

# The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”\*

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## I. Introduction

In the past fifty years, one has heard debates about whether law is a business, a profession, or both, what these terms mean and whether it matters.<sup>1</sup> Regardless of what one thinks about these debates, there is a new paradigm that must be added to the mix, which is the paradigm of lawyers as “service providers.” In the *service providers* 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,” all of whom can be regulated together.<sup>2</sup> In my view, this new paradigm represents a fundamental, seismic shift in the approach towards lawyer regulation.<sup>3</sup> This perspective already has affected some aspects of U.S. (and non-U.S.) lawyer regulation and is likely to have profound implications for the future.

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1. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238-42;1257 (1995); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002) (noting the rise of a cottage industry of bar committees, conferences, commissions, and centers focusing on this “crisis in professionalism”).

2. As notes 22-89 show, the *service providers* paradigm describes the phenomenon in which lawyers are conceptualized and regulated together with other kinds of service providers. The exact configuration of service providers included in any given set of regulations, however, may vary from regulator to regulator.

3. Because of the word limit for this article, I have not offered as many citations or support as I would have preferred. I have come to terms with this by thinking about the recent call for more academics who will engage in crude thinking and cocktail party musings: “We have to learn not only to have specialists but also people whose specialty is to spot the strong interactions and the entanglements of the different dimensions and then take a crude look at the whole. What we once considered

## II. The New Paradigm: Lawyers as “Service Providers”

The new paradigm of lawyers as “service providers” began to emerge in the last quarter of the 20th Century, but hit full stride in the first decade of the 21st Century.<sup>4</sup> Trying to pinpoint the key factors in the evolution of this new paradigm is more art than science and individuals might disagree about the formative events. In my view, however, there are three watershed events that helped create the “lawyers as service providers” mentality that now influences U.S. and non-U.S. lawyer regulation.

The first significant event was the European Union’s 1977 adoption of the Lawyers’ Services Directive.<sup>5</sup> The Lawyers’ Services Directive is exceedingly important within the EU because it grants EU lawyers the right to provide temporary legal services in another EU Member State without the need to obtain host jurisdiction licensure.<sup>6</sup> From my perspective, however, it is a watershed event because of the simple fact that it linked the words “lawyers” and “services” together. EU lawyers are very proud of this Directive and refer to it often, including in the U.S.<sup>7</sup> Hence, this Directive laid important ground work—even in the U.S.—for thinking about lawyers as one of many different kinds of “service providers.”

The second watershed event in the development of the *service providers* paradigm was the 1992 signing of the North American Free Trade Act (NAFTA).<sup>8</sup> Although the NAFTA was not the first U.S. trade agreement to include services, it was the first high profile trade agreement to do so.<sup>9</sup> The NAFTA is significant

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the cocktail party stuff—that’s a crucial part of the real story.” THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 28 (Anchor Ed. 1999, 2000) (quoting Nobel Laureate Murray Gell-Mann).

4. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); Thomas S. Kuhn, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957); Pearce, *supra* note 1, at 1229 (“That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images . . . have lost their meaning.”).

5. Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC), O.J. L. 78/17 (1977) [hereinafter 1977 Services Directive].

6. *Id.* The 1957 Treaty of Rome established the concepts of freedom of movement for goods, services, capital and people; this freedom (and the cases implementing it) were the basis for the 1977 Directive. For links to this and other treaties, see European Union, Treaties and Laws, at [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm) (last visited Feb. 20, 2008, as are all urls in this article). The EU is made up of three separate communities—the EC, the European Coal and Steel Community and the European Atomic Energy Community, but has one set of institutions. *Id.* In this article, the term “EU” will be used in a non-technical sense and include EC directives.

7. Although the 1977 Services Directive, *supra* note 5, implemented European case-law that had found European bar rules inconsistent with the Treaty, European lawyers now cite this Directive with pride. I have heard such comments from numerous European lawyers, including at the ABA’s hearings on multidisciplinary and multijurisdictional practice.

8. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The NAFTA became effective January 1, 1994. *Id.*

9. See Harry G Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT’L LAW. 623, 626, 628 (1993) (NAFTA was preceded by the 1985 U.S.-Israel Free Trade Agreement that covered services and the 1988 U.S.-Canada Free Trade Agreement that created legally binding rights and obligations regarding services).

because it demonstrates the U.S. federal government’s recognition of the important role of services in the U.S. economy and in foreign policy. As one of the individuals who worked in the Office of the U.S. Trade Representative (USTR) at the time has explained, services 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 U.S. had a trade balance advantage (unlike trade in goods.) When the NAFTA was signed, the services sector employed approximately 79% of the U.S. work force and accounted for about 52% of U.S. Gross Domestic Product (GDP), which was more than any other sector.<sup>10</sup> Internationally, services accounted for approximately 19% of global trade. The U.S. was the largest services exporter in the world, and “ha[d] been enjoying a rising surplus in services trade.”<sup>11</sup> Thus, including services within the NAFTA was expected to have positive economic consequences—especially if it led to an 80% increase in services exports, as the 1988 U.S.-Canada Free Trade Agreement reportedly had done.<sup>12</sup>

The NAFTA included both a chapter on services and a “Professional Services” Annex that had three sections, one of which was devoted to legal services.<sup>13</sup> Both the NAFTA and this Annex explicitly used the term “service providers,” stating, for example:

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.<sup>14</sup> (Emphasis added).

