# TRENDS IN CROSS-BORDER LAWYERING: THE GATS IDEAL OR THE INDIAN REALITY FOR U.S. LAWYERS?

EDNA UDOBONG*

ABSTRACT

*This article analyzes the impact of the challenges posed by recent developments in cross-border legal services. It examines the General Agreement on Trade in Services (GATS), its provisions on trade in legal services, and its implications for cross-border lawyering for U.S. lawyers. Recognizing the growing global context of the practice of law, the question is what responsibilities belong to those who regulate lawyers and the practice of law to provide individuals and businesses with access to justice? Although progress has been made to liberalize global trade in the provision of cross-border legal services, lawyers still face a non-uniform patchwork of rules regulating their practices both domestically and abroad. U.S. lawyers are familiar with the patchwork approach because the practice of law in the U.S. is regulated by the highest court of each state and the District of Columbia, wherein independent regulators in each state maintain their own eligibility, residency, and jurisdictional requirements. The state regulatory bodies are strung together by Model Rules, whose adoption is not the same from one state to the next. The article discusses the two most recent Indian High Court decisions that demonstrate the barriers U.S. lawyers face notwithstanding the goals*

* Assistant Professor of Law at Liberty University School of Law, 2008-2009; Chair, Africa and Eurasia Division, American Bar Association Section of International Law; and 2010-2012 member ABA Rule of Law Initiative. The author acknowledges and appreciates Mr. Jeremy S. Roe, outstanding law graduate from Liberty University, for his excellent assistance with research that has contributed to this article. This article is inspired by recent developments in trade in legal services that led to several Indian court decisions and subsequent dialogue by leaders and professionals at the American Bar Association and Indian Bar Council on future relations between the professions.

*of the GATS. It provides an analysis of the consequences of the decisions and the impact of economic protectionism in cross-border lawyering. It discusses ongoing dialogue between the U.S. and Indian governments to remove barriers to trade in legal services. Finally, the article makes recommendations on how bilateral negotiations and reciprocity could foster mutual understanding on trade in legal services between the U.S. and India.*

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## I. INTRODUCTION

Nearly everyone has heard of Doctors Without Borders, while few of us have given much thought to lawyers and borders. The fact of the matter is that global organizations, such as *Médecins sans Frontières* (Doctors without Borders), might find their work much more difficult were it not for lawyers practicing across borders. Law, like medicine, is a service and is the subject of the global trade in services. "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."[1]

When a lawyer licensed in nation A seeks to practice in nation B in matters of international law, or the domestic law of nation B within nation B's borders, the complexity of the issue is thrown into sharp relief. Some nations have erected high barriers around their legal market, often prohibiting foreign lawyers from practicing law of any kind within their borders.[2] Others have eased restrictions or entered into bilateral agreements meant to ensure reciprocity between lawyers from nation A and nation B.[3] Likely, all such nations are members of

1. Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 983 (2010).

2. U.S. INT'L TRADE COMM'N, RECENT TRENDS IN U.S. SERVICES TRADE: 2011 ANNUAL REPORT 7-20 (2011), *available at* http://www.usitc.gov/publications/332/pub4243.pdf. For example, Brazil prohibits foreign lawyers from practicing local law and allows only Brazilian lawyers to own local law firms. *Id.* In June 2005, Brazil revised its WTO offer, which did not include trade in legal services. *See* Special Session of the Council for Trade in Services, *Brazil Revised Offer* TN/S/O/BRA/Rev.1 (June 22, 2005), *available at* http://www.esf.be/new/wp-content/uploads/2011/03/Brazil-Revised-Offer.pdf. China, also a member of the WTO, restricts the type of law foreign lawyers can practice, and their ability to hire Chinese nationals as lawyers. U.S. INT'L TRADE COMM'N, *supra*.

