services Cluster Finishes With New Focus On 'Breakthrough Sectors', 11 BRIDGES WKLY. TRADE NEWS DIG. 15 (May 3, 2007) ("In the meantime, many developing countries remained reluctant to agree to substantive commitments, as well as to set new timelines for submitting revised offers of liberalisation, absent greater clarity on the possible outcome of the negotiations on agriculture and non-agricultural market access (NAMA)").

the most recent official WTO/GATS Track #1 document that was publicly available was a July 2008 Chair's Report which indicated that progress had been made on outstanding issues, but issues remained that would require further consideration.[262]

Following the issuance of this report, many WTO Members participated in a July 2008 "Services Signaling Conference" in Geneva.[263] In his summary of this signaling conference, WTO Director-General Pascal Lamy noted that members remained committed to the Hong Kong Ministerial statements and deadlines, that he had been pleased about expressions of willingness to close the gap between applied regimes and existing commitments in several sectors, that he was encouraged by signals that involved new market openings beyond status quo conditions, that he was pleased about expressions of satisfaction with the implementation of modalities for least-developed countries, and that the exercise did not represent the final outcome of the services negotiations.[264] The July 2008 report called for revised offers by Oct. 15, 2008, with final drafts of commitments due Dec. 1, 2008.[265]

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262. *See* July 2008 Chair's Report, *supra* note 235. Paragraph 4 in this document stated:

> Members reaffirm that the services negotiations are an essential part of the DDA [Doha Round negotiations]. They recognize that an ambitious and balanced outcome in services would be integral to the overall balance in the results of the DDA single undertaking. Negotiations must therefore be driven by a high level of ambition and political will as reflected in the other areas of the DDA. Accordingly, the negotiations shall aim at a progressively higher level of liberalization of trade in services with a view to promoting the economic growth of all trading partners, and the development of developing and least-developed countries. There shall be no a priori exclusion of any service sector or mode of supply. Respecting the existing structure and principles of the GATS, Members shall, to the maximum extent possible, respond to the bilateral and plurilateral requests by offering deeper and/or wider commitments. Such responses shall, where possible, substantially reflect current levels of market access and national treatment and provide new market access and national treatment in areas where significant impediments exist, in particular in sectors and modes of supply of export interest to developing countries, such as modes 1 and 4, in accordance with Article IV of the GATS. Commitments shall be commensurate with the levels of development, regulatory capacity and national policy objectives of individual developing countries. In making such commitments, Members shall be guided by paragraphs 1, 2 and 7 of Annex C of the Hong Kong Ministerial Declaration.

Id.

263. WTO Council for Trade in Servs., *Report by the Chairman of the TNC: Services Signaling Conference*, JOB(08)/93 (July 30, 2008), *available at* http://www.tradeobservatory.org/library.cfm?refID=103471 [hereinafter Signaling Conference Report].

264. *Id.* at para. 48.

265. *See* July 2008 Chair's Report, *supra* note 235, paras. 7-8.

This schedule was not met due in part, no doubt, to problems in global financial markets and the credit and liquidity crises.[266] In May 2009, WTO Members decided to hold their Seventh Ministerial Conference in Geneva in late-November to early December 2009.[267] The Chair announced, however, that the upcoming Ministerial was "not intended as a negotiating meeting."[268] This Ministerial will instead have as its theme: "The WTO, the Multilateral Trading System and the Current Global Economic Environment."[269]

In sum, the outcome of the GATS Track #1 negotiations remains uncertain. Although some WTO Members have circulated proposed changes to the legal services portion of their *Schedules*, the Doha Round has not yet concluded and none of these proposed changes has become effective. It is important to remember, however, that even if the Doha "progressive liberalization" negotiations collapse, the United States and other WTO Members remain bound by their prior obligations (which took effect in January 1995 for most WTO Members).

A number of nongovernmental entities inside and outside the United States have taken actions relevant to GATS Track #1. Within the United States, both the ABA and the Conference of Chief Justices have adopted policies that are relevant to the GATS Track #1. The ABA, for example, has urged the USTR to negotiate for rights for outbound U.S. lawyers that are consistent with the rights found in the ABA Model Rule on Foreign Legal Consultants.[270] It has also adopted a resolution

266. *See*, *e.g.*, Pascal Lamy, Director-General, *WTO, Remarks to the General Council: Lamy Creates WTO Task Force on Financial Crisis* (Oct. 14, 2008), http://www.wto.org/english/news_e/news08_e/ tnc_chair_report_oct08_e.htm (last visited Apr. 18, 2010).

267. *See* WTO General Council, *Seventh Session of the Ministerial Conference, Draft Decision, Revision*, WT/GC/W/601/Rev.1, (25 May 2009) [hereinafter Decision about the Seventh Ministerial Conference].

268. *See* WTO, *News, Chair says Geneva Ministerial "Not Intended as a Negotiating Meeting"*, (July 22, 2009), http://www.wto.org/english/news_e/news09_e/mn09a_22jul09_e.htm (last visited Apr. 18, 2010).

269. *See* WTO, *Seventh Ministerial Conference,* http://www.wto.org/english/thewto_e/minist_e/min09_e/ min09_e.htm (last visited Apr. 18, 2010) ("The general theme for discussion shall be 'The WTO, the Multilateral Trading System and the Current Global Economic Environment'"). For more information on ministerial conferences, see Ministerial Conferences, *supra* note 253.

270. *See* ABA, *Resolution [Regarding Outbound U.S. Lawyers, with Recommendations to the USTR Regarding the U.S. "Requests" to Other WTO Members]* (February 2002), *available at* http://www.abanet.org/cpr/gats/silp.pdf. This resolution states in its entirety as follows: "RESOLVED, the American Bar Association supports negotiation proposals to the United States Trade Representative regarding access to foreign markets for U.S. lawyers through permanent establishments consistent with, and as expressed and incorporated in [the ABA Model Foreign Legal Consultant Rule]." *Id.*

applauding the rule of law benefits that emanate from trade agreements.[271] (The ABA also has adopted a Model Rule on Temporary Practice for Foreign Lawyers.)[272] The Conference of Chief Justices

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In 2002, the ABA reaffirmed its 1993 adoption of the "Model Rule for the Licensing of Legal Consultants" in the United States." ABA COMM'N ON MULTI-JURISDICTIONAL PRACTICE, REPORT TO THE HOUSE DELEGATES, REPORT 201H (2002), *available at* http://www.abanet.org/cpr/mjp/201h.pdf. This rule was later amended in ABA Recommendation 301A (adopted by the House of Delegates Aug 7-8, 2006), *available at* http://www.abanet.org/leadership/2006/annual/dailyjournal/ threehundredonea.doc [hereinafter ABA Model FLC Rule].

271. *See* ABA, SECTION OF INTERNATIONAL LAW REPORT THE HOUSE OF DELEGATES, RECOMMENDATION 108B, (August 11-12, 2008), *available at* http://www.abanet.org/leadership/2008/annual/recommendations/OneHundredEightB.doc. The text of this resolution stated in its entirety: "RESOLVED, That the American Bar Association supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the Rule of Law, both at the state-to-state level and within participants' domestic legal systems." *Id.*

272. ABA COMM'N ON MULTI-JURISDICTIONAL PRACTICE, REPORT TO THE HOUSE OF DELEGATES, REPORT 201J (2003), *available at* http://www.abanet.org/cpr/mjp/201j.pdf [hereinafter ABA Foreign Lawyer Temporary Practice Resolution].

This resolution was adopted as part of a package of resolutions proposed by the ABA MJP Commission. *See* ABA COMM'N ON MULTI-JURISDICTIONAL PRACTICE, FINAL REPORTS (adopted Aug. 12, 2002), http://www.abanet.org/cpr/mjp/home.html (last visited Apr. 18, 2010) [hereinafter MJP Commission Final Reports]. MJP Recommendation 8 is Report 201H; Recommendation 9 is Report 201J; and the domestic counterpart rule is Recommendation 2, which is Report 201B. In a number of U.S. jurisdictions, foreign lawyers have an additional path to practice in the United States because they are eligible to sit for the bar exam and become a fully licensed U.S. lawyer. *See* NAT'L CONF. OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2010 COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 30-34, chart X (Erica Moeser & Margaret Fuller Corneille eds., 2010), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2010.pdf.

Not all GATS-related ABA resolutions have passed. In August 2007, the House of Delegates rejected a resolution proposed by the Section of International Law to encourage the Patent and Trademark Office to eliminate its reliance on citizenship, residence, or immigration status in its licensing regulations (in the hope that these changes would be reflected in any revised U.S. GATS "offer"). ABA SECTION OF INT'L LAW REPORT TO THE HOUSE OF DELGATES, RECOMMENDATION 118A (2007), *available at* http://www.abanet.org/leadership/2007/annual/docs/hundredeighteena.DOC. The Council of the Section thereafter voted to pursue discussions with other Sections with a view to the possible reintroduction of some of the policies expressed in the defeated resolution. *See* Terry et al., *Transnational Legal Practice 2006-2007*, *supra* note 50, at 842. The proposed resolution was prompted, in part, by the U.S. Supreme Court's denial of certiorari in *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir. 2006), *cert. denied*, 127 S.Ct. 1246 (2007) (involving a foreign lawyer who sought admission to the Patent and Trademark Office). For a fuller discussion of the *Lacavera* case and *LeClerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003), *aff'd,* 419 F.3d 405 (5th Cir. 2005), which involved foreign lawyers denied admission to Louisiana, see Transnational Legal Practice 2006-2007, *supra* note 50, at 850-52. Despite the failure of this ABA resolution, the May 31, 2005 U.S. offer proposed to eliminate the citizenship requirement for practice before the U.S. Patent and trademark Office. *See* May 2005 U.S. Legal Services Offer, *supra* note 249, at 16. Moreover, although U.S. residency previously was required in order to practice before the U.S. Patent and Trademark Office, that is no longer the case. In certain circumstances, resident aliens may practice before the U.S. Patent and Trademark Office. See 37

(CCJ) has urged the federal government in trade negotiations to recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments; it has also urged its members to adopt a foreign legal consultant rule, to adopt a rule allowing temporary practice by foreign lawyers, to let Australian lawyers sit for the state's bar examination, and to encourage the ABA Section on Legal Education and Admission to the Bar to consider developing and implementing a program to certify the quality of the legal education offered by universities in other common-law countries.[273]

The Organization of Economic Cooperation and Development (OECD),[274] the International Bar Association (IBA), and the Union Internationale des Avocats (UIA) are among the entities outside the United States that have been quite active. For example, in addition to the request-offer paper cited earlier,[275] the OECD has sponsored a number of conferences that address professional services and trade agreements.[276] The IBA has also been quite active with respect to GATS Track #1 issues. In addition to the "terminology" resolution cited

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C.F.R. § 11.6. Although the *LeClerc* certiorari petition was not the subject of the failed ABA resolution, the circumstances behind that case also have changed. Louisiana amended its admission rule, effective Jan. 1, 2009, to allow aliens "lawfully admitted for permanent residence" or "otherwise authorized to work lawfully" in the United States to qualify for admission to the bar of Louisiana. LA. SUP. CT., BAR ADMISSION RULES, RULE XVII: ADMISSION TO THE BAR OF THE STATE OF LOUISIANA, § 3(B) (2008) (Jan. 1, 2009).

273. *See* Conf. of Chief Justices, Res. 6 Regarding Adoption of Rules on Temporary Practice by Foreign Lawyers (Jan. 30, 2008), http://ccj.ncsc.dni.us/resol6AdoptionRules TemporaryPractice.html (last visited Apr. 18, 2010); Conference of Chief Justices, Resolution 7 Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations (Feb. 2007), http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html (last visited Apr. 18, 2010); Conf. of Chief Justices, Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar (Feb. 2007), http://ccj.ncsc.dni.us/LegalEducationResolutions/ resol8AccredLegalEducCommonLawCountries.html (last visited Apr. 18, 2010); Conf. of Chief Justices, Resolution 4 Regarding Adoption of Rules on the Licensing and Practice of Foreign Legal Consultants (Aug. 2006), http://ccj.ncsc.dni.us/InternationalResolutions/ resol4ForeignLegalConsultants.html (last visited Apr. 18, 2010). *See infra* note 312 (describing the 2004 CCJ resolution regarding sovereignty).

274. For information about the OECD, see *supra* note 242.

275. *See* OECD, *Managing Request-Offer Legal Services Negotiations, supra* note 242.