Because lawyers are covered by the NAFTA, they were included within this new *service providers* framework. Commentators writing about the NAFTA widely repeated the term “service providers” to talk about those who were covered by the NAFTA, including lawyers.<sup>15</sup> Thus, the NAFTA was an important step in the evolution of the new paradigm of lawyers as “service providers.”

The third and most important watershed event in this paradigm shift was the 1994 General Agreement on Trade in Services (GATS), which was one of

10. *Id.* at 624.

11. *Id.* at 624-625.

12. *Id.* at 625-626.

13. NAFTA, *supra* note 8, 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.

14. NAFTA, *supra* note 8, at para. A(2) of Annex 1210.5., Professional Services, Section A General Provisions. *See also id.* at Art. 1201(d) (“This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party. . .”).

15. *See, e.g.,* Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, n. 190; Broadman, *supra* note 9, at 640.

the agreements signed as part of the creation of the World Trade Organization (WTO).<sup>16</sup> The GATS was a critical event because it expanded to a worldwide stage this new perspective that viewed services—including legal services—as something to be traded in both a literal and political sense.<sup>17</sup> Indeed, one of the first articles written about the GATS and legal services pointed out how, at the last minute, the U.S. agreed not to withdraw their legal services offer in exchange for advantages for U.S. semi-conductors.<sup>18</sup> The GATS is also a watershed event in the development of the *service providers* paradigm because it spawned numerous developments including those discussed in the next section.

Some might argue that the GATS is not a watershed event because few were aware of it and because its impact is small since few countries made promises to liberalize access to their legal service market that went beyond their status quo. 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,”<sup>19</sup> I consider it the third watershed event contributing to the inclusion of legal services in the *service providers* paradigm.<sup>20</sup>

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16. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994), at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) [hereinafter GATS]. The GATS took effect January 1, 1995. For additional information, see International Bar Association, *GATS: A Handbook on Trade in Services* (2002), at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS Handbook]; Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICHIGAN ST. J. INT'L L. 635 (2007).

17. GATS, *supra* note 16, at Art. I(b-c) (coverage definition); accord 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, 994 (2001) as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002).

18. Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 54-57.

19. See, e.g., GATS, *supra* note 16, at Art. I, II, IV, VII, VIII, IX, XIV-XVII, XIX, XXV (referring to “service suppliers”). Despite the absence of the term “service providers” in the GATS, many GATS commentators have used this terminology. See, e.g., Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, throughout including 965, 97 (1995); Flores, *supra* note 15, at n. 174; Terry, *GATS*, *supra* note 17, at 1000, 1005; Louise L. Hill, *Services As Objects of International Trade: Bartering The Legal Profession*, 39 VAND. J. TRANSNAT'L L. 347, 350 (2006). In my view, there isn't a significant difference between saying “service providers” and “service suppliers.”

20. It is beyond the scope of this paper to address the economic and other factors that have contributed to the development of the *services providers* phenomenon, in general. See, e.g., *infra* note 54-56 (citing clients' perspectives.) This paper focuses exclusively on the issue of why the legal profession has been included within the larger phenomenon.

In addition to the watershed events described above, there were a number of other events that either helped advance this *service providers* paradigm for lawyers or that illustrate its increased use. These events include:

- Post-NAFTA and GATS developments, including the need to develop statistical systems to “count” legal services trade and the need to implement GATS Articles VI:4 and XIX;
- U.S. approval of bilateral free trade agreements (FTAs) that apply to legal services;
- Domestic and international anti-money-laundering and terrorism initiatives directed towards service providers, including lawyers;
- Increased interest in professional services by antitrust officials;
- Increased federal efforts to regulate lawyers; and
- Increased state legislative efforts to regulate lawyers.

These developments (along with some related global developments) are briefly discussed below.