3. For example, both Korea and Singapore have eased the restrictions under which foreign lawyers may practice law within their respective jurisdictions. U.S.

the first multilateral treaty governing the cross-border practice of law. Despite inconsistency in the municipal regulatory schemes in place today, and the trade-restrictive practices of certain nations, international advocacy and lobbying efforts are beginning to bear fruit in opening up new markets for trade in legal services. Furthermore, the globalization of trade in legal services is the subject of ongoing negotiations among the 153 members of the World Trade Organization (WTO) and the General Agreement on Trade and Services (GATS).[4]

Global trade in legal services is big business for lawyers who also want to serve clients outside of their home country. The global economy is creating opportunities for U.S. lawyers to serve businesses and clients whose activities take them to other nations. Global trade in legal services is a significant part of the U.S. economy, and one that is holding its own despite the downturn in global credit markets. According to the Director of the American Bar Association's (ABA) Government Affairs Office, recent statistics published by the United States International Trade Commission (USITC) "suggest that the United States exports annually legal services valued at more than $7 billion and enjoys a trade surplus of more than $3 billion."[5] Taken together, cross-border exports of U.S. legal services declined just one percent to $7.3 billion in 2009, while the average annual growth rate of legal services exports was 14.8% from 2005 to 2008.[6] Growth

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INT'L TRADE COMM'N, *supra* note 2, at 7-20, 7-21.

4. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS]. The GATS entered into force on January 1, 1995, the same date as the World Trade Organization's creation. INFO. & EXTERNAL RELATIONS DIV., WORLD TRADE ORG., UNDERSTANDING THE WTO 10 (2011) [hereinafter UNDERSTANDING THE WTO], *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf; *The General Agreement on Trade in Services (GATS): Objectives, Coverage, and Disciplines*, WTO.ORG, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited July 30, 2012) [hereinafter *GATS: Objectives, Coverage, and Disciplines*].

5. Letter from Thomas M. Susman, Director, Am. Bar Ass'n, to Donald W. Eiss, Office of the U.S. Trade Representative (Jan. 13, 2012) [hereinafter Letter from Thomas M. Susman] (citing U.S. INT'L TRADE COMM'N, *supra* note 2, at 7-13), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/12jan13_transpacific_1.authcheckdam.pdf.

6. U.S. INT'L TRADE COMM'N, *supra* note 2, at 7-13. Box 7.2 of the Report

markets included India and Brazil (where exports grew by 52.3% and 33.8%, respectively, between 2005 and 2008).[7]

This trend has not been free from its challenges. While some nations that promote free trade in services foresee great promises for the health of the global economy, others find the expanding trend a threat to local and domestic services.[8] Such countries may respond by creating barriers in the form of regulations that favor local services and stifle development.[9] The following joint statement by the U.S., European, and Japanese Service Industries reflects the challenges that both developed and developing countries face in addressing barriers to global trade in goods and services:

> If barriers to trade in goods and services were completely eliminated, world economic welfare would increase an additional $1.9 trillion, benefiting developed and developing countries alike. A broader WTO Round should be able to reduce barriers to trade in goods and services by one-third, which would still add approximately $613 billion to the world economy.[10]

Due to the burgeoning legal services market, the United States and other nations have begun to reevaluate their rules governing admission of foreign lawyers, given the variations on legal education across the globe. For example, in 2009, the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree recommended a uniform national requirement for bar admission for both foreign and domestic lawyers.[11] An impetus for

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compares growth in legal services based on services provide by affiliate firms abroad, and services provided by legal professionals that travel to provide services to clients overseas. *Id.* at 7-14.

7. *Id.* at 7-15, 7-17.

8. *See, e.g.*, Baldev Raj Nayar, *India's Globalization: Evaluation of Economic Consequences*, 22 POL'Y STUD. 1-2 (2006) (examining the arguments made in support and against globalization of the economy).

9. *See, e.g.*, *id.* ("While India has doubtless made considerable accommodation to globalization . . . powerful political and intellectual forces nonetheless actively oppose and resist globalization . . . .").

10. *Trade Resources: Quotes on Services*, WTO, http://www.wto.org/trade_resources/quotes/services/otherserv.htm (last visited Aug. 31, 2012) (quoting Press Release, European Servs. Forum, Joint Statement by the U.S., European, and Japanese Services Industries (May 10, 2001)).

