



**From GATS to APEC:**  
**The Impact of**  
**International Trade Agreements**  
**on Lawyer Regulation**

**Miller-Becker Inaugural Symposium,**  
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**Summary of Remarks**



- Introduction
- The proliferation of U.S. trade agreements
- The structure and application of trade agreements to legal services
- The impact of trade agreements on lawyer regulation
- What to do about it....



OFFICE of the UNITED STATES TRADE REPRESENTATIVE  
EXECUTIVE OFFICE OF THE PRESIDENT

**Trade Agreements** ▾

- WTO & Multilateral Affairs
- ▾ **Free Trade Agreements**
  - Australian FTA
  - Bahrain FTA
  - CAFTA-DR (Dominican Republic-Central America FTA)
  - Chile FTA
  - Colombia FTA
  - Israel FTA
  - Jordan FTA
  - KORUS FTA
  - Morocco FTA
  - North American Free Trade Agreement (NAFTA)
  - Oman FTA
  - Panama TPA
  - Peru TPA
  - Singapore FTA
- Trade & Investment Framework Agreements
- Bilateral Investment Treaties
- Other Initiatives

**Trade Agreements & Legal Services:**

- The GATS may be the best-known U.S. trade agreement
- But there are many other U.S. agreements covering legal services
- Unfortunately, there is no standard format for these agreements
- But if you understand the GATS, you can figure out the others

## FTAs are a Global Phenomenon

- **EU FTAs:**
  - Russia, other CIS countries, Mexico and Chile,
  - Ongoing negotiations with Euromed, Mercosur, Gulf Cooperation Council, Korea, India, Central America, Andean Pact, and ASEAN
- **Australia FTAs:**
  - U.S., Singapore, Thailand and New Zealand
  - Negotiations with Chile, China, Japan, Malaysia, Gulf Cooperation Council (Saudi Arabia, Qatar, Bahrain, Oman, Kuwait, United Arab Emirates), and ASEAN
- **Canada FTAs:**
  - Jordan, Columbia, Peru, European Free Trade Association (EFTA), Costa Rica, Chile and Israel
  - 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
- **India FTAs:** with Korea and ASEAN



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# GATS 101

[The General Agreement on Trade in Services]

[Eff. 1995, 1<sup>st</sup> global “services” agreement, now 153 WTO Members]

- **Basic obligations** (e.g. Article III on transparency)
- **Optional obligations**
  - If a sector (legal services) is listed on one’s “Schedule,” then: except as otherwise noted, one must comply with:
    - Article XVI (market access) and
    - Article XVII (national treatment)
- Services are “**scheduled**” using “**Modes of Supply**”
  - **Mode 1** (inbound product); **Mode 2** (outbound client)
  - **Mode 3** (foreign firms); **Mode 4** (inbound foreign lawyer)

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## A Sample GATS “Schedule”

SECTOR-SPECIFIC COMMITMENTS

WTO Services Database Output

Modes of supply:

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	Notes
<b>Australia</b>				
	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		

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## “Scheduling” Legal Services

- The U.S. scheduled legal services
- Approximately 45 countries “scheduled” legal services (counting the EU as one)
- The manner of scheduling differs
- These countries agreed to comply with:
  - Article 16 (Market Access) and
  - Article 17 (National Treatment)



**EXCEPT AS OTHERWISE NOTED!**

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## GATS Article 16- Market Access Except as otherwise noted...

### **NO:**

- limitations on the number of service suppliers whether in the form of... monopolies
- measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service

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## **GATS Article 17- National Treatment** **Except as otherwise noted...**

1. ...Each Member shall accord to ...service suppliers of any other Member ... treatment no less favourable than that it accords to its own service suppliers.
2. A Member may meet the requirement of paragraph 1 by according ...service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own ...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 .... 9

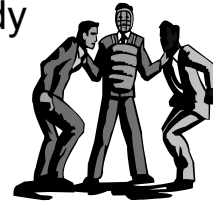
## **GATS Track #1 and Track #2**

- The GATS required two kinds of **future action** (plus its basic and optional obligations)
- **Track #1**: GATS Art. 19 required progressive liberalization negotiations within 5 years
  - These talks are now known as the Doha Round
  - Even if Doha fails, our 1994 promises remain
- **Track #2**: GATS Art. 6:4 required consideration of “any necessary disciplines”
  - Disciplines might be analogized to regulations
  - Could cover qualification, licensing and technical standards [ethics rules] that aren’t scheduled