### III. Examples of the New Paradigm

After the GATS was signed, there were a number of related developments that helped further the use of the *service providers* paradigm for lawyers. For example, the Organization for Cooperation and Development (OECD)<sup>21</sup> sponsored several “Professional Services” conferences that brought together government representatives and several different kinds of service providers, including lawyers, in order to discuss barriers to trade.<sup>22</sup> Dissatisfaction with these OECD conferences was one reason why the ABA, the Council of Bars and Law Societies of Europe (CCBE), and the Japan Federation of Bar Associations (JFBA) decided to organize the 1998 *Paris Forum on Transnational Practice for the Legal Profession*, which was attended by over 100 lawyers from around the world.<sup>23</sup> As its press release explained, the purpose of the *Paris Forum* was to discuss issues specific to the legal profession with an ultimate goal of developing a consensus that could be conveyed to the WTO.<sup>24</sup> Among other issues, the organizing bars were worried about the effect of including lawyers with other service providers in any WTO

21. The OECD was established in 1961 and consists of thirty countries, including the U.S., the EU, Australia, and other large economy countries. It “provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies.” Organisation for Economic Co-operation and Development (OECD), About the OECD, at [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html).

22. 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).

23. See Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT’L L. 1, 23 (1999).

24. *Id.* at 10-11.

“disciplines,” *i.e.* WTO regulations.<sup>25</sup> A number of bars ultimately prepared papers that expressed concerns or outright hostility toward the idea of being included with other service sectors in any proposed WTO disciplines.<sup>26</sup>

The 2004 WTO Workshop on Domestic Regulation is another post-GATS development that illustrates the inclusion of the legal profession in the *service providers* paradigm.<sup>27</sup> This Workshop brought together representatives from nine different service sectors, including legal services, to address the issue of possible WTO “disciplines” or regulations.<sup>28</sup> Trade officials at this workshop seemed skeptical of arguments that the legal profession should be treated differently than other professions.<sup>29</sup>

Another post-GATS example that illustrates the increased use of the *service providers* paradigm is the ABA’s increased involvement in matters involving trade in legal services, including communications with the USTR. In 2002, the ABA

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25. *Id.* at 10. See *infra* note 28 for an explanation of WTO “Disciplines.”

26. See, e.g., ABA, GATS Track 2, at [http://www.abanet.org/cpr/gats/track\\_two.html](http://www.abanet.org/cpr/gats/track_two.html) (includes links to “disciplines” papers by various bar associations). The IBA, for example, recommended additional language to ensure that the WTO Appellate Body treats legal services in the same manner as it treats health and safety measures, thereby granting the WTO Member State the highest possible discretion in implementing its legitimate objectives. 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 ST. INT’L L. REV. 695, 709, 738 (2004).

27. WTO, Workshop on Domestic Regulation—Programme (March 29-30, 2004), at [http://www.wto.org/english/tratop\\_e/serv\\_e/workshop\\_march04\\_e/workshop\\_programme\\_march04\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_programme_march04_e.htm). (includes presentations by representatives of the legal, nursing, accounting and architectural professions; representatives of electricity suppliers and express delivery companies; and representatives of financial, telecommunications and educational services organizations).

28. GATS Article VI:4 required WTO members to develop “any necessary disciplines” with respect to certain domestic regulation measures. In December 1998, WTO Members adopted “disciplines” for the accountancy sector. See WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998* (17 Dec. 1998) [hereafter “Accountancy Disciplines”], at <http://www.abanet.org/cpr/gats/accounting.doc>. Since 1998, WTO Members have discussed whether to adopt additional disciplines and the contents of any such disciplines. In December 2005, WTO Members agreed that they *would* develop an additional set of disciplines. See WTO, DOHA Work Programme, Ministerial Declaration Adopted on 18 December, 2005, WT/MIN(05)/DEC (Dec. 22, 2005), at Annex C, para. 5 at [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_annex\\_e.htm#annexc](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc). Although Australia has proposed a set of disciplines specifically for legal services, the majority of WTO Members appears to have settled on horizontal disciplines. Compare WTO Council for Trade in Services, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, S/WPDR/W/34 (Sept. 5, 2005), at [http://www.abanet.org/cpr/gats/aus\\_disp.pdf](http://www.abanet.org/cpr/gats/aus_disp.pdf) with Working Party on Domestic Regulation, REVISED DRAFT, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, Informal Note by the Chairman, 474.08 (Jan. 23, 2008), at <http://www.tradeobservatory.org/library.cfm?refID=101417> (the latest draft available at the time this article was written). See also ABA GATS Track 2, *supra* note 26.

29. This statement is based on my memory of conversations that took place during this WTO Workshop. A common response was that every group thinks that it is unique and that nothing will get done in the WTO if a separate approach is required for each group.

created the Task Force on GATS Legal Services Negotiations in order to better respond to the increasingly frequent consultations the ABA received from the USTR.<sup>30</sup> Several of the USTR officials responsible for the legal services negotiations are not lawyers and were not initially familiar with the details of lawyer regulation; indeed, for the officials at the USTR, legal services are just one of several service sectors for which they are responsible.