11. FED'N OF LAW SOC'YS OF CAN., TASK FORCE ON THE CANADIAN COMMON

the study and recommendation was the noted increase in the number of U.S. lawyers seeking admission to Canadian practice, which led to the need to articulate what the law societies there view as "the essential features of a lawyer's academic preparation."[12] English and Australian bar regulators made similar moves in 2009.[13] Recent developments in India and other countries reveal the extent of the challenge that the legal profession faces when providing legal services and access to justice across borders.

This article discusses the barriers U.S. lawyers face, using India as an example, to trade in legal services and the impact of economic protectionism in cross-border lawyering as a modern strategy for economic development. Section II provides an introduction and general understanding to globalization and liberalization of trade in legal services. In particular, section II discusses why the globalization and liberalization of trade in legal services are important to world economic growth, access to justice, and protection for would-be clients of cross-border lawyers. Section III examines the regulatory framework of trade in legal services in India. It highlights the Indian reality using recent judicial decisions in the High Courts of India. These decisions illustrate the challenges U.S. lawyers face in cross-border lawyering. Section IV provides an overview of the General Agreement on Tariffs and Trade (GATT), the WTO and the enforcement of the GATS. This section discusses the backgrounds to these initiatives, and their respective approaches to addressing barriers to trade in legal services. Section V discusses India's position on the advantages and disadvantages of competition and its moral values,

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LAW DEGREE: FINAL REPORT 4 (2009), *available at* http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf. The responsibility of the Canadian Task Force was to report on the criteria for approving common law degrees for the purpose of entry into bar admission programs in Canada. *Id.* Prior to 2009, there had never been a national standard set by the Law Societies of Canada for the admission of lawyers to Canadian practice. *Id.* at 3. "The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and revised in 1969." *Id.*; *see also* Laurel S. Terry, Carole Silver & Ellyn S. Rosen, *Transnational Legal Practice: 2009*, 44 INT'L LAW. 563, 568-69 (2010) (discussing the Canadian Task Force's recommendations, as well as other countries' legal profession reform initiatives).

12. Terry et al., *supra* note 11, at 568 (quoting FED'N OF LAW SOC'YS OF CAN., *supra* note 11, at 3).

13. *Id.* at 568-69.

along with a look at the impact of protectionism on individuals and clients that need access to justice and protection. Section VI analyzes the GATS and its implications for the professional bodies, such as the ABA and the International Bar Association (IBA). Section VII discusses efforts by the ABA and other legal professional bodies to eliminate barriers to trade in cross-border lawyering. Finally, sections VIII and IX review India's protectionism and provide recommendations on the importance of bilateral negotiations and reciprocity to ensure that those most in need of legal help can get it, notwithstanding appropriate domestic regulations on the practice of law or restrictions on trade in legal services.

## II. UNDERSTANDING GLOBALIZATION OF TRADE IN LEGAL SERVICES

The end of the Cold War was followed by tumultuous events that marked that decade.[14] Scholars viewed the events as tumultuous because they dislodged the foundation on which international relations was constructed in the postwar era.[15] Faced with an "intellectual vacuum," scholars made efforts to organize around concepts that would fit new developments in the postwar period.[16] According to Simon Reich, several concepts were considered appropriate for the new era, including democratization, deregulation of markets, privatization, globalization and more.[17] The term globalization was considered more appropriate, though its substance remained to be defined and applied in a broader framework.[18] The breadth of the concept has made its meaning elusive in its application to any given field.[19] Indeed, wherever the term is used, other terms have also been applied to describe the same event. For example, globalization and internationalization have been used synonymously to describe

14. Simon Reich, *What is Globalization? Four Possible Answers* (Kellogg Inst. for Int'l Studies, Working Paper No. 261, 1998), *available at* http://kellogg.nd.edu/publications/workingpapers/WPS/261.pdf.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.*

activities taking place across borders in trade and services.[20] One general definition is that globalization is:

> [t]he worldwide movement toward economic, financial, trade, and communications integration. Globalization implies the opening of local and nationalistic perspectives to a broader outlook of an interconnected and interdependent world with free transfer of capital, goods, and services across national frontiers. However, it does not include unhindered movement of labor and, as suggested by some economists, may hurt smaller or fragile economies if applied indiscriminately.[21]

In some cases, globalization has been a disruptive force. The globalization of markets and legal services has also been described as the "flattening"[22] of the world of the legal profession where rules and regulations transcend and apply globally.[23]

Globalization and liberalization can be considered terms that have developed in the twentieth century as part of concepts used to describe approaches in international trade.[24] Trade liberalization is defined as "[t]he removal of or reduction in the trade practices that thwart free

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20. See Symposium, *The Effect of Globalization on Domestic Legal Services*, 24 FORDHAM INT'L L.J. S277, S277-78 (2000), where the terminologies were used by scholars to either denote different or similar meanings.

21. *Globalization Definition*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/globalization.html (last visited July 4, 2012).

22. *See generally* Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-related Services*, 38 GEO. J. INT'L L. 401 (2007) (discussing implications of the trend in outsourcing legal services). The terminology for globalization was coined by Thomas Friedman, where he described the world as flat. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (1st ed. 2005). *See also The Opinion Pages: Thomas L. Friedman,* N.Y. TIMES, http://topics.nytimes.com/top/opinion/editorialsandoped/oped/columnists/thomaslfriedman/index.html (last visited Sept. 1, 2012).

23. *See generally* 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) (discussing Friedman's flattening world in the context of the legal profession's changing scope).

24. *See, e.g.*, *Globalization and Liberalization*, BUS. MAPS OF INDIA, http://business.mapsofindia.com/globalization/liberalization.html (last visited July 4, 2012) (examining globalization and liberalization in relation to India's economy).

flow of goods and services from one nation to another. It includes dismantling of tariffs (such as duties, surcharges, and export subsidies) as well as nontariff barriers (such as licensing regulations, quotas, and arbitrary standards)."[25] These two terms and concepts are interconnected.[26] Globalization "began with the liberalization of exchange and capital controls and lowering of trade . . . barriers in the 1980s."[27] It connotes the integration of human interactions and interconnectivity between economies, professions, and cultures for the interchange of ideas, products, and services for economic or human development.[28] Economic globalization represents the integration of the world economy, and it has remained the subject of much praise and criticism.[29]

Applied to legal services, globalization of legal services enables lawyers to travel beyond their domestic jurisdiction to another continent or country to provide legal services.[30] The services provided are in different forms, and the effects have been found to be generally positive for both lawyers and clients.[31] Globalization generally affects the economy of any nation that allows it, as well as the society and its culture.[32] As a result of globalization, U.S. lawyers and law firms are able to establish legal practice in various countries where they would normally not be able to practice.[33] The

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25. *Trade Liberalization Definition*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/trade-liberalization.html (last visited July 4, 2012).

26. Nayar, *supra* note 8, at vii; *see also Globalization and Liberalization*, *supra* note 24.

27. Michael S. Barr & Reuven S. Avih-Yonah, *Globalization, Law & Development: Introduction and Overview*, 26 MICH. J. INT'L L. 1, 1 (2004).

28. *See Globalization*, WIKIPEDIA, http://en.wikipedia.org/wiki/Globalization (last visited July 19, 2012).

29. Nayar, *supra* note 8, at 1.

30. *See* Terry, *supra* note 23, at 528-31.

31. *See generally* Alistair King, *Legal Globalization: Investigating the Effects of an "Inexorable Phenomenon,"* THE BARRISTER, Oct.-Dec. 2008, at 24, 24-25, *available at* http://www.justis.com/news/news-legal-globalization.pdf.

32. *See* Nayar, *supra* note 8, at 1.