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## **GATS Enforcement Mechanisms**

- The GATS is enforced through retaliatory trade sanctions by governments, after a decision by the WTO appellate body
- The GATS does not create a private cause of action
- The USTR has said the GATS does not override the states' ability to regulate
- But there have been concerns



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## **What about the other 14 FTAs?**

- Although they are similar to the GATS, there are variations:
  - The Services chapter numbers differ
  - The provision numbers differ
  - There are some substantive differences
  - Some FTAs have unique provisions
- On some issues, most FTAs follow the NAFTA model, rather than the GATS
  - See my Symposium article for details
  - Most have a “Professional Services Annex”
  - These annexes require ongoing work

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## The U.S.-Australia FTA Annex



1. The Parties **shall encourage** the relevant bodies in their respective territories 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.
2. The standards and criteria referred to in paragraph 1 **may be developed** with regard to the following matters: [(a) education; (b) examinations; (c) experience; (d) conduct and ethics; (e) professional development and re-certification; (f) scope of practice; (g) local knowledge; and (h) consumer protection.]
5. The Parties **shall establish a Professional Services Working Group**, comprising representatives of each Party, to facilitate the activities listed in paragraph 1.

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## What is APEC?



- 21 Countries join in a forum for facilitating economic growth, cooperation, trade and investment
- An important forum:
  - 40% of the world's population
  - 54% of world GDP
  - 43% of world trade
- Uses a different structure than international trade agreements:

“APEC operates on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants.”

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## The APEC Legal Services Initiative



- As the Doha Round faltered, energy → APEC
- The LSI was funded in late 2008 for 2009
- 4 stages:
  - Conducting an “Inventory” of existing lawyer rules
  - Capacity building workshop (7-09 in Singapore)
  - Developing “best practices”
  - Preparing a Legal Services Framework to reduce impediments in providing foreign-int'l law
- Australia is a major driver of the APEC LSI

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## The Impact of Trade Agreements on Lawyer Regulation

- In my view, IT'S VERY BIG!

See my paper for this Symposium

Examples include: MJP, discipline cooperation, statistical studies noting regulatory barriers [cf. antitrust and regulatory studies elsewhere]

- See the slides from my “Global Development” talks,  
<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm>



Représentant les avocats d'Europe  
Representing Europe's lawyers



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## Conclusion

- The GATS is here, it's binding (even if Doha fails), and its mandate is relevant to lawyers
- Trade agreements have affected the players, landscape, and language of lawyer regulation
- There is no easy model to follow for trade negotiations in a federal system
- We can't change the global world, so let's figure out how to adapt
- We need more scholars working on this!

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## To Read More About It....

- ABA-GATS Webpage,  
<http://www.abanet.org/cpr/gats/home.html>
- Laurel Terry's Articles:
  - This symposium's article: ***From GATS to APEC***
  - ***The GATS in Limerick***, 15 *Michigan St. J. Int'l L.* 635 (2007)
  - ***The New Paradigm of Lawyers as Service Providers***, 2008 *J. Professional Lawyer* 189
  - GATS articles on her webpage:  
<http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2>



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## What's Waiting for you in my Symposium Article:

**Laurel S. Terry , From GATS to APEC: The Impact of Trade Agreements on Legal Services, Vol. 43, No. 4 Akron L. Rev. \_\_\_\_ (2010)**

- Terry Tables 1a-1d provide the location in 15 trade agreements of common provisions
- The article identifies some similarities and differences among these provisions

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**TERRY TABLE 1a: COMMON PROVISIONS IN EXISTING GLOBAL AND REGIONAL MULTILATERAL U.S. TRADE AGREEMENTS – 1<sup>st</sup> half**