276. *See* OECD, LIBERALISATION OF TRADE IN PROFESSIONAL SERVICE (1995); OECD, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ASSESSING BARRIERS AND ENCOURAGING REFORM (1996); OECD, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES (1997); ALISON HOOK, SECTORAL STUDY ON THE IMPACT OF DOMESTIC REGULATION ON TRADE IN LEGAL SERVICES, PREPARED FOR THE OECD-WORLD BANK SIXTH SERVICES EXPERTS MEETING DOMESTIC REGULATION AND TRADE IN PROFESSIONAL SERVICES PARIS (2007), *available at* http://www.abanet.org/cpr/gats/alison_hook.pdf.

earlier,[277] the IBA has issued a GATS Handbook for its member bars,[278] has held a number of educational programs on the GATS, and has adopted a resolution encouraging GATS legal services commitments.[279] It has also adopted several other resolutions that are informed by the GATS legal services developments, including the IBA's so-called "core values" resolution, its "establishment" resolution, and a "recognition" resolution.[280] The UIA has also adopted resolutions relevant to the GATS.[281]

In sum, there have been a number of GATS Track #1 developments since the GATS was signed. Although the Doha Round negotiations continue to limp along, one cannot rule out a successful conclusion. Moreover, it is important to know that even if WTO Members are not able to reach any new liberalization agreements, the commitments they made in 1994 (or whenever they joined the WTO) remain in place.

B. GATS Track #2 Developments

In addition to the GATS Track #1 activity described above, there have been a number of events related to GATS Track #2 and the obligation to develop "any necessary disciplines."[282] Shortly after the GATS became effective, WTO members began studying the issue of "disciplines" for the accountancy sector.[283] In December 1998, after several years of drafts and discussions, WTO members agreed upon a set of *Disciplines for Domestic Regulation in the Accountancy Sector*

277. *See supra* note 140 (IBA terminology resolution).

278. *See* IBA GATS Handbook, supra note 111.

279. *See* IBA, Resolution of the IBA Council on Transfer of Skills and Liberalization of Trade in Legal Services (Oct. 16, 2008), *available at* http://www.abanet.org/cpr/gats/iba.pdf. For additional information on this resolution, see LAUREL S. TERRY, REMARKS AT THE THIRD ANNUAL IBA BAR LEADERS' CONFERENCE: SKILLS TRANSFER IN DEVELOPING JURISDICTIONS (May 14, 2008), *available at* http://www.int-bar.org/images/downloads/BLC_Amsterdam2008/Laurel_Terry_PPT_Overview_Skills_Transfer.pdf.

280. *See* ABA, Miscellaneous: Other Items Relevant to the GATS, http://www.abanet.org/cpr/gats/misc.html (last visited Apr. 18, 2010) (including links to IBA GATS resolutions). As explained *infra* in note 316 and accompanying text, the IBA also adopted a "disciplines" resolution relevant to GATS Track 2. International Bar Association (IBA) *Resolution Regarding Suitability of Using the Accountancy Disciplines in "Track 2" of the GATS* (Adopted San Francisco, 2003), http://www.int-bar.org/images/downloads/WTO_Resolution_on_Disciplines_for_the_Accountancy_Sector.pdf [hereinafter IBA Disciplines Resolution].

281. *See* ABA, Miscellaneous: Other Items Relevant to the GATS, *supra* note 280 (including links to UIA resolutions).

282. *See supra* note 146-47 and accompanying text for information on GATS Article VI: 4.

283. *See* WTO, Decision on Professional Services adopted by the Council, S/L/3 (Mar. 1, 1995) (decision creating the Working Party on Professional Services (WPPS), delegating to WPPS the issue of Disciplines, and directing WPPS to begin with the Accountancy Sector).

(Accountancy Disciplines).[284] The Accountancy Disciplines are scheduled to take effect at the conclusion of the Doha Round of negotiations.[285]

Since the adoption of the Accountancy Disciplines, WTO Members (and others) have continued their discussions about whether and how to adopt disciplines that would apply to other service sectors, including legal services. There have been a number of documents and events to assist WTO Members with the GATS Track #2 issues. For example, the WTO has sponsored at least one conference on the topic of domestic regulation and disciplines.[286] The OECD has issued papers on domestic regulation and services.[287] In addition to its Legal Services Sector and classification papers cited earlier[288] the WTO Secretariat has issued a paper that includes possible definitions for the disciplines terms,[289] a document that summarizes the consultations about disciplines with relevant professional organizations such as the IBA,[290] and a document

284. WTO Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 (Dec. 17, 1998), *available at* http://www.abanet.org/cpr/gats/accounting.doc [hereinafter Accountancy Disciplines].

285. Decision on Disciplines Relating to the Accountancy Sector, S/L/63 (Dec. 15, 1998), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/disciplinessl63.doc [hereinafter WTO 1998 Decision]. In this Decision, WTO Members adopted the Accountancy Disciplines, *supra* note 284, but decided that those disciplines would take not take effect until the conclusion of the current round of negotiations.

286. *See* WTO, *Workshop on Domestic Regulation — Programme* (March 29-30, 2004), http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_programme_march04_e.htm (last visited Apr. 18, 2010).

287. *See* HENK KOX & HILDEGUNN KYVIK NORDÅS, SERVICES TRADE AND DOMESTIC REGULATION, OECD TRADE POLICY WORKING PAPER NO. 49, TD/TC/WP(2006)20/FINAL (Feb. 14, 2007), *available at* http://www.olis.oecd.org/olis/2006doc.nsf/LinkTo/NT0000779E/$FILE/JT03221792.PDF; WORK IN THE AREA OF PROFESSIONAL SERVICES, ADDENDUM: THE OECD CATEGORIZED INVENTORY OF MEASURES AFFECTING TRADE IN PROFESSIONAL SERVICES: NOTE BY THE SECRETARIAT, S/WPPS/W/4/Add.2 (Jan. 5, 1996) (cited in paragraph 5 of the March 2001 WPDR minutes, S/WPDR/M/9). *See also* ALISON HOOK, THE IMPACT OF DOMESTIC REGULATION ON TRADE IN LEGAL SERVICES, *supra* note 276.

288. *See supra* notes 123 (Legal Services Background Note) and 140 (Sectoral Classification paper).

289. *See* THE RELEVANCE OF THE DISCIPLINES OF THE AGREEMENTS ON TECHNICAL BARRIERS TO TRADE (TBT) AND ON IMPORT LICENSING PROCEDURES TO ARTICLE VI.4 OF THE GENERAL AGREEMENT ON TRADE IN SERVICES: NOTE BY THE SECRETARIAT, S/WPPS/W/9, at para. 4 (Sept. 11, 1996). *See also* ARTICLE VI:4 OF THE GATS: DISCIPLINES ON DOMESTIC REGULATION APPLICABLE TO ALL SERVICES : NOTE BY THE SECRETARIAT, S/C/W/ 96, at para. 4 (March 1, 1999).

290. The most recent version of which I am aware is WTO WORKING PARTY ON DOMESTIC REGULATION, CONSULTATIONS WITH INTERNATIONAL PROFESSIONAL ORGANIZATIONS REGARDING THE SUITABILITY OF USING THE ACCOUNTANCY DISCIPLINES, JOB (03)/126/Rev.6 (Sept. 15, 2005) [hereinafter WPDR Professional Organizations' consultations], which was cited in the WPDR's 2005 Annual Report, S/WPDR/8 at para. 10. *See* REPORT OF THE WORKING PARTY ON DOMESTIC

that summarizes WTO members' domestic consultations within their own countries about disciplines.[291] The WTO Secretariat also has issued several versions of a document that provides examples of measures that might be subject to disciplines.[292] (One of my articles included an

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REGULATION TO THE COUNCIL FOR TRADE IN SERVICES (2005), S/WPDR/8 (Sept. 23, 2005) [hereinafter WPDR 2005 Annual Report].

The 2005 document cited above appears to be a later version of a document entitled WTO WORKING PARTY ON DOMESTIC REGULATION, RESULTS OF THE CONSULTATIONS WITH INTERNATIONAL PROFESSIONAL ORGANIZATIONS, JOB (03)/126. Rev.1 (Sept. 22, 2003), which was cited in para. 8 of the 2003 WPDR Annual Report. *See* REPORT OF THE WORKING PARTY ON DOMESTIC REGULATION TO THE COUNCIL FOR TRADE IN SERVICES (2003), S/WPDR/6 (Dec. 3, 2003) [hereinafter WPDR 2003 Annual Report]. Because both of these documents are "jobs," these consultation summaries are not publicly available. Documents that are labeled "jobs" are not publicly released by the WTO. *See* Terry, *supra* note 1, at 1023. Many "jobs," however, are publicly available on websites such as the Trade Observatory library. *See* Institute for Agriculture and Trade Policy, Trade Observatory Library, http://www.tradeobservatory.org/library.cfm (last visited Apr. 18, 2010) [hereinafter Trade Observatory Library].

291. The most recent version of which I am aware is WTO WORKING PARTY ON DOMESTIC REGULATION, SYNTHESIS OF RESULTS TO DATE OF THE DOMESTIC CONSULTATIONS IN PROFESSIONAL SERVICES, JOB(02)/204/Rev.1, (Feb. 21, 2003), which was cited in the WPDR's 2003 Annual Report at para. 10. *See* WTO WORKING PARTY ON DOMESTIC REGULATION, REPORT OF THE WORKING PARTY ON DOMESTIC REGULATION TO THE COUNCIL FOR TRADE IN SERVICES S/WPDR/6 (Dec. 3, 2003) [hereinafter WPDR, WTO Members' Domestic Consultations]. Because this version (like prior versions) is a "job," the results of WTO Members' domestic consultations are not publicly available. *See supra* note 290.

292. *See*, *e.g.*, WTO WORKING PARTY ON DOMESTIC REGULATION, EXAMPLES OF MEASURES TO BE ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI:4, JOB(02)/20/Rev.10 (Jan. 31, 2005) (cited in para. 9 of the 2005 WPDR Annual Report, *supra* note 290). An earlier version of this "Examples" paper is WTO WORKING PARTY ON DOMESTIC REGULATION, EXAMPLES OF MEASURES TO BE ADDRESSED BY THE DISCIPLINES UNDER GATS ARTICLE VI:4, JOB(02)/20/Rev.7 (Sept. 22, 2003) (cited in para. 35 of the Dec. 2003 WPDR minutes, S/WPDR/M/24 (22 Jan. 2004)).

Because these are "jobs," these examples paper are not publicly available. *See supra* note 290. Although WTO Members are up to at least the tenth revision, as the symbol on the document cited in the prior paragraph shows, the second revision, dating from 2002, is available on the Public Citizen webpage. *See* WORKING PARTY ON DOMESTIC REGULATION, EXAMPLES OF MEASURES TO ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI:4, INFORMAL NOTE BY THE SECRETARIAT, JOB(02)/20/Rev.2 (Oct. 18, 2002), *available at* http://www.citizen.org/documents/Measures_to_be_disciplined_under_GATS.pdf. The third revision was included as an appendix in MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 220 (Kluwer 2003) (APP. IV: WORKING PARTY ON DOMESTIC REGULATION, EXAMPLES OF MEASURES TO ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI:4, INFORMAL NOTE BY THE SECRETARIAT, JOB(02)/20/Rev.3 (Dec. 3, 2002)).