33. *See* Anna Stolley Persky, *The New World: Despite Globalization of the Economy, Lawyers Are Finding New Barriers to Practice on Foreign Soil*, A.B.A. J., Nov. 2011, at 34, 36. The article discusses regulatory changes in countries, such as Canada, the United Kingdom, and Australia, that allow lawyers from the United

internationalization of legal services was initially within the comfort of the big law firms. However, with the expansion of the global market for legal services from Europe to Asia and other regions, countries that experienced a surge of U.S. law firms began to consider the influx a threat to their profession and domestic jurisdictions.[34] While U.S. lawyers see globalization as a means to expand their expertise to other places, developing economies are building walls of protection against such intrusion.[35] Supporters of globalization believe that allowing market forces to operate with no state oversight will result in higher economic growth and better human welfare, but critics of globalization believe the opposite.[36]

The critics of globalization are of the view that globalization, rather than creating higher economic growth, leads to economic stagnation.[37] They also posit that rather than encouraging economic advancement and industrialization, globalization results in deindustrialization, impoverishment, and inequality.[38] The case of India, as we find in recent high-profile decisions, supports the views of critics.[39] Though India remains one of the largest economic markets for trade in services,[40] some internal forces have openly opposed any form of globalization.[41] The question, therefore, is why

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States and other jurisdiction to practice within their boundaries, while others, such as Singapore, South Korea, Switzerland, and Mongolia, are actively seeking ways to open their legal system to foreign lawyers. *Id.*

34. *Id.*

35. *Id.*

36. Nayar, *supra* note 8, at 1-2.

37. *Id.* at 2 (citing the works of Falk 1999, Chomsky 2002, Singh 2005, among others).

38. *Id.*

39. See Balaji v. Gov't of India, Writ Petition No. 5614 of 2010 (Madras H.C. Dec. 21, 2012) and Lawyers Collective v. Bar Council of India, Writ Petition No. 1526 of 1995 (Bombay H.C. Dec. 16, 2009), for examples of two Indian High Court cases that reveal India's position on liberalization of trade in legal services. See *infra* Section III, for detailed discussion of the cases.

40. *See* Tyler Cowen, *Never Mind Europe. Worry About India*, N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/business/economic-view-forget-europe-worry-about-india.html?_r=0&pagewanted=print (discussing the reasons for the slow rate of economic growth in India as including India's attitude toward foreign business and investment).

41. Nayar, *supra* note 8, at 2-3.

is there such protection? Does liberalization of trade in services actually help or hurt nations that favor trade in legal services? Or are the advantages simply outweighed by the negative effects often cited by globalization's critics? The following overview of India's liberalization laws and recent High Court decisions might be helpful in understanding the reasons for its policies on trade in services.

## III. LIBERALIZATION OF TRADE IN LEGAL SERVICES: THE CASE OF INDIA

### *A. Introduction*

Since India's independence in 1947, the country has undergone several phases of economic development, adopting mixed economic approaches in product, manufacturing, and services delivery that affect its economy.[42] At independence, it was one of the two most industrialized nations in Asia.[43] With an area of 3.3 million square kilometers and a population of over one billion (as per a 2001 census), India is considered the second largest country in Asia, the seventh largest in the world, and the second most populous country in the world, next to China.[44]

India's economy is diverse but developed around the manufacturing industry.[45] Soon after independence, India followed a framework of development planning that focused on local capability in the manufacturing industry that was implemented by the public

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42. Pawan Budhwar, *Doing Business in India*, 43 THUNDERBIRD INT'L BUS. REV. 549, 549, 554 (2001). *See generally* Atul Kohli, *Politics of Economic Liberalization of India*, 17 WORLD DEV. 305 (1989) (discussing the stages of liberalization by different governments in India with a major structural reform in the 1990s).

43. Budhwar, *supra* note 42.

44. *Id.* at 550.