	GATS (Effective 1-1995)	NAFTA (Eff. 1-1994)	CAFTA-DR <sup>1</sup> (Dominican Republic-Central America)
<b>Transparency</b>	Article III: Transparency		Article 11.7: Transparency In Developing and Applying Regulations and Chapter. 18
<b>MFN Provision</b>	Article II: Most Favoured Nation	Article 1103: Most Favored Nation Treatment	Article 11.3 Most-Favored-Nation Treatment
<b>Recognition Section</b>	Article VII: Recognition	--- [But see Article 1210 : Licensing and Certification]	Art. 11.9: Mutual Recognition
<b>Exceptions</b>	Article XIV: General Exceptions	Article 2101: General Exceptions	Chapter 21 (incorporates GATS Art. XIV)
<b>Domestic Regulation</b>	Article VI: Domestic Regulation	--- [But see Article 1210 : Licensing and Certification]	Article 11.8: Domestic Regulation
<b>Positive Or Negative List Approach?</b>	Positive (Article XX: Schedules of Specific Commitments)	Negative (Annex I: Reservations for Existing Measures and Liberalization Commitments)	Negative
<b>National Treatment-Market Access</b>	Article XVI: Market Access and Article XVII: National Treatment	Article 1202: National Treatment and Article 1207: Quantitative Restrictions	Article 11.2: National Treatment; Article 11.4: Market Access

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**TERRY TABLE 1a: COMMON PROVISIONS IN EXISTING GLOBAL AND REGIONAL MULTILATERAL U.S. TRADE AGREEMENTS- 2<sup>nd</sup> half**

	<b>GATS (Effective 1-1995)</b>	<b>NAFTA (Eff. 1-1994)</b>	<b>CAFTA-DR (Dominican Republic-Central America)</b>
<b>“Standstill Provisions”</b>	---	Art. 1206: Reservations; Chapter Twenty-One: Exceptions + ANNEXES	Art. 11.6: Non-Conforming Measures and Annex I and II
<b>Local Presence</b>	---	Art. 1205: Local Presence	Article 11.5: Local Presence
<b>Is There A Prof. Or Legal Services Annex?</b>	---	Annex 1210.5: Professional Services	Annex 11.9 Professional Services
<b>Ongoing Work Or Joint Committee</b>	--- [But see Art. VI:4 and the obligation to consider “any necessary disciplines”]	Chapter 22 and Annex 1210.5 : Professional Services	Art. 11.11: Implementation + Annex 11.9 Professional Services
<b>Investment Chapter</b>	---	Chapter Eleven: Investment	Chapter 10. Investment
<b>Other</b>	---	---	---
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**Selected Presentations**

**SELECTED PRESENTATIONS – BY TOPIC** (Note: the Chronological Listing includes links to related articles)

- Global Developments in general (See 11-08)
- the WTO’s GATS agreement and legal services (including presentations on skills transfer provisions, “classification” and domestic regulation disciplines) (See 3-05 for a GATS overview and 3-05, 4-05, 10-04, and 3-04 for presentations on specialized GATS-legal services issues)
- Foreign lawyer “recognition” issues (See 4-02)
- Legal outsourcing (See 4-05)
- Antitrust initiatives directed towards the legal profession, including the EU’s Professional Services Competition Initiative (See 3-05, 4-05)
- *Alternative Business Structure (ABS)* developments (including the UK’s Legal Services Act 2007, Australia’s publicly traded law firms, and OECD developments) (See 5-05, 10-05, and 5-09)
- Using ABA Model Rule 5.1 More Proactively (with a nod towards Australia’s current practice) (See 8-05; see also 3-02 at slide 15)
- Bologna Process (See 3-06, 1-05)
- EU lawyer regulation (See 1-05; see also 4-05)
- Double deontology & ABA Model Rule 8.5 Choice of Law issues (See 5-05)
- Global and comparative legal ethics (See 11-04, 5-05, 3-09)
- U.S. multijurisdictional practice initiatives (MJP) (See 8-06, 10-05, 3-05; see also 1-07)
- U.S. and German multidisciplinary partnership initiatives (MDPs) (See 7-2000)
- Pennsylvania implementation of Ethics 2000 (See 12-04)

**For additional info:** See the urls at the end of this talk plus my topic-specific talks