Several WTO Members have submitted their own "examples" papers. *See*, *e.g.*, WORKING PARTY ON DOMESTIC REGULATION, BRAZIL: EXAMPLES OF MEASURES TO BE ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI:4, (JOB(04)/169 (Nov. 19, 2004); WORKING PARTY ON DOMESTIC REGULATION, HONG KONG, CHINA: COMPARISON OF REGULATORY EXAMPLES WITH ACCOUNTANCY DISCIPLINES AND PROPOSALS FOR REGULATORY DISCIPLINES, (JOB(04)/166 (Nov. 19, 2004) (both cited in the WPDR 2005 Annual Report, *supra* note 290, at para. 10).

appendix that presented, for comparisons purposes, a legal-services specific set of examples.[293])

Although Australia proposed a set of disciplines specifically for legal services in 2005,[294] the majority of the WTO Working Party on Domestic Regulation appears to have settled on so-called "horizontal" disciplines—*i.e.,* a single set of disciplines that would apply to all other service sectors.[295] During the Sixth Ministerial Conference in Hong Kong in December 2005, WTO members agreed that they would adopt (in the future) a set of horizontal disciplines.[296] The commitment to disciplines found in the Hong Kong Ministerial Declaration has been publicly reaffirmed several times, including as recently as July 2008.[297]

Notwithstanding these statements, the issue of disciplines has been contentious both globally and domestically. The global disagreements are reflected in the many conflicting proposals that WTO members, including the United States, have circulated.[298] There have been at least fifteen proposals, including a number of proposals for horizontal disciplines and several sector-specific proposals, including one proposal

293. *See* Terry, *But What Will Disciplines Apply To*?, *supra* note 129, at 113. To illustrate the difficulty of determining the measures to which disciplines would apply, in 2001, the WTO Secretariat "apologized for presenting a paper listing examples of regulatory measures covered under GATS Article VI:4, noting that the dividing line between measures covered under Article VI:4 and those covered under Articles XVI and XVII was not always easy to draw." *See* WTO WORKING PARTY ON DOMESTIC REGULATION, REPORT ON THE MEETING HELD ON 20 MARCH 2001, NOTE BY THE SECRETARIAT, S/WPDR/M/10 para. 8 (May 10, 2001).

294. *See* Australian Legal Services Proposed Disciplines, *supra* note 69.

295. *See, e.g.*, WTO WORKING PARTY ON DOMESTIC REGULATION, INFORMAL NOTE BY THE [WPDR] CHAIRMAN: DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4 (Apr. 18, 2007) (draft), *available at* http://www.tradeobservatory.org/library.cfm?refID=98264 [hereinafter Chair's April 2007 Draft].

296. *See* Hong Kong Ministerial Declaration, *supra* note 235, para. 5 ("Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption").

297. *See* JULY 2008 CHAIR'S REPORT, *supra* note 235, para. 5. *See also* MAY 2008 CHAIR'S REPORT, *supra* note 235, para. 5. In March 2010, after this law review article was submitted for publication, the Chair of the WTO Working Party on Domestic Regulation issued several important documents related to disciplines, including an annotated set of disciplines and a status report. These documents are available on the ABA GATS Track #2 website, *infra* note 299, http://www.abanet.org/cpr/gats/track_two.html.

298. Although many disciplines proposals are not public documents, leaked copies often are available. *See*, *e.g.*, Trade Observatory, Library, *supra* note 290, http://www.tradeobservatory.org/library.cfm (last visited Apr. 18, 2010) (select "GATS" from the left-hand drop-down menu). The ABA GATS-Legal Services Webpage has a subpage that includes titles and links to fifteen proposals. The webpage also includes a useful analysis prepared by Nicole Lloyd that indicates the subject matter covered in these fifteen disciplines proposals. *See* ABA, Horizontal Disciplines Proposals from WTO Member States (including the United States), http://www.abanet.org/cpr/gats/disp_proposals.html (last visited Apr. 18, 2010) [hereinafter ABA Webpage on Horizontal Disciplines Proposals].

for a set of legal services-specific disciplines.[299] In the past, the United States has commented in favor of "transparency" disciplines, but has urged caution with respect to disciplines on the issues of qualifications, licensing, or technical standards.[300] Some other countries, on the other hand, have requested more robust disciplines, especially on the licensing and qualification issues.[301]

At the time this article was written, the most recent version of the WTO committee's Draft Disciplines appears to be the version dated March 2009. The annual report of the WTO Working Party on Domestic Regulation (WPDR) refers to the WPDR Chair's second revised draft set of disciplines which was dated in March and presented to WPDR Members on April 1, 2009.[302] This—presumably—is the same document as the leaked set of disciplines dated March 20, 2009 that is posted on the Trade Observatory website.[303] (Until late September 2009, the most recent draft that was publicly available was the Jan. 23, 2008 non-public but leaked draft that appeared on the Trade

299. *See* ABA Webpage on Horizontal Disciplines Proposals, *supra* note 298, *available at* http://www.abanet.org/cpr/gats/disp_proposals.html (last visited Apr. 10, 2010). These proposals are organized on this page both by country and by topic. The main GATS Track 2 webpage includes the legal services-specific disciplines proposal from Australia, the commentary on the Accountancy Disciplines by legal organizations, and many other documents relevant to the GATS Track #2 "disciplines" issues. *See* ABA, GATS Track 2, http://www.abanet.org/cpr/gats/track_two.html (last visited Apr. 18, 2010).

300. *See*, *e.g.*, WTO WORKING PARTY ON DOMESTIC REGULATION, OUTLINE OF US POSITION ON A DRAFT CONSOLIDATED TEXT IN THE WPDR, JOB (06)/223 (July 11, 2006) *available at* http://www.tradeobservatory.org/library.cfm?refID=88410 (restricted). *See also infra* note 308-09 and accompanying text (discussing the current U.S. position).

301. *See*, *e.g.*, WTO WORKING PARTY ON DOMESTIC REGULATION, COMMUNICATION FROM BRAZIL AND THE PHILIPPINES, Job (06)/133 (May 2, 2006), http://www.tradeobservatory.org/library.cfm?refID=80782.

302. WTO, ANNUAL REPORT OF THE WORKING PARTY ON DOMESTIC REGULATION [WPDR] TO THE COUNCIL FOR TRADE IN SERVICES (2009) S/WPDR/12, at para. 4 (Oct. 2, 2009) [hereinafter WTO WPDR 2009 Annual Report]. For links to the WPDR Annual Reports, see http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web.htm (last visited Apr. 18, 2010). The 2009 WPDR Annual Report indicates that there were not many changes between the April 2009 draft disciplines and the January 2008 draft disciplines. *See* WTO WPDR 2009 Annual Report, *supra*, para. 4. The April 2009 draft "contained only changes to a handful of paragraphs of the text on which discussions had indicated wide support for new language, and which left the overall balance of the text intact." *Id.*

303. *See* WTO, WORKING PARTY ON DOMESTIC REGULATION, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, SECOND REVISION, INFORMAL NOTE BY THE CHAIRMAN (March 20, 2009) (draft), *available at* http://www.tradeobservatory.org/library.cfm?refID=106851. This document was posted on the website in late September or early October 2009.

Observatory webpage.[304] A leaked June 2008 WTO document identifies some of the disciplines issues on which WTO members disagree.[305])

Despite the apparent disagreements among members, in July 2008 WTO Director General Lamy reported that effective disciplines on domestic regulation played an important role with respect to the aspirations expressed by participants.[306] The 2009 annual report of the relevant WTO Committee described the status of the disciplines work as follows:

> At the meeting on 1 April 2009, the Chairman introduced his second revised draft text, which contained only changes to a handful of paragraphs of the text on which discussions had indicated wide support for new language, and which left the overall balance of the text intact. At the present stage of the negotiations, the Chair could not offer "solutions" to those areas where differences among Members were still broad. Numerous delegations stressed that a lot of work remained to be done, but all accepted that the Chair's revised draft was a basis for future work. . . . At the meeting on 26 June 2009, the Chair reported on her consultations with Members on future work. She reported that large gaps in ambition for the disciplines remained, and progress of work was linked to progress on the market access negotiations. Several delegations were open to the idea of a reality check on the disciplines as a complementary element to technical work.[307]

Thus, it appears that despite the problems in the Doha Round, WTO members remain committed to the concept of horizontal disciplines on domestic regulation. The shape of such disciplines, however, is unclear.

The USTR webpage currently includes a hotlink for the "U.S. position on WPDR Negotiations" this link takes one to an undated

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304. *See* WTO, WORKING PARTY ON DOMESTIC REGULATION, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, INFORMAL NOTE BY THE CHAIRMAN (Jan. 23, 2008) (revised draft), *available at* http://www.tradeobservatory.org/library.cfm?refID=101417 .

305. *See* WTO, WORKING PARTY ON DOMESTIC REGULATION, ISSUES RECEIVED FROM DELEGATIONS FOR DISCUSSION AT THE INFORMAL MEETING OF THE WPDR ON 8 JULY 2008 (June 25, 2008), *available at* http://www.tradeobservatory.org/ library.cfm?refID=103141. After this article was submitted, the Chair of the WTO Working Party on Domestic Regulation circulated an *Annotated Version of the Current Draft GATS DISCIPLINES* (March 14, 2010) and a document entitled "March 2010 Status Report on the GATS Working Party on Domestic Regulation." Both of these items are available on the ABA GATS Track #2 Webpage, *supra* note 299, http://www.abanet.org/cpr/gats/track_two.html.

306. *See Signaling Conference Report*, *supra* note 263, at para. 48. *See also id.* para. 47 (citing the need for disciplines to implement Mode 4 and noting the mandate in Annex C of the Hong Kong Ministerial Declaration to develop disciplines on domestic regulation before the end of current negotiations).

307. *See* WTO WPDR 2009 Annual Report, *supra* note 302, at para. 4-5.

document that appears substantially similar to the prior U.S. position.[308] Because the issue of disciplines is potentially very significant, I have reprinted below the current U.S. position:

> Licensing and Qualifications Requirements:
> Given the strong preference of some WTO Members for horizontal disciplines, the United States supports a very cautious approach in the area of requirements. This is an area that very quickly touches on the content of regulations and can impinge on Members' right to set appropriate standards to ensure the quality of services, public health and safety, environmental protection, prudential financial practices, and other important policy objectives. Our ability to support disciplines in this area will depend greatly on the nature of the proposed disciplines, the clarity of their scope of application and flexibility in the level of compliance.
>
> Licensing and Qualifications Procedures:
> This is an area where, in principle, the United States believes it is feasible to have more developed disciplines, since over time best practices have developed and been adopted on a regional or international basis.
>
> Technical Standards:
> The United States takes a very cautious approach in this area. The concept of technical standards is not well-developed in the services sector, few countries have regulations in this area, and so far the proposed definitions for technical standards are very vague. In this area we can support general provisions related to transparency and public availability of any technical standards Members might adopt for the services sector.

The "definitions" section of the U.S. policy statement includes cautionary language about licensing and qualification, stating:

- We are also concerned about clarity in the definitions of licensing requirements and qualifications requirements. We are not convinced that the definitions proposed so far, which link the two,

308. *See* OUTLINE OF THE U.S. POSITION ON A DRAFT CONSOLIDATED TEXT IN THE GATS WORKING PARTY ON DOMESTIC REGULATION (WPDR) 2-3 (undated), *available at* http://www.ustr.gov/webfm_send/1084. This document is listed on the current USTR "Services in the WTO" page, http://www.ustr.gov/trade-topics/services-investment/services/services-wto. Although the document on the USTR's webpage looks different than the July 2006 U.S. Room Document on the Trade Observatory webpage, *supra* note 300, on the issues of qualification, licensing, and technical standards, the substance appears substantially similar to the earlier document. *Compare id.*, *with* the July 2006 Room Document, *supra* note 300.

> provide the necessary clarity to implement new disciplines effectively.
>
> - We are also concerned that terms not be defined so broadly as to create legal uncertainty about coverage. With respect to qualifications requirements, for example, we would not want any confusion about application to academic or other qualifications that we feel should clearly be excluded from any GATS disciplines. We have similar concerns about the definition of technical standards.[309]

The USTR is not the only U.S. entity that has taken a position on disciplines issues. In August 2006, the ABA adopted a resolution that established its policy position regarding GATS Track #2 disciplines. This resolution states in its entirety:

> RESOLVED, That with respect to the legal services portion of the General Agreement on Trade in Services (GATS), the American Bar Association:
>
> 1. Supports the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of "any necessary disciplines" to be applicable to service providers; and
>
> 2. Supports the U.S. Trade Representative's participation in the development of additional disciplines on domestic regulation that are: (a) "necessary" within the meaning of Article VI (4) of the GATS; and (b) do not unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States. [310]

This resolution was designed to balance the competing interests of ABA members. It was carefully negotiated among committee members, some of whom worked in firms that exported legal services and wanted to encourage the development of tools to tackle what they saw as "unfair barriers" in other countries; whereas, other members, especially state regulators, were worried about the possible effect of WTO disciplines on

309. *Id.* at 2.

310. *See* ABA Standing Comm. on Prof'l Discipline et. al., Recommendation 105 (2006), *available at* http://www.abanet.org/leadership/2006/annual/onehundredfive.doc [hereinafter ABA GATS Track #2 Resolution].