45. *See* Nagesh Kumar, *Liberalisation and Changing Patterns of Foreign Direct Investments: Has India's Relative Attractiveness as a Host of FDI Improved?*, 33 ECON. & POL. WKLY., 1321, 1321, 1323 (1998) ("The government policy pursued until 1990 generally restricted F[oreign] D[irect] I[nvestment] to technology-intensive branches of the manufacturing industry."). *See generally* Arvind Panagariya, *India in the 1980s and 1990s: A Triumph of Reforms* (IMF Working Paper, WP/04/43, 2004) (discussing trends in India's trade reform and liberalization in the public and private sectors).

sector.[46] India's government accorded the domestic industry high protection through high tariffs and restrictions on imports.[47] The government established a Planning Commission in 1950 to formulate national plans that would expand the country's economy.[48] This was followed by a mixed economy that emphasized both public and private sector growth.[49] The approach resulted in reduced entrepreneurship and global competition.[50] Restrictions on Foreign Direct Investment (FDI) created the foreign exchange crisis of 1957-1958 that "led to further liberalization in the government's attitude towards FDI."[51] In order to attract foreign investment to finance local industrial projects, the government subsequently created incentives and concessions for foreign investors to accord financial support to local markets.[52] This was a form of protection and encouragement for the manufacturing industry to seek FDI.[53] However, this relatively new industry was unable to compete with products from more industrialized foreign sources.[54] In response, the government placed restrictions on "foreign direct investments unaccompanied by technology transfer and those seeking more than . . . [forty] . . . percent foreign ownership."[55] Thus, government approval of foreign collaboration with local investors was limited.[56]

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46. Kumar, *supra* note 45, at 1321.

47. *Id.*

48. Budhwar, *supra* note 42, at 554.

49. *Id.*

50. *Id.*

51. Kumar, *supra* note 45; *see also* Suma Athreye & Sandeep Kapur, *Private Foreign Investment in India: Pain or Panacea*, 24 WORLD ECON. 399, 402 (2001) (discussing trends in FDI in India and government restrictions on foreign direct investment).

52. Kumar, *supra* note 45, at 1321.

53. *Id.*

54. *Id.* at 1322.

55. *Id.*

56. *Id.*

### *B. The Foreign Exchange Regulation Act, 1973*

In 1973, a new Foreign Exchange Regulation Act (FERA)[57] came into force requiring all foreign companies operating in India with up to forty percent foreign equity to register under Indian corporate legislation.[58] The FERA of 1973 was the Indian government's way of controlling foreign exchange in any remote way to protect the local market.[59] FERA, however, provided for local licensing of foreign investments and approvals for opening liaison offices by foreign companies in India; this form of liberalization enabled foreign companies to directly register in India before choosing a local partner.[60] Despite the planning formalities and the liberalization that took place from 1950 through the 1970s, the restrictive attitude to protect India's domestic base remained.[61] This is illustrated by the fact that only selected industries—such as the technology sector and those industries producing predominantly for exports—were considered high priority sectors that benefitted from liberalization.[62]

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57. The Preamble of the Foreign Exchange Regulation Act (FERA) describes the Act as:

> [a]n Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country.

The Foreign Exchange Regulation Act, No. 46 of 1973, pmbl., INDIA CODE (1993), *available at* http://www.rbi.org.in/scripts/ECMUserView.aspx?Id=21&CatID=12. The 1973 Act replaces the Foreign Exchange Regulation Act of 1947 to effectively address the following three aspects of foreign investment in India: "(i) regulation of foreign capital in India, (ii) regulation of employment of foreigners in India and, (iii) making enforcement of provisions regarding foreign exchange leakages more rigorous." Sudip Chaudhuri, *FERA: Appearance and Reality*, 14 ECON. & POL. WKLY., 734, 734 (1979).

58. Kumar, *supra* note 45.

59. Prabina Rajib, *Module 5: Introduction to Indian Foreign Exchange Market*, NAT'L PROGRAMME ON TECH. ENHANCED LEARNING, http://nptel.iitm.ac.in/courses/110105031/pr_pdf/Module5-5.pdf (last visited July 24, 2012) (India).

60. Kumar, *supra* note 45, at 1323.

61. *See id.* at 1322.