A final set of examples are the efforts to develop systems to classify and count services trade, including legal services. Although most lawyers are oblivious of these initiatives and unsure how to respond even if consulted,<sup>31</sup> governments and non-governmental organizations (NGOs) are investing a tremendous amount of energy in these efforts, which contribute to a *service providers* perspective for legal services.<sup>32</sup> Because a picture is worth a thousand words, it is instructive to look at the WTO “sectoral classification list,” which included legal services as a subset of professional services (along with bookkeepers, midwives, landscape architects and veterinarians, among others), which in turn was one of six types of business services, which were one of twelve service sectors:<sup>33</sup>

#### SERVICES SECTORAL CLASSIFICATION LIST SECTORS AND SUB-SECTORS

##### 1. BUSINESS SERVICES

###### A. Professional Services

- a. Legal Services
- b. Accounting, auditing and bookkeeping services
- c. Taxation Services
- d. Architectural services
- e. Engineering services
- f. Integrated engineering services
- g. Urban planning and landscape architectural services
- h. Medical and dental services

30. The ABA Board of Governors Executive Committee established the Task Force in March 2003; the Board increased it to eight members in August 2003. See *Summary of Action, American Bar Association Board of Governors* 6 (Aug. 2003), at [http://www.abanet.org/leadership/2003/summary\\_action03.pdf](http://www.abanet.org/leadership/2003/summary_action03.pdf).

31. In 2004, the ABA was asked by the U.S. Bureau of Labor Statistics to comment on proposed definitions for legal services for the North American Product Classification System (NAPCS). The ABA had few comments and the BLS was largely left on its own. See Emails from Kristi Gaines, ABA Staff, to author (Oct. 7 and 13, 2004) (on file with author).

32. See, e.g., ABA, GATS Track 1: Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations, at [http://www.abanet.org/cpr/gats/track\\_one\\_class.html](http://www.abanet.org/cpr/gats/track_one_class.html); United Nations Statistics Division, International Trade in Services, at <http://unstats.un.org/unsd/tradeserv/default.htm>.

33. WTO, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (July 10, 1991), at [http://www.wto.org/english/tratop\\_e/serv\\_e/mtn\\_gns\\_w\\_120\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc).

- i. Veterinary services
- j. Services provided by midwives, nurses, physiotherapists and para-medical personnel
- k. Other
- B. Computer and Related Services (items a-e omitted)
- C. Research and Development Services (items a-c omitted)
- D. Real Estate Services (items a-b omitted)
- E. Rental/Leasing Services without Operators (items a-e omitted)
- F. Other Business Services (items a-t omitted)

[The remaining five and a half pages of the WTO document included sectors listed under these headings:

- 2. COMMUNICATION SERVICES
- 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES
- 4. DISTRIBUTION SERVICES
- 5. EDUCATIONAL SERVICES
- 6. ENVIRONMENTAL SERVICES
- 7. FINANCIAL SERVICES
- 8. HEALTH RELATED AND SOCIAL SERVICES
- 9. TOURISM AND TRAVEL RELATED SERVICES
- 10. RECREATIONAL, CULTURAL AND SPORTING SERVICES
- 11. TRANSPORT SERVICES
- 12. OTHER SERVICES NOT INCLUDED ELSEWHERE

Lest one think that these classification systems are unimportant, the U.S.'s alleged failure to properly list U.S. state gambling prohibitions in its GATS Schedule resulted in a U.S. loss in the WTO dispute resolution system after a complaint was brought against it by Antigua. Thereafter, several countries sought compensation from the U.S., the EU threatened to seek legal services concessions as compensation and the WTO granted Antigua the right to retaliate against US intellectual property, including patents and copyrights.<sup>34</sup> Moreover, if one believes that "what gets measured, matters,"<sup>35</sup> then these new efforts by governments to classify and count legal services not only reflect the new *service providers* paradigm but have the potential for far-reaching effects for both lawyer regulation and lawyer behavior.

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34. See *Antigua Awarded Modest Cross-Retaliation Rights In Gambling Dispute With US*, Vol. 12, #1 BRIDGES WEEKLY (Jan. 16, 2008), John Miller, *EU Service Firms Could Gain U.S. Access*, WALL ST. J. (Aug. 23, 2007) at A2 (suggesting the EU might seek compensation in the legal services sector); WTO DISPUTE DS285, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm); Nancy J. King and Kishani Kalupahana, *Choosing Between Liberalization and Regulatory Autonomy Under GATS: Implications of U.S.-Gambling For Trade in Cross Border E-Services*, 40 VAND. J. TRANSNAT'L L. 1189 (2007).

35. See, e.g., DAVID OSBOURNE AND TED GAEBLER, *REINVENTING GOVERNMENT* (1992).