U.S. state regulatory authority.[311] The final language was intended to reflect the existing U.S. GATS obligations, as well as these concerns. The CCJ was even more cautious about disciplines, however, urging the ABA to eliminate the word "unreasonably" in the resolution's sentence that urged the USTR not to "unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States"; in 2004, the CCJ had adopted a resolution that urged Congress and the USTR to support "the sovereignty of state judicial systems."[312] Thus, the 2006 CCJ and ABA resolutions on GATS disciplines provide the policy basis for these organizations' responses to GATS Track #2 consultations from the USTR.[313]

As noted earlier, the concept of GATS disciplines has been contentious within the United States (as many trade issues are). Several states have sent letters to the USTR asking to be excluded from services negotiations or FTAs.[314] Because its many memos are posted in the

311. I was a member of the committee that worked on developing this resolution.

312. Conf. of Chief Justices, Resolution 5 Regarding the Proposed Recommendation Pending Before the House of Delegates of the American Bar Association on the Legal Services Portion of the General Agreement on Trade in Services (GATS) (Aug. 2, 2006) ("NOW, THEREFORE, BE IT RESOLVED that the Conference urges the ABA House of Delegates to strike the word 'unreasonably' before acting upon the resolution"), http://ccj.ncsc.dni.us/IndependenceofStateJudicialSystems/resol5GATS.html; Conf. of Chief Justices, Resolution 26 Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments (July 29, 2004), http://www.citizen.org/documents/CCJresolution.pdf, In addition to its "whereas" clauses, the 2004 resolution states:

> Now, Therefore, BE IT RESOLVED that the Conference of Chief Justices urges the United States Trade Representative to negotiate, and the United States Congress to approve, provisions in trade agreements that recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments; and
> BE IT FURTHER RESOLVED that the Conference of Chief Justices urges the United States Trade Representative and the United States Congress to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than U.S. citizens and businesses.

Id.

313. It is important for the ABA to have adopted GATS policies because in recent years, the USTR has consulted not only ITAC, but also the ABA ITILS group about GATS negotiations relevant to legal services. The ABA has provided both informal and more formal responses. One of the ABA's more formal responses is a March 2008 letter commenting on the January 2008 draft disciplines. Because the USTR has requested confidentiality when consulting the ABA, the ABA's responses are similarly confidential. For information on the ABA ITILS group, see *infra* note 330.

314. *See*, *e.g.*, Oregon Gov. Kulongoski letter to USTR Robert Zoellick regarding the reevaluation of Oregon's participation in FTAs (5/7/04), *available at* http://www.citizen.org/documents/Kulongoski_to_USTR.pdf; Gov. Kulongoski's letter to USTR Portman requesting that Oregon not be bound by GATS rules in any additional service sectors (3/17/06), *available at* http://www.citizen.org/documents/ACF92A9.pdf; Letters from Pennsylvania

Trade Observatory library website, the Harrison Institute at Georgetown Law School is the most visible legal critic of GATS disciplines of which I am aware.[315]

A number of global bar associations have expressed concerns about certain GATS disciplines. In December 2002, at the request of the WTO Member States, the WTO consulted the International Bar Association (IBA) and the Union Internationale des Avocats (UIA) for their views on what changes, if any, would be needed before the Accountancy Disciplines could be applied to the legal profession.[316] Both organizations responded by adopting resolutions urging caution in some areas.[317]

In sum, there has been a significant amount of activity with respect to the GATS Track #2 disciplines issue. Although the Doha Track #1 negotiations do not appear to have much momentum, WTO members appear committed to the idea of adopting some form of disciplines.

Before closing this section, it is worth noting the backdrop against which the GATS disciplines negotiations are taking place. If WTO members fail to adopt disciplines, then GATS Article VI:5 arguably applies. It imposes a modified form of disciplines even in the absence of an agreement on disciplines by WTO Members. This provision states:

Governor Rendell, New York Governor Spitzer and Washington Governor Gregoire to USTR Schwab (March 30, 2007), *available at* http://www.forumdemocracy.net/downloads/Governors,%20March%2030,%202007.pdf; Letter from Iowa Governor Vilsack to USTR (May 19, 2006), *available at* http://www.forumdemocracy.net/downloads/Gov.%20Vilsack,%20May%2019,%202006.pdf; Letter from Christine O. Gregoire, Washington Governor to USTR Ron Kirk Urging Caution in GATS and FTA negotiations (June 2, 2009), *available at* http://www.forumdemocracy.net/downloads/gregoire06022009.pdf; *see also* Letter from 29 States Attorneys General to the USTR (May 31, 2005) (seeking greater consultation), *available at* http://www.forumdemocracy.net/downloads/Attorneys%20General,%20May%2031,%202005.pdf.

315. *See*, *e.g.*, HARRISON INSTITUTE, ANALYSIS OF WPDR DRAFT TEXT (Feb. 12, 2008), http://www.tradeobservatory.org/library.cfm?refID=101603.

316. *See* Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN STATE INT'L L. REV. 695, 700, 815 (2004) [hereinafter Terry, The History of the WTO's IBA Consultation]. This article includes reprints of the WTO's letter to the International Bar Association and UIA, together with the IBA's responses and documentation. The UIA response was provided after the article cited above was published, but is available from the ABA GATS Track 2 webpage, http://www.abanet.org/cpr/gats/track_two.html (last visited Apr. 18, 2010). *See also* IBA Disciplines Resolution, *supra* note 280.

317. *See generally* Terry, The History of the WTO's IBA Consultation, *supra* note 316; ABA GATS Miscellaneous Webpage, supra note 280 (includes links to these resolutions).

> 5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
>
> (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
>
> (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
>
> (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.[318]

GATS Article VI:5 means that the issue of GATS Track #2 and disciplines is potentially very significant, even if WTO Members are not able to agree on horizontal disciplines.[319]

C. Developments Directly Related to Other Trade Agreements

While the GATS has triggered most of the trade agreement implementation efforts, there have been initiatives directly related to other trade agreements. For example, Section B(3) of NAFTA Annex 1210.5 required the signatory countries to encourage the relevant professional bodies to develop foreign legal consultant rules.[320] This led to the creation of the NAFTA Trilateral Lawyers Working Group.[321]

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318. GATS, *supra* note 2, at Art. VI:5.

319. Because the U.S. "scheduled" legal services, it presumably will be subject to GATS Article VI:5 if no disciplines are adopted. Thus, any U.S. qualification, licensing, or technical standards provisions that are subject to disciplines would have to comply with Article VI:5, quoted in the prior footnote. The Article VI:4(a-c) subparagraphs referred to in Article VI:5 state: that the measures in question must be (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; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. GATS, *supra* note 2, at Art. VI:4.

320. NAFTA, *supra* note 6, at Annex 1210.5(B)(3) ("Prior to initiation of consultations under paragraph 7, each Party shall encourage its relevant professional bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations on the matters referred to in paragraph 2").

321. *See*, *e.g.*, Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1399-1400 (1998) (citing interviews with Trilateral Working Group Member Steven Nelson and an unpublished paper by a former USTR lawyer) [hereinafter Terry, Cross-Border Legal Practice].

After many months and many drafts,[322] the U.S., Canadian and Mexican representatives on the Trilateral Lawyers Working Group were finally able to agree upon a NAFTA Model Rule Respecting Foreign Legal Consultants ("NAFTA Model Rule").[323] When the final version was circulated, however, several U.S. law firms objected to the rule, which they believed was more restrictive than the current practices in Mexico.[324] No further progress has been made since that time.[325] Other

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322. *Id.* U.S. Trilateral Lawyers Working Group representatives circulated drafts of the Model Rule to U.S. lawyers and firms before they reached agreement on the final draft. I have not seen any publications or news reports that document how widespread this circulation was. I have been advised that U.S. representatives received few comments on the drafts they circulated. I have also been advised that some of the law firms with Mexican offices that opposed the agreement felt they had not been sufficiently consulted during the negotiations. *See also infra* note 323.

323. *See* Sydney M. Cone, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND GLOBAL PRACTICE 6:10-6:21and App. IID:1-16 (1996) (including the text of the draft model FLC rule.) [hereinafter Cone]. *See also* Law Society of Upper Canada, Professional Regulation Committee Report to Convocation 25 (March 27, 2003) ("In June 1998, the parties signed a joint recommendation, including a model rule, but their respective governments have not yet ratified the recommendations and there are no indications when, if at all, this might occur"), *available at* http://www.lsuc.on.ca/media/convmarch03_prc.pdf.

324. There are very few published reports about the failed NAFTA Model FLC rule. In addition to Terry, Cross-Border Legal Practice, *supra* note 321, and Cone, *supra* note 323, *see* Steven C. Nelson, *Law Practice Of U.S. Attorneys In Mexico and Mexican Attorneys in the United States: A Status Report*, 6 U.S.-MEX.. L.J. 71 (1998) [hereinafter Nelson]; JAMES P. DUFFY, III **,** PRACTICING LAW IN THE ERA OF NAFTA: MASTERING THE NEW GLOBAL MARKETPLACE, STRATEGIES FOR PRACTICING LAW IN THE 21ST CENTURY, PROSPECTS FOR THE JOINT-LICENSING OF ATTORNEYS IN NORTH AMERICA (March 19, 1999 San Antonio), *available at* http://www.bergduffy.com/Personnel/Articles/san%20antonio.htm [hereinafter Duffy]. Mr. Nelson and Mr. Duffy were both U.S. representatives on the NAFTA Trilateral Lawyers Working Group. Mr. Nelson's article stated that:

> The U.S. delegation circulated the draft joint recommendation and Model Rule to interested members of the U.S. legal profession, including members of the firms currently having offices in Mexico, requesting their comments. The draft was, to say the least, extremely unpopular. Many of the objections came from Mexican lawyers practicing with law firms based in the United States. They saw the restrictive provisions of Rule 15 as an infringement upon their own freedom of professional association and their rights under the Mexican Constitution. [FN50] This surprised the U.S. delegation because the Mexican government had selected the members of the Mexican delegation and was therefore representing governmental policy. Moreover, it had been expressly represented on a number of occasions that the restrictions contained in Rule 15 were required under Mexican law. Thus, the U.S. delegation responded to the protests with the explanation that it had attempted to accommodate what it had been led to believe were existing constraints of Mexican law and policy. However, both U.S. and Mexican lawyers who responded to the draft insisted that those representations were not correct. A study prepared under the auspices of the Institute for Juridical Studies of the National University of Mexico appeared to confirm this view. . . . In light of these developments, the U.S. delegation has made it clear to its Mexican and Canadian counterparts that it is not prepared to agree to the joint recommendation and Model Rule as presently drafted. The Mexican government must first issue a

> definitive, reasoned statement to the effect that the restrictions contained in Rule 15 are required by current Mexican law and policy. This statement would be included in any foreign legal consultant rules in Mexico. It has also made it clear that it is prepared to proceed at once to sign and submit the joint recommendation and Model Rule if (i) Rule 15 is either removed or conformed to Rule 16, and (ii) the correlative phrase "other than a partnership" is deleted from Rule 14.

Nelson, *supra*, at n. 50 and accompanying text. Mr. Duffy has explained what happened as follows:

> The Model Rule has proven to be quite controversial in New York even though it falls well within the parameters of existing New York foreign legal consultant rules. Somewhat to my surprise, when I sought to have the New York State Bar Association endorse it, the reaction was it should not be endorsed because it was too restrictive. It did not come close enough to the broad freedom provided in the New York rule which does not even require reciprocity. You should keep in mind that there are already a number of Mexican foreign legal consultants in New York and they are quite welcome and very active in the New York State Bar Association. Thus, New York felt Mexico should have been more accommodating. The outcome was, therefore, that New York declared its rules were far more liberal than the Model Rule and basically instructed the U.S. negotiators to contact the U.S.T.R. for assistance in further negotiations. This position would not prevent the Model Rule from becoming effective in New York because the Model Rule requires only that local rules be no more restrictive, and New York's rules, N.Y. Ct. Rules § 521.1 et seq., certainly are not.
>
> This process of involving the U.S.T.R. began on February 11, 1999, when Steve Nelson and I attended a meeting at the U.S.T.R.'s office in Washington, D.C., to review the concerns of certain U.S. law firms and try to plot a course for the future. I might add Steve Nelson and I feel the Model Rule is not as well understood as it should be. It is indeed complex in certain areas, particularly those areas relating to forms of association. However, he and I believe, despite these complexities, it is easily possible for U.S. lawyers to come to Mexico and to form the types of international law firms that can effectively offer the international legal services I discussed above.