62. *See id.* at 1325.

India witnessed near full-scale liberalization in 1991, when the government, with the support of the International Monetary Fund (IMF) and the World Bank,[63] "intensified the process of integration of India with the global economy."[64] The process involved the removal of major barriers to FDI and allowed foreign companies to raise foreign equity levels to fifty-one percent for proposed expansion of high priority industries.[65] India became a signatory to the Convention of the Multilateral Investment Guarantee Agency (MIGA)[66] for the protection of foreign investments.[67] The government policy pursued until 1990 was restricted to FDI in technology-intensive industries.[68] Since 1991, FDI stock in India has increased beyond the public-controlled high priority areas.[69] For example, FDI stock in Services increased from 4.1% in 1980, to 31.31% between 1991 and 1997.[70] Similarly, FDI in Consultancy, which was not available in 1980, had a stock of 0.69% from 1991 to 1997 after the full-scale liberalization

63. The World Bank and International Monetary Fund (IMF) are specialized agencies of the United Nations system; their functions complement one another. *The IMF and the World Bank Factsheet*, IMF, http://www.imf.org/external/np/exr/facts/imfwb.htm (Mar. 14, 2013). The common goal is to raise the living standards of member countries. *Id.* The World Bank promotes long-term economic development and the IMF concentrates on international monetary cooperation by providing policy advice and technical assistance to member countries. *Id.* For more information about the twin institutions, see *id.*

64. Kumar, *supra* note 45, at 1323.

65. Budhwar, *supra* note 42, at 557.

66. MIGA, a member of the World Bank Group, describes that its mission is to "promote foreign direct investment (FDI) into developing countries to help support economic growth, reduce poverty, and improve people's lives." *Overview*, MULTILATERAL INV. GUARANTEE AGENCY, http://www.miga.org/whoweare/index.cfm (last visited Feb. 9, 2013). India became a member of MIGA on January 6, 1994. *MIGA Members*, WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:20122866~menuPK:64020025~pagePK:64020054~piPK:64020408~theSitePK:278036~isCURL:Y,00.html (last visited Apr. 6, 2013).

67. Kumar, *supra* note 45, at 1323.

68. *Id.* at 1324.

69. *See id.* at 1322, tbl. 1(Sectoral Distribution of the Stock of FDI in India, 1980 to 1997).

70. *Id.*

that the government introduced.[71] From 1991 to 1997, the sources of the FDI flow were from developed countries, including the United States, United Kingdom, Germany, and France.[72] The United States emerged as the most important source with a share of 27% during that period.[73] Obviously, the liberalization of trade policy in 1991 created advantages for India and foreign investors.

While these 1991 reforms did not specifically affect trade in services, recent trends reveal that U.S. lawyers have been providing legal services in India despite a host of regulatory and judicial decisions that prevent them from doing so.[74] In fact, exports of U.S. legal services to India grew 52.3% from 2005 to 2008.[75] Just as a global economic downturn gripped the world economy, all eyes turned to India. The world's largest democracy maintained its rapid growth even as the world faced economic crisis.[76] Between 2004 and 2009, India's economy grew at its fastest pace since the nation gained independence in 1947.[77] Within that period, India's services sector has been a dominant driver of economic growth during the global market downturn, accounting for 56% of GDP and expanding by an average of 10% during the 2006 to 2007, and 2009 to 2010 periods.[78]

As one author noted, today, "everyone seems to be in India."[79] By 2011, most Fortune 500 companies had a presence in India.[80] The pace of GDP growth in India makes the economy attractive for

71. *Id.*

72. *See id.* at 1325, tbl. 4 (Relative Importance of Major Source Countries in Inward FDI in India, 1980-1997).

73. *Id.* at 1325 tbl. 4, 1326.

74. *See, e.g.*, U.S. INT'L TRADE COMM'N, *supra* note 2, at 7-15.

75. *Id.*

76. DELOITTE, ALL EYES ON INDIA 2 (2009), *available at* http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/All%20Eyes%20on%20India.pdf.