Duffy, *supra*.

325. The only official NAFTA document I have found about legal services is the undated 1996 REPORT OF THE NAFTA WORKING GROUP ON INVESTMENT AND SERVICES, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/report7.aspx?lang=en

> In regard to the work program for FLCs, representatives from the legal profession of the NAFTA Parties have developed a draft recommendation. The Parties will review this recommendation in accordance with NAFTA Annex 1210.5, Section B. As well, several other professional groups (*e.g.*, architects, nurses, and accountants) have initiated trilateral discussions with a view to developing joint recommendations on mutual recognition. . . . The Working Group is planning to meet in the spring of 1997, in Ottawa. The following work will be on the agenda . . . status report on professional services.

Id.

I have reviewed the annual reports of the NAFTA Commission, but have not found any mention of the proposed NAFTA Model FLC Rule. (The NAFTA established a Free Trade Commission and several committees and working groups, but none specifically devoted to legal services. *See* NAFTA, *supra* note 6, at Art. 2001 and Annex 2001.2.) As an aside, I would like to urge all relevant entities (the NAFTA Secretariat, the USTR, the Canadian Foreign Affairs and International Trade Department, and the relevant Mexican department) to post all of the NAFTA

agreement-specific implementation efforts include the U.S.-Australia FTA meeting described earlier[326] and the decision about which four U.S. law schools to recognize under the U.S.-Singapore FTA.[327] Although all of the FTAs except the GATS create an implementation process that requires the parties to consult or meet annually[328] and several FTAs explicitly create a Working Party on Professional Services,[329] I am not

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Commission annual reports on their websites under an easy to locate tab. I found the NAFTA Commission's annual reports to be exceedingly difficult to locate. An Organization of American States website includes links to some, but not all such reports. *See* SICE, Foreign Trade Information System, Canada-Mexico-United States (NAFTA), http://www.sice.oas.org/TPD/ NAFTA/ NAFTA_e.ASP (last visited Apr. 18, 2010). The Canadian Government includes links to the Working Group reports and to some but not all annual NAFTA Commission reports. *See* Canada, Foreign Affairs and International Trade, Commission Meetings, http://www.international.gc.ca/ trade-agreements-accords-commerciaux/agr-acc/nafta-alena/celeb2.aspx?lang=en&menu_id=38&menu=R (last visited Apr. 18, 2010); Canadian Foreign Affairs and International Trade Department, Reports to the NAFTA Free Trade Commission, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/reports-rapports.aspx?lang=en&menu_id=37&menu. Other than by doing a word search in the USTR's chronological archives, I have not been able to locate these reports on the USTR's webpage. They are not on the USTR's NAFTA page. *See* USTR, North American Free Trade Agreement (NAFTA), http://www.ustr.gov./trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta. Nor are they located on the NAFTA Secretariat's webpage. *See NAFTA Secretariat*, http://www.nafta-sec-alena.org/en/view.aspx (last visited Apr. 18, 2010).

326. *See supra* note 68 (describing the U.S.-Australia meeting).

327. *See* Singapore FTA, supra note 33, Side Letter on Legal Services (May 6, 2003), *available at* http://www.ustr.gov./sites/default/files/uploads/agreements/fta/singapore/asset_upload_file 702_4051.pdf [hereinafter Singapore Side Letter]. A Federal Register notice sought comments on whether Harvard, Yale, Columbia, and New York University should be designated as the four U.S. law schools whose degrees would be recognized in Singapore. 69 Fed. Reg. 71095-01 (2004). The final four schools were slightly different. Singapore currently recognizes law degrees from those who graduate in the top 40 percent of their class at Harvard, Columbia, New York University and the University of Michigan. *See* Singapore Ministry of Law, Legal Profession Act, (Chapter 161, Section 2 (2)), Legal Profession (Qualified Persons) Rules, Rule 9a and Schedule 5, http://www.agc.gov.sg/lps/docs/LegalProfessionRules_QualifiedPersons_000.pdf (Aug. 2009); *see also* Singapore Board of Legal Education, Outline, Topics L5 and R, *available at* http://www.lawsociety.org.sg/ble/outline.htm. My *Service Providers* article, *supra* note 7, included Yale and omitted Columbia from the list of universities Singapore had chosen to recognize. I included that data at the last minute, in response to a question from the editor. The link is now dead and I have been unable to determine whether I simply made a mistake previously or whether Singapore has changed the U.S. law schools that it recognizes. The four law schools cited in this footnote are the institutions currently recognized.

328. *See supra* note 168 (discussing implementation provisions). The Singapore, Australia, Morocco, and Bahrain agreements require the parties to *meet* annually unless otherwise agreed, whereas the CAFTA-DR, Chile, Oman, Peru, pending Colombia and pending Panama agreements require the parties to *consult* annually, unless the parties agree otherwise. *Id.* The NAFTA and the Israel, Jordan, and pending Korea FTAs require the parties to *convene* once a year. *Id.*

329. *See supra* notes 199-208 and accompanying text (discussing the Annexes on Professional Services). A Working Group on Professional Services is explicitly created in the Annexes found in the Australia, Peru, pending Colombia and pending Korea FTAs. These working groups are

aware of any meeting of legal services professionals other than the 2006 U.S.-Australia meeting.

D. Other Developments

In addition to the GATS Track #1, GATS Track #2, and FTA-specific efforts described above, there have been a number of other developments that arguably have been inspired, at least in part, by the international trade agreements described in this article. Within the United States, most of these initiatives have come from the ABA Task Force on International Trade in Legal Services (ITILS),[330] the ABA Standing Committee on Professional Discipline, or the Transnational Legal Practice Committee of the ABA Section of International Law.

Globalization and the U.S.'s international trade obligations were part of the backdrop for the ABA's two foreign-lawyer multijurisdiction practice (MJP) recommendations. In 2002, the ABA adopted nine recommendations regarding multi-jurisdictional practice; two of these recommendations addressed the rights of foreign lawyers to practice in the United States.[331] MJP Recommendation 8 urged all states to adopt rules permitting foreign lawyers to practice as foreign legal consultants (FLCs) without taking a U.S. qualification examination.[332] MJP Recommendation 9 suggested adoption of a Model Rule for Temporary Practice by Foreign Lawyers that would allow a foreign lawyer to engage in temporary practice (sometimes called "fly-in fly-out" or FIFO) on terms similar to the MJP rules for domestic lawyers.[333] Although there are a variety of reasons why many U.S. jurisdictions have not yet adopted MJP rules for foreign lawyers,[334] the incomplete

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required to report to the main committee, which must review their work at least once every three years.

330. The ABA Task Force on International Trade in Legal Services (the "ITILS Task Force") coordinates the ABA's initiatives related to the GATS. The ITILS Task Force is engaged in dialogue with the U.S. Government, interested law firms, and significant participants in the U.S. law practice regulatory system as well as with foreign bar associations and bar leaders. It is composed of representatives of a diverse group of ABA entities, liaison members who represent major U.S. stakeholders having interests in the regulation of the U.S. legal profession, and a number of special advisors who are experts in legal ethics, international trade law, and lawyer regulation. *See* Terry et al., 2008 Transnational Legal Practice, *supra* note 234, at 841.

331. *See* ABA MJP Commission Recommendations 8 and 9, *supra* note 272.

332. *See* ABA MJP Commission Recommendation 8 regarding the Model FLC Rule, *supra* note 270. As noted *supra* note 270, the ABA Model FLC Rule was amended in 2006.

333. *See* ABA Foreign Lawyer Temporary Practice Resolution, *supra* note 272.

334. Although the ABA's domestic MJP recommendations have been adopted by a number of states, its foreign lawyer MJP recommendations have been much less successful. *Compare* ABA Center for Professional Responsibility, State Implementation of ABA Model Rule 5.5

adoption of MJP Recommendations 8 and 9 by all states has been raised during the GATS legal services discussions and has been cited as a request of our trading partners in the Doha Round negotiations.[335]

In addition to MJP, the general implementation initiatives include efforts to promote dialogue, discussion, and action on issues that are relevant to the U.S. international trade agreements. For example, for the past several years, the ABA ITILS group has held a conference call almost every month; these calls cover a variety of developments, including requests from the USTR to ITILS to provide feedback on a range of issues. The ABA ITILS and the Transnational Legal Practice Committee of the ABA Section of International Law have jointly sponsored a number of "summits" that have brought together lawyers and regulators from around the world to discuss various transnational legal practice issues, including issues related to the GATS.[336]

(Multijurisdictional Practice Of Law) (July 1, 2009), http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf *available at* (showing forty-two jurisdictions that have adopted a rule identical or similar to ABA Model Rule 5.5), *and* Lance J. Rogers, *Admissions: Multijurisdictional Practice*, 25 LAW. MAN. PROF. CONDUCT 539 (Sept. 30, 2009), *with* Laurel S. Terry, Summary of State Action on ABA MJP Recommendations 8 & 9 (Sept. 26, 2009), *available at* http://www.abanet.org/cpr/mjp/ 8_and_9_status_chart.pdf [hereinafter Terry Foreign Lawyer MJP Chart]. As of Sept. 26, 2009, thirty-one U.S. jurisdictions had adopted a foreign legal consultant rule, including a number of states that recently adopted or revised an FLC rule. Seven jurisdictions in the United States permit temporary practice by lawyers not licensed in the United States. The states which have adopted rules explicitly authorizing temporary practice are Delaware, Florida, Georgia, New Hampshire, and Pennsylvania. Rule language in effect in a sixth state (North Carolina) appears to authorize temporary practice. In addition, the Unauthorized Practice of Law (UPL) Committee in the District of Columbia has issued an opinion authorizing FIFO practice. Only one jurisdiction has issued a report urging rejection of Recommendation 9. Other states continue to study the issue. *Id.*

Despite the relatively low number of states that have adopted the ABA's foreign lawyer MJP recommendations, approximately 80 percent of the actively licensed U.S. lawyers are licensed in jurisdictions that have a foreign legal consultant rule. *See* Terry et al, Transnational Legal Practice 2006-2007, *supra* note 50, at 844. For additional information on the details of these foreign lawyer MJP rules, see Carol A. Needham, *Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-Border Legal Practice*, 15 MICH. ST. J. INT'L L. 605 (2007); Silver and DeBruin, *supra* note 247.

335. *See*, *e.g.*, Pub. Citizen's Posting, GATS Requests by State, *supra* note 246, at 6. For example, Japan requested that:

> commitments be made by all States and District on legal services supplied by a foreign lawyer on home country law where the service supplier is qualified as a lawyer, and also requests that the minimum practicing experience requirement for services on applicants' home country law should not exceed three years in total and should not require 3 consecutive years of experience.

Id.; *see also* Collective Request—Legal Services, *supra* note 255.

336. *See* Terry et al, *Transnational Legal Practice 2006-2007*, *supra* note 50, at 842 (describing summits with the CCBE and with Asian Bar leaders); Terry et al, *2008 Transnational Legal Practice*, *supra* note 234, at 961-62 (referring to the Korea Bar Summit, India Bar Summit, and Summit with representatives of U.S. law firms with multiple foreign

U.S. interest in facilitating cross-border legal services has sometimes been accompanied by concerns about foreign lawyer accountability. Thus, one could conclude that U.S. international trade agreements have contributed to the need for the CCJ's 2009 international discipline cooperation resolutions. The CCJ and the CCBE conducted talks that ultimately resulted in resolutions adopted by the CCJ and the CCBE; the CCJ and the Law Council of Australia have endorsed the concept of cooperation with respect to the disciplining of lawyers engaged in international multijurisdictional practice.[337]

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offices).

337. *See supra* note 75 (citing the August 2009 CCJ resolution and protocol regarding lawyer admission and discipline cooperation with the Law Council of Australia); Conference of Chief Justices, Resolution 2, In Support of Cooperation Among United States and European Disciplinary Bodies (Jan. 2009), *available at* http://ccj.ncsc.dni.us/2-ProposedCCBEResolution1-6-09.pdf. In addition to its "whereas" clauses, this resolution states:

> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages the competent lawyer disciplinary body in each United States state, territory or the District of Columbia (U.S. jurisdictions) to consider:
>
> 1. Informing the competent disciplinary body of the home jurisdiction of a European lawyer (European disciplinary body) of the grounds for and nature of the sanction(s) imposed whenever it has disciplined a European lawyer for violation of a professional regulation (any provision or rule governing the professional activity of a lawyer, including a code of conduct); and
>
> 2. Informing the European disciplinary body of an alleged violation of a professional regulation by a European lawyer if he/she left the host jurisdiction before a determination whether discipline is warranted was made by the competent disciplinary body of that jurisdiction; and
>
> 3. Informing the European disciplinary body whether the host jurisdiction, in its discretion under the applicable state professional regulations, will take disciplinary action and if so, the nature of the sanction(s) that it will impose when it receives information from that European disciplinary body that:
>
> a. The European disciplinary body has disciplined a United States or European lawyer, who is admitted to practice in the host jurisdiction, for violation of a professional regulation; or
>
> b. A U.S. lawyer who is admitted to practice in the host jurisdiction is alleged to have violated the professional regulations of the European country but left that country before a determination whether discipline is warranted was made by the competent European disciplinary body; and
>
> BE IT FURTHER RESOLVED that the Conference will use its best efforts to enable the above described disciplinary cooperation, in particular by:
>
> 1. Providing to the CCBE and regularly updating a list of names and addresses of the competent disciplinary body in each U.S. jurisdiction;
>
> 2. Distributing to its members the list of the names and addresses of the competent disciplinary bodies that it receives from the CCBE; and
>
> 3. Facilitating, if called upon, communications between U.S. and European disciplinary bodies.

Id. *See also* CCBE, Resolution In Support of Cooperation Among American and European Disciplinary Bodies (adopted Feb. 19, 2009, linguistically updated Mar. 27, 2009), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Resolution_in_Suppor1_1241602552.pdf

As this brief discussion has shown, international trade agreements and the globalization phenomenon that lies behind them have provided the impetus for a number of developments in the United States, including some not discussed in this article. For the last few years, these developments have been addressed in the "Year-in-Review" reports prepared by the ABA Section of International Law's Transnational Practice Committee for the *International Lawyer* journal and in the periodic GATS columns found in *The Bar Examiner* monthly journal.[338] These articles provide a good resource for reviewing the annual developments and implementation activities related to international trade agreements.

V. THE IMPACT OF INTERNATIONAL TRADE AGREEMENTS ON U.S. REGULATION OF THE LEGAL PROFESSION

While it is clear that the United States has signed a number of international trade agreements applicable to legal services, it is less clear what impact, if any, these agreements have had. Some may wonder (and have done so aloud to me) whether the GATS and these other agreements have had any impact at all since it is difficult to point to any particular ethics rule or lawyer regulatory provision and definitively say that it has been changed as a result of the GATS. I do not share these views, however. I continue to believe that the GATS and these other international trade agreements have had a fundamental impact on U.S. lawyer regulation. While these trade agreements are undoubtedly a response to the globalization factors described earlier in this article, in my view, these international trade agreements have affected the *vocabulary*, *landscape*, and *stakeholders* involved in lawyer regulation. These agreements, coupled with globalization and pressure from lawyers and law firms engaged in transnational practice, have led to fundamental changes that I believe will only increase in the future.

; Letter from Anne Birgitte Gammeljord, President of the CCBE, to the President of the Conference of Chief Justices (May 6, 2009), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/090506_letter_CCJpd1_1241602466.pdf (creating an exception for Spain because of data protection rules). *See also* ABA Standing Comm. on Prof'l Discipline, Model Rules For Lawyer Disciplinary Enforcement, Rule 22, *available at* http://www.abanet.org/cpr/disenf/rule22.html.

338. The Year-in-Review articles are available in the "Global Legal Practice" publications section of my webpage: http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#1 (last visited Apr. 18, 2010). The Bar Examiner articles are found on the articles page of the ABA GATS webpage. *See* http://www.abanet.org/cpr/gats/articles.html (last visited Apr. 18, 2010).

Let me begin by talking about the effect of trade agreements on the *vocabulary* of lawyer regulation. This article has talked about "legal services" because that is how this particular "services sector" is described by those involved in trade agreements.[339] Prior to studying these trade agreements, I would have talked about legal ethics, lawyer regulation, lawyers, and the legal profession—or I would have referred to the specific service the lawyer agreed to provide, such as a contract, a will, a debenture, due diligence, or a litigation defense. But other than in the context of the "Legal Services Corporation," I rarely talked about "legal services" nor did my friends and colleagues in the lawyer regulatory community. Although law firms may have been marketing for decades the full range of legal services they could offer, and although economists such as those in the Bureau of Economic Affairs may have been talking about "legal services" or the "legal services profession" for many years, my impression is that *in the lawyer regulatory community*, one typically did not hear many references to "legal services" or the "legal services sector."

My vocabulary (and that of others) has changed dramatically as I have become more involved in international trade agreements issues. It has become common for me (and for my friends and colleagues) to speak about "legal services" in general, rather than identifying the specific item or category of service a lawyer provides.

Not everyone is happy with this change in vocabulary. For example, during one of the ABA's summits with foreign lawyers and bar leaders, some of the foreign participants expressed their unhappiness with the phrase "legal services" because of a concern that it diminished the legal profession. I suspect that many in the United States would agree. Nevertheless, when speaking with trade agreement policymakers, it is useful to use the same terminology they use and thus one inevitably

339. *See*, *e.g.*, the WTO Secretariat Sectoral Classification Paper, *supra* note 140 (identifying "legal services" as one sector for which commitments can be made); Recent Trends 2009, *supra* note 16, at Ch. 6 (Chapter 6 is devoted to legal services); Email from Kristi Gaines, Staff Counsel to the ABA Task Force on International Trade in Legal Services to Laurel S. Terry (Oct. 7, 2004) (on file with author) (forwarding an email from ABA Executive Director Robert Stein to ABA entities asking about legal services' classification systems). The forwarded email stated, in part, the following:

> The Bureau of Labor Statistics has approached the ABA for assistance in developing the North American Product Classification System (NAPCS). Specifically, they are seeking our help in identifying and defining the products/services produced by the legal industry. . . . Would you please review the list with an eye toward the following? 1. Has the BLS accurately identified the legal services sold in the US? If not, what services need to be added or modified? 2. How can the definitions be improved?

begins to talk about "legal services" and our particular "services sector." Thus, trade agreements have fundamentally and permanently changed the vocabulary used to describe what it is that lawyers do.

While international trade agreements have contributed to a change in our vocabulary about what it is that lawyers provide ("legal services" rather than a contract, a will, litigation services or tax services), these agreements have contributed to even more dramatic vocabulary changes in the way lawyers themselves are described. Because trade agreements deal with all categories of services in a single chapter, these agreements use the phrase *service providers*.[340] This vocabulary change has rubbed off on those who work with trade agreements. Even if lawyers themselves have not accepted and internalized these changes, I submit that many outside the legal profession (including government officials and other stakeholders) think of lawyers as simply one of many different kinds of *service providers*. I remember being very surprised when I first learned that the official at the USTR who had the initial responsibility for legal services negotiations was not a lawyer and that this person's portfolio included express delivery services, legal services, and other services.[341] For those in the field, lawyers are simply one of many different groups of service providers.

This vocabulary change does not come easily to many lawyers. This is true not only in the United States, but around the world. Many lawyers are used to thinking of themselves and their profession as "unique." But this is not how many in the non-lawyer world think of lawyers. I was once at a WTO meeting in Geneva with an IBA delegation that consisted of lawyers from around the world. An IBA representative made the remark that "lawyers are unique": the response we heard back was that all groups think they are unique and—implicitly—that it would be impracticable to have separate accommodations for all of the groups that think they are unique. In sum, while lawyers may have a hard time letting go of their traditional self-image and vocabulary,[342] and while there may be valid reasons for

340. *See*, *e.g.*, *supra* notes 183 and 204 and accompanying text (using service provider's language).

341. *See* Terry, GATS, *supra* note 1, at n. 237. Mr. Ascher's replacements have also been non-lawyers.

342. *See supra* notes 339-41 and accompanying text. Perhaps another example of our changing vocabulary is the fact that commentators are increasingly likely to point out as a "peculiarity" the fact that lawyers regularly refer to lawyers and "non-lawyers." I have now heard several commentators observe that other professions do not use this kind of language. The first time I heard this observation was during the Miller-Becker Symposium keynote lunch speech when Stephen Gillers asked why it was that lawyers talk about non-lawyers, pointing out that dentists do not talk

treating the legal profession differently than other professions,[343] it seems clear that the vocabulary used to describe lawyers has changed. Despite the fact that many lawyers are used to thinking of their profession as "unique," in the vocabulary of trade agreements, lawyers are simply one of many different kinds of service providers.

As I wrote in a previous article, I believe that this change in vocabulary was one of the factors that contributed to the creation of a new *Service Provider's Paradigm* that applies to lawyer regulation.[344] In the new *Service Provider's Paradigm*, the legal profession is not viewed as a separate, unique profession entitled to its own individual regulations, but is included in a broader group of "service providers" who are regulated together.[345] I previously described this new paradigm as a "fundamental, seismic shift in the approach towards lawyer regulation" because it has changed *who* regulates lawyers (with more U.S. federal regulation and international regulation), and it has changed *how* lawyers are regulated (with the burden placed on the legal profession to justify rules that deviate from the rules used in other cultures or for other professions).[346] Although many lawyers believe, and the ABA policy still states, that lawyers should be primarily regulated by the state judicial branch,[347] it is undeniable that a number of

about non-dentists. For Stephen Gillers' article from the symposium, see *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677 (2010).

343. In my article about the EU antitrust initiative directed against the legal profession, I argued that there might—perhaps—be a reason to exercise extra caution when dramatically changing lawyer regulatory systems. Lawyers have a fundamental role in establishing the rule of law within a country. It may be true that if the pendulum swings too far with respect to lawyer regulation, negatively impacting the rule of law, it will be harder to respond and make corrections than it would be in other areas. *See generally* Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT'L L. & BUS. 1, 69, 95-97 (2009).

344. *See* Terry, Service Providers, *supra* note 7. That article stated:

> The alternative argument, however, and the one to which I subscribe, is that the GATS has been the impetus for profound changes because it has put the issue of regulation of legal services on the international stage in contexts that go beyond trading, has kept the issue alive, and has provided the impetus for many, many discussions (and some action) by a wide variety of stakeholders, many of whom had not been actively involved in lawyer regulation issues previously. Thus, even though the GATS uses the phrase "service suppliers" rather than "service providers," I consider it the third watershed event contributing to the inclusion of legal services in the service providers paradigm.

Id. at 192.

345. *Id.* at 189.

346. This article argued, *inter alia*, that lawyers are subject to many more regulators and that these regulators are much more likely to conduct cross-cultural and cross-professional benchmarking. *Id.* at 206.

347. *See*, *e.g.*, ABA MJP Recommendation 1, Final Reports 201a (Regulation of the Practice of Law by the Judiciary) in the MJP Commission Final Reports, *supra* note 272.

other entities have taken action that affects U.S. lawyer regulation. I gave a number of examples in my "Service Providers" article,[348] but many more examples exist. Perhaps the most recent illustration of the "service providers" paradigm is the FTC's efforts to include the legal profession within the ambit of its so-called "red flag" rules. Before it filed a lawsuit to challenge the proposed regulations,[349] the ABA explained the issue in this fashion:

> The "Red Flags Rule," mandated by the 2003 Fair and Accurate Credit Transactions Act (FACTA), requires that "creditors" and "financial institutions" implement programs to detect, identify and respond to activities that could indicate identity theft. The FTC interprets a broad definition of "creditor" that includes businesses that provide services and bills for those services at a later date to encompass attorneys, doctors and other professionals.
>
> In delaying the effective date of the rule for 90 days, the FTC was responding to deep concerns expressed by Congress, the ABA and more than two dozen state and local bar associations that applying the rule to lawyers "threatens the independence of the profession from federal controls—independence that is fundamental to the lawyer's role as client confidante and advocate." Applying to the rule to lawyers "undercuts an unbroken history of strong regulation" of the legal profession by state bars and supreme courts, Wells said. Maintaining that Congress never intended that lawyers be regulated under the law, Wells said the ABA and its counterparts at the state and local levels will continue to work with Congress to clarify that the rule should not apply to the legal profession. The association, he said, is prepared to take the issue to the courts for a final resolution if necessary.[350]

Although the district court granted the ABA's request for partial summary judgment, the "red flags" issue provides yet another example that the *Service Provider's Paradigm* has indeed become a pervasive way in which potential regulators outside the legal profession think

348. *See* Terry, *Service Providers*, *supra* note 7, at 198-205.

349. *See* Complaint, American Bar Association v. Federal Trade Commission, *available at* http://www.abanet.org/media/nosearch/1_1_Complaint.pdf; ABA News Release, *Federal Trade Commission's "Red Flags Rule" Leads American Bar Association to File Suit Rule Burdens Lawyers with No Client Benefit and Invades State Regulation of Lawyers* (Aug. 27, 2009), http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=755 (last visited Apr. 18, 2010).

350. *See*, *e.g.*, *ABA Washington Letter*, Vol. 45, No. 8 (August 2009), http://www.abanet.org/poladv/wl/09aug/#no3 (last visited Apr. 18, 2010).

about lawyers and lawyer regulations.[351] To the extent that the vocabulary used in the GATS (and subsequent trade agreements) contributed to the creation of this new paradigm, as my prior article argued, these trade agreements have had a fundamental impact on lawyer regulation.

Let me offer one final example of the impact of international trade agreements on our vocabulary. As noted above, trade agreements have changed the vocabulary used to talk about who we are (service providers) and what we do (legal services). In addition to these changes, international trade agreements have changed the vocabulary we use to talk about our regulations and regulatory system. In the past, lawyers, academics, and judges might disagree about the propriety and validity of a particular rule, about whether it was justified and necessary, and about whether it was narrowly tailored or overbroad. But with few exceptions,[352] the issue of regulation was not usually framed in terms of whether a particular rule created "barriers" to trade. Now, however, it is common to hear references to the "barriers" that regulation creates. This is the language used in GATS Article VI:4, which requires WTO members to consider the development of "any necessary disciplines" in order to ensure "that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. . . ."[353] During an ABA ITILS conference call in which I participated during October 2009,

351. See Amended Order, ABA v. FTC, Case No. 09-1636 (RBW) (D. DC), *available at* http://www.abanet.org/media/docs/ABA_v._FTC_Amended_Order.pdf. The research for this article was completed in October 2009. Subsequent to the article's submission, the FTC appealed the grant of summary judgment; that appeal was pending when this article went to press. *See generally* ABA, *FTC "Red Flags" Rule*, http://www.abanet.org/poladv/priorities/redflagrule/ (last visited May 3, 2010).

Less than two weeks after the ABA filed its lawsuit against the FTC challenging the proposed "red flag" rule, it filed an amicus brief with the U.S. Supreme Court protesting the application to lawyers of the debt relief agency provisions in the bankruptcy statute. *See* ABA News Release, *ABA Amicus Brief Opposes Application of Bankruptcy Act Restrictions to Lawyers* (Sept. 2, 2009), http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=765 (last visited Apr. 18, 2010); *News: ABA's Brief Urges High Court to Exclude Lawyers From "Debt Relief Agency" Definition*, 25 ABA/BNA LAW. MAN. PROF. CONDUCT 501 (Sept. 16, 2009). In March 2010, the Supreme Court rejected the position of the lawyer petitioners and amicus ABA and found that the federal bankruptcy statute applied to lawyers. Milavetz, Gallop & Milavetz, Pa, Et Al., v. United States, 130 S.Ct. 1324 (March 8, 2010).

352. Richard Abel's body of work might be described as an exception.

353. *See* GATS, *supra* note 2, at Art VI:4 and *supra* notes 146-47 and accompanying text (noting that WTO disciplines should aim to ensure that domestic regulation is (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; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.).

U.S. lawyer regulations were referred to as "barriers." There is a wealth of recent academic literature that also approaches regulation as barriers.[354] This analysis and approach also has become common outside the trade context, including in regulatory reform projects of the OECD and others.[355]

The 2009 *Recent Trends* U.S. government report described earlier is the final vocabulary example I will point to. This report had a subsection entitled "Regulatory Environments are Restrictive," which I found noteworthy because of its title, its approach, and its reference to "barriers":

> In many countries—especially those with federal systems such as Australia, Canada, and the United States—state-based regulations require formal admittance in the relevant subterritory to be licensed to practice law there. Some U.S. industry representatives believe that divergent state-level regulations impede the delivery of legal services by both domestic suppliers and foreign lawyers. By contrast, an EU directive has reduced certain barriers to entering European legal markets.[356]

While many of the regulations cited as restrictive or as barriers were those of other countries, there is no logical reason to assume that the approach used in this report should be limited to other countries' lawyer regulation. While this may be a good development,[357] it is

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354. *See*, *e.g.*, Gillian K. Hadfield, *Legal Barriers to Innovation: the Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008) (citing authorities).

355. *See*, *e.g.*, OECD, GUIDING PRINCIPLES FOR REGULATORY QUALITY & PERFORMANCE, *available at* http://www.oecd.org/dataoecd/24/6/34976533.pdf; THE HUNT REVIEW OF THE REGULATION OF LEGAL SERVICES (Oct. 2009), *available at* http://www.legalregulationreview.com/files/ Legal%20Regulation%20Report%20FINAL.pdf.

356. *See* 2009 Recent Trends, *supra* note 16, at 6-7.

357. *See generally*. Terry, *The EU Professional Services Competition Initiative*, *supra* note 343 (criticizing many aspects of the EU Professional Services Competition initiative, but endorsing the concept of asking regulators to be able to articulate the basis for their rules). *See also* Terry, *Service Providers*, *supra* note 7, at 208-11 (recommending that the ABA and other regulators develop a regulatory template and that such regulators or shadow regulators). The regulators should do this in the following manner:

> 1) explicitly articulate the justification for any rule or regulatory approach it recommends;
>
> 2) set forth the manner in which that regulation advances the articulated regulatory goal;
>
> 3) explain why the regulation is narrowly tailored and not broader than necessary;
>
> 4) understand and benchmark the ways in which the proposed rule or regulation is similar to or different than the rules of other service providers within the U.S.;
>
> 5) understand and benchmark the ways in which the proposed rule or regulation is similar to or different than the legal profession rules found in other countries; and

clearly a departure from the traditional language that has been used by the U.S. legal profession to discuss lawyer regulation.[358] Moreover, international trade agreements have contributed to the pressure to "count" both legal services and barriers. Reports such as the *Recent Trends* report create a certain amount of pressure for the United States to have high exports and low barriers.[359] Thus, in my view, these statistical and barrier studies have both contributed to, and reflect, relatively new ways of thinking and talking about lawyer regulations.[360]

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6) explain why any differing regulation is necessary and appropriate.

See id. at 209.

358. *Id.* This paragraph stated in its entirety:

> Regulations governing legal services have also restricted the supply and raised the cost of employing qualified lawyers in recent years. Particularly restrictive regulations pertain to the licensing required to practice law in a certain country or subnational jurisdiction. For example, quotas on the number of professionals allowed to pass bar exams in Korea act as barriers to entry. In many countries—especially those with federal systems such as Australia, Canada, and the United States—state-based regulations require formal admittance in the relevant subterritory to be licensed to practice law there. Some U.S. industry representatives believe that divergent state-level regulations impede the delivery of legal services by both domestic suppliers and foreign lawyers. By contrast, an EU directive has reduced certain barriers to entering European legal markets. Although the regulations apply only to EU nationals, there is free movement within the EU and the arrangement accommodates differences in language and legal traditions.
>
> Limits on the size of firms, advertising, and foreign presence are also common and restrict the supply of legal services. For example, legal services regulations in India prohibit firms from having more than 20 partners, proscribe legal services advertisements, and permit only Indian citizens to provide legal services. By comparison, the Chinese government allows entry by foreign law firms, but licenses must be reviewed and renewed yearly, and foreign firms cannot hire Chinese lawyers (they must resign and act as consultants). Further, prohibitions on practicing Chinese law require that legal advice of international firms be approved by Chinese law firms.

Id. (footnotes omitted).

359. *Id.* For an example of a project directed at measuring barriers to legal (and other) services, see OECD Experts Meeting on the Services Trade Restrictiveness Index (STRI), http://www.oecd.org/document/9/0,3343,en_2649_36344374_41524105_1_1_1_37431,00.html (last visited Apr. 18, 2010). The World Bank is also contemplating a "barriers" study and has contacted members of the IBA WTO Working Group for assistance. *See generally* ABA GATS – Legal Services Webpage, Miscellaneous: Statistics and Studies about Trade in Legal Services and Existing Barriers, http://www.abanet.org/cpr/gats/misc.html (last visited Apr. 18, 2010).

360. When invited to speak at this Symposium, I originally proposed that I address the many global regulatory reforms initiatives that are relevant to these relatively new ways of thinking about lawyer regulation. There is work that needs to be done to review the effect on the legal profession of the many ongoing global regulatory initiatives. *See*, *e.g.*, OECD Regulatory Reform, *supra* note 355, Hunt Review, *supra* note 355. *See* also LAUREL S. TERRY, REGULATION OF LEGAL SYSTEMS AND LAWYERS, HARVARD-OXFORD-JINDAL GLOBALIZATION OF THE LEGAL PROFESSION PROGRAMME Slides 7-8, 20-21 (Sept. 12, 2009), *available at* http://www.personal.psu.edu/

In sum, it seems undeniable that international trade agreements have changed the vocabulary that is used in the United States to describe lawyers, their work, and their regulatory system.

As I noted in this section's introductory paragraph, I believe that international trade agreements have changed the *landscape* of lawyer regulation, as well as the vocabulary we use. When I first started teaching legal ethics twenty-five years ago, the regulatory field or landscape that one had to cover was much smaller. For example, most casebooks and conferences focused on the ABA's Model Rules of Professional Conduct, the rules of professional conduct adopted by the state supreme courts, and the regulatory effects of litigation (whether through disqualification cases or malpractice-related cases). As Professors Wolfram and Wilkins have pointed out in their classic articles,[361] the landscape of regulation was, in fact, much larger, even if the legal profession had not always recognized those broader regulatory boundaries.

What *has* changed is our awareness of the landscape in which we are situated. International trade agreements, especially the disciplines provision in GATS Article VI:4, have forced many in the U.S. legal profession to recognize a new regulatory landscape. It is a landscape that makes many in the U.S. legal profession uncomfortable. In my view, this discomfort is palpably visible in the ABA and CCJ resolutions regarding GATS Track #2 disciplines. The ABA resolution acknowledges the reality of GATS Article VI:4, but urges caution.[362] The CCJ resolution goes even further by asking that the federal government not impinge in any fashion on the states' ability to regulate lawyers.[363]

These resolutions are not the only events that demonstrate an acknowledgment of a changed regulatory landscape. The CCJ's 2003 creation of an International Agreements Committee, the 2009 reorganization of its committee structure which gives more CCJ committees jurisdiction with respect to international issues,[364] and the

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faculty/l/s/lst3/presentations%20for%20webpage/Laurel_Terry_Oxford.pdf (including links to a number of regulatory reform initiatives).

361. *See* David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799 (1992); Charles Wolfram, *Lawyer Turf and Lawyer Regulation – The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989-90).

362. *See supra* note 310 and accompanying text regarding the ABA GATS Track 2 resolution.

363. *See supra* note 312 and accompanying text regarding the CCJ's response to the ABA GATS Track 2 resolution.

364. For information about the CCJ's creation of an International Agreements Committee in 2003, see Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative*

CCJ's representation on the Intergovernmental Policy Advisory Committee (IGPAC) demonstrate to me the CCJ's acknowledgement of the changed landscape in which it now operates.[365] The creation of the ABA GATS-Legal Services Task Force and its expansion to the ABA Task Force on International Trade in Legal Services (ITILS) is further recognition of the changed landscape in which lawyer regulation now operates.[366] The new ABA 20-20 Commission similarly reflects the changed landscape of lawyer regulation, a change to which international trade agreements have contributed.[367] All of these examples illustrate the degree to which international trade agreements have changed the landscape of lawyer regulation.

Of course, international trade agreements are not the only phenomenon that has affected the landscape of lawyer regulation. Within the United States, increased federal regulation has changed the regulatory landscape; legal practice is now regulated to some degree by federal securities laws, tax laws, bankruptcy laws, and consumer protection laws, to name just a few.[368] U.S. lawyer regulation also has been (or soon will be) influenced by international developments, including those of the Financial Action Task Force and the OECD.[369] Although international trade agreements may not be alone in changing the regulatory landscape for the U.S. legal profession and may reflect globalization and other large changes in our society, they have brought significant changes to the regulatory landscape.

Perspectives, 4 WASH. U. GLOBAL STUD. L. REV. 463, 509-10 (2005) [hereinafter Terry, Global Legal Ethics]. In 2009, the CCJ merged the International Agreements Committee into the Committee on Professionalism and Competence of the Bar and created a new Task Force on the Regulation of Foreign Lawyers and the International Practice of Law to monitor the changes in regulation of the bar and ownership of law firms in the UK, Australia, Canada, and the EU. The Government Affairs Committee of the CCJ and the Conference of State Court Administrators (COSCA) has responsibility for issues of federalism and would able to address issues such as those related to the Hague Choice of Court Convention. As reconstituted, there are a larger number of Chief Justices who will regularly consider international policy matters. *See* Email from Richard Van Duizend, Principal Court Management Consultant, National Center for State Courts to author (Nov. 11, 2009) (on file with author).

365. *See supra* note 157 (for citations to and a discussion of IGPAC).

366. *See supra* note 330 for a discussion of ITILS.

367. *See* ABA, Commission on Ethics 20/20, http://www.abanet.org/ethics2020/ (last visited Apr. 18, 2010).

368. *See generally* John Leubsdorf, *Legal Ethics Falls Apart,* 57 BUFF. L. REV. 959 (2009); Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. And Australian Reforms With U.S. Traditions In Regulating Law* Practice, J. LEGAL PROF. (2009), *available at* http://www.abanet.org/cpr/pubs/uk.pdf; Terry, Service Providers, *supra* note 7; Terry, *European Competition Initiatives*, *supra* note 343; Terry, Global Legal Ethics, *supra* note 364..

369. *See, e.g.,* Terry, FATF, *supra* note 117.

The third way to measure the impact of international trade agreements upon lawyer regulation is to examine the behavior of the relevant *stakeholders*. In support of this point, I would point to the variety of U.S. legal profession organizations that now make serious efforts to monitor GATS developments (and provide commentary to the USTR). One need look no further than the members and liaisons of the ABA Task Force on International Trade in Legal Services to make this point. ITILS has active participation from the CCJ, the ABA Section of Legal Education and Admissions to the Bar, the National Organization of Bar Counsel, the National Conference of Bar Examiners, the National Association of Bar Executives, and the National Association of Bar Presidents, among others. The ABA Center for Professional Responsibility provides significant professional staff support for ITILS and its work. While not all of the *members* of these organizations are aware of, or care about, international trade agreements, it is significant that these organizations now send representatives who participate actively. In a world of finite resources and human capital, I view this participation as proof that these organizations have determined that the GATS and these international agreements are important. This commitment is particularly noteworthy in light of the steep learning curve that is involved when one decides to tackle the topic of international trade agreements.[370]

It is also noteworthy that these organizations have not limited themselves to participating in the ITILS. Many of them have been substantially involved in issues related to the GATS and other international trade agreements.[371] As noted earlier, in 2003, the CCJ created an international agreements committee that was responsible for monitoring trade developments and communicating with the USTR; while the name of the CCJ entity responsible for this activity has changed, the CCJ's interest has not waned. In 2009, the CCJ agreed to participate in a conference on globalization sponsored by the ABA Center for Professional Responsibility and the Georgetown Center on the Legal Profession and subsequently created a task force to monitor these developments.[372] National Organization of Bar Counsel

370. As a small example of this complexity, I would note that the journal editors originally asked authors to write twelve pages for the Symposium. I thank them for their willingness to publish this longer article.

371. All of the statements in this paragraph are based on my personal observations.

372. The American Bar Association Center for Professional Responsibility and Standing Committee on Professional Discipline & Georgetown Center for the Study of the Legal Profession, The Future Is Here: Globalization and the Regulation of the Legal Profession: Recent Global Legal Practice Developments Impacting State Supreme Courts' Regulatory Authority Over the U.S. Legal

representatives were deeply involved in the development of the ABA policy on GATS Track #2, lawyer discipline cooperation, and other initiatives. The National Conference on Bar Executives not only has had GATS programs at its annual education meetings, but it also was very involved in the planning and implementation of the U.S.-Australia meeting that followed in the wake of that FTA. The ABA Section of Legal Education and Admissions to the Bar has formed an international committee that is likely to consider the issue of what recognition, if any, to give to foreign lawyers who want to become licensed U.S. lawyers. The issue of recognition is a fundamental issue underlying international trade agreements.[373]

Other U.S. stakeholders are also interested in the issue of international trade agreements and legal services. For example, on the same day as this Symposium, U.S. Department of Commerce representatives met with ABA representatives in order to discuss legal services issues including many issues related to international trade agreements.[374] U.S. legal profession academics are increasingly aware of these developments; it is included in case books and supplements.[375] It is also noteworthy that international organizations to which the United States belongs consider these issues important.[376] Indeed, from my

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Profession, May 26-27, 2009, Chicago, IL, Conference Materials (2009), *available at* http://www.abanet.org/cpr/regulation/conf-materials.pdf.

373. This International Committee was formed at the recommendation of the 2008-2009 Special Committee on International Issues of the ABA Section of Legal Education and Admission to the Bar. That Committee issued a report in July 2009. The Council of the ABA Section of Legal Education authorized publication of the July 2009 report and has asked for feedback in time for its Dec. 5, 2009 Council meeting. *See* ABA Section of Legal Education and Admission to the Bar, http://www.abanet.org/legaled/ (last visited Apr. 18, 2010).

> At its meeting on July 31, 2009, the Council received the report of the Special Committee on International Issues. The Council requested that the report be posted on the Section's Web site and welcomes comments from interested persons. The Council will consider the recommendations of the Special Committee at its December 5, 2009 meeting.

Id. *See* AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES (July 15, 2009), *available at* http://www.abanet.org/legaled/committees/International%20Issues%20Report%20(final).doc.

374. *See* Agenda, ABA Task Force on International Trade in Legal Services Negotiations Meeting with Deputy Asst. Secretary for Services Joel Secundy, U.S. Department of Commerce, Oct. 9, 2009 (on file with author). The ABA had a similar meeting in 2006. *See* Agenda, Roundtable with Deputy Assistant Secretary of Commerce Ana Guevera and ABA GATS Task Force, September 12, 2006 (on file with author).

375. *See*, *e.g.*, David Wilkins & Andrew Kaufman, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION, (5th ed., Carolina Academic Press 2009).

376. *See*, *e.g.*, *supra* note 242, 276, (citing GATS-related OECD materials). The United Nations has also been interested in "classification" issues that are related to GATS-legal services issues. *See* Terry, UN Classification Materials, *supra* note 140. *See* also ABA, Documents

perspective, it is not surprising that U.S. individuals and entities interested in lawyer regulation are now interested in the GATS and other international trade agreements; for many years, lawyers elsewhere in the world have recognized that trade agreements are an important issue for the legal professions.[377]

In sum, the simple fact of who is paying attention convinces me that the GATS and the other international trade agreements are important to legal services. International trade agreements have affected the behavior of numerous legal services stakeholders, as well as affecting the vocabulary and landscape of lawyer regulation.

This Symposium is the final example I will point to in order to bolster my point about the influence of the international trade agreements on the legal profession. This Symposium does not have the GATS or other international trade agreements as its focus. Nevertheless, if I had more time and room, I could go through each of the topics listed on the program and talk about the ways in which international trade agreements could be relevant to that topic:

- Lawyer regulation and ethics in China?[378] An important aspect of that topic is China's legal services commitments found in its GATS Schedule of Specific Commitments.
- Sports lawyers crossing borders?[379] To the extent we focus on the U.S.-Canadian border (e.g., with hockey players), an important issue for regulators will be the question of whether—if we extend MJP rights to Canadian lawyers (and vice versa for U.S. lawyers in Canada), do we have to extend similar recognition to lawyers from around the world?
- Litigation financing by third parties?[380] Much of that is being done by companies located outside the United States. Even if the United States wanted to crack down on this

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Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations, http://www.abanet.org/cpr/gats/track_one_class.html (last visited Apr. 18, 2010).

377. *See supra* note 276 (citing OECD Professional Services conferences). *See also* Terry, The History of the WTO's IBA Consultation, *supra* note 316; Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L. L. 1 (1999) (documenting international legal profession interest in the GATS).

378. *See* Judith A. McMorrow, *Professional Responsibility in an Uncertain Profession: Legal Ethics in China*, 43 AKRON L. REV. 1081 (2010).

379. *See* David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L. REV. 697 (2010).

380. *See* Gillers, *supra* note 342.

phenomenon, could it do so consistent with its GATS obligations?

- An interim assessment of MJP?[381] Such an assessment could contrast the tremendous success in state adoption of Rules 5.5 and 8.5 with the less successful adoption of MJP rules applicable to foreign lawyers and ask about the impact, if any, on trade agreements.
- How do lawyers practice transnational corporate law? Jurisdictional limits may be influenced by, and subject to, the GATS.
- Barriers to practicing across borders? If the United States has barriers that are inconsistent with its GATS Schedule, foreign lawyers may urge their governments to challenge these barriers.
- Exporting American legal ethics?[382] If the result of GATS Track #2 is a set of "disciplines" applicable to legal services, will those disciplines include provisions on "technical standards"? The GATS term "technical standards" has been interpreted to include standards of conduct such as ethics rules.
- Legal process outsourcing?[383] Before deciding what limits if any, the United States or its states could place on this phenomenon (assuming they wanted to place limits), one should consult a country's commitments concerning GATS Modes 1 and 4.
- Lawyer advertising?[384] To the extent the United States tries to regulate advertising and UPL activities of foreign lawyers, one should consult the GATS to see whether it places any limits on such regulation.

Will the GATS and the other U.S. international agreements provide concrete answers to questions that were posed in this Symposium? The answer is a resounding "no." The GATS does not give definitive guidance to the issues listed above nor does it tell one, for example, whether to vote for or against the revisions (or the revisions to the

381. *See* Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729 (2010).

382. *See* James E. Moliterno, *Exporting American Legal Ethics*, AKRON L. REV. 769 (2010).

383. *See* Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825 (2010).

384. *See* Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801 (2010).

revisions) in the screening rule found in ABA Model Rule of Professional Conduct 1.10. In this respect, I understand why some commentators may find it difficult to conclude that the GATS has had a significant impact on U.S. lawyer regulation. Nevertheless, I continue to believe that if any foreign lawyers will be affected by U.S. lawyer regulation, then we cannot talk about any of these issues without exploring the relevance, if any, of U.S. international trade agreements to the issue at hand. In light of the ever-larger impact of globalization, more and more issues have the potential to affect some foreign lawyers, thus triggering consideration of these issues. Globalization is now part of the frame of reference in which the U.S. legal profession operates and one cannot talk about lawyers and globalization without considering the impact of international trade agreements on any given issue. While these agreements may not ultimately apply, they reflect the globalized world in which we now live and are an integral part of the regulatory landscape that must be considered. In short, these agreements reflect fundamental changes in the way we must approach lawyer regulation issues. Moreover, the emergence of the APEC Legal Services Initiative makes me believe that in the future, there will be an increase, rather than a decrease in the international trade discussions devoted to legal services.

In sum, I am very pleased that Jack Sahl urged me to talk and write about the impact of international trade agreements on legal services for the inaugural symposium of the Miller-Becker Center for Professional Responsibility, rather than some of the other topics I had been considering. Writing this article has given me the chance to reflect on, and document, some of my experiences and learning about these agreements. At the time I wrote my Vanderbilt article, I did not know very much about the GATS except the fact that I wanted to know more and that I thought we in the U.S. legal community needed to know more. On the one hand, I continue to believe many of the same things I thought in 2000—especially the idea that the GATS is a very significant development. On the other hand, after a decade's worth of experience, knowledge and reflection, I have revised my thinking about the GATS in certain respects. For example, if I were writing my Vanderbilt article today, I probably would be much less certain about which legal profession measures are subject to scheduling and which would be

covered by domestic regulation disciplines.[385] As is true in many areas, the more you know, the more you realize how much you do not know, how complicated and complex it all is, and how hard it is to come up with definitive answers. Despite these uncertainties, one fact seems certain—it is clear to me that the GATS other U.S. international trade agreements reflect changes that have had a fundamental impact on how we think about lawyer regulation in the U.S. and must be taken into account. It is time we all became more familiar with all of the U.S. trade agreements applicable to legal services.

385. To get an appreciation of how complicated it can be to determine which legal profession "measures" are subject to the GATS domestic regulation provisions, see Terry, *But What Will the WTO Disciplines Apply To?*, *supra* note 129.