77. Douglas Wong, *India's 'Not for Sale' Legal Market Draws U.S., U.K. Law Firms*, BLOOMBERG (June 15, 2009, 2:30 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHz8zYy8.Vdg.

78. Trade Policy Review Body, *Report by the Secretariat, Trade Policy Review—India*, 125, WT/TPR/S/249 (Aug. 10, 2011), *available at* http://www.hse.ru/data/2011/11/10/1272142468/India%20-%20s249_e.pdf.

79. Christine Garg, *Affiliations: Foreign Law Firms' Path into India*, 56 N.Y. L. SCH. REV. 1165, 1166 (2011/2012).

80. *Id.*

businesses, especially multinational corporations. India has become the hot hub for trade in legal services.[81]

Like other global businesses, lawyers from other parts of the world have found it impossible to ignore India.[82] But is India ready to open up its legal services to foreign lawyers?[83] India's lawyer-regulation laws and two significant Indian High Court rulings effectively bar foreign lawyers and law firms from practicing law in India. These legislative and judicial expressions of India's protectionist policy toward global trade, discussed in the next section, stand in sharp relief to the services trade liberalization objectives of GATS and the WTO,[84] of which India is a member.[85]

### *C. The Advocates Act 1961,[86] The Lawyers Collective and the Balaji Judgments*

India's legal framework in legal services is within the sole domain of the Advocates Act of 1961 ("the Act"). In 1961, India's Parliament enacted the Act to govern legal practice in India.[87] The Act, *inter alia*, established the Bar Council of India to regulate the profession and to protect the public by ensuring that professionals render legal services

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81. *See* Bindu Samuel Ronald, *Liberalizing Legal Services in India Under General Agreement on Trade in Services* (Symbiosis L. Sch., Working Paper, 2012) (India), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009675.

82. *See id.*

83. *See* Marianne Purzycki, *Is India's Legal Sector Ready to Open Up?*, HILDEBRANDT INST. (Oct. 14, 2011), http://hildebrandtblog.com/2011/10/14/is-india%E2%80%99s-legal-sector-ready-to-open-up/ (highlighting discussions between the U.K. and Indian governments regarding the possibility of opening up the legal sector to foreign attorneys).

84. *See infra* Part IV (providing an overview of the legal framework of the GATS and WTO).

85. *Member Information: India and WTO*, WTO.ORG, http://www.wto.org/english/thewto_e/countries_e/india_e.htm (last visited Feb. 14, 2013).

86. The Advocates Act is described as an "[a]ct to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and all India Bar." The Advocates Act, No. 25 of 1961, pmbl., INDIA CODE (1961), *available at* http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf.

87. *Id.* § 1.

consistent with the "high and noble traditions of the profession."[88] Section 29 of the Act provides that only "advocates" may practice law in India.[89] "Advocates," in turn, is a term of art specifying only Indian citizens, over the age of 21, who received a law degree from an Indian university (or a university not in India but nonetheless recognized by the Bar Council of India).[90]

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88. *Id.* §§ 3-4. Section 3 of the Act establishes a Bar Council for each State. *Id.* § 3. Section 4 establishes a Bar Council of India. *Id.* § 4 ("There shall be a Bar Council for the territories to which this Act extends to be known as the Bar Council of India . . . ."). Under section 7, the functions of the Bar Council of India shall be:

> (b) to lay down standards of professional conduct and etiquette for advocates;
> (c) to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council;
> (d) to safeguard the rights, privileges and interests of advocates;
> (e) to promote and support law reform;
> (f) to deal with and dispose of any matter arising under this Act, which may be referred to it by a State Bar Council;
> (g) to exercise general supervision and control over State Bar Councils;
> (h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils;
> (i) to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf;
> (ia) to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and papers of legal interest;
> (ib) to organise legal aid to the poor in the prescribed manner;
> (ic) to recognise on a reciprocal basis foreign qualifications in law obtained outside India for the purpose of admission as an advocate under this Act;
> (j) to manage and invest the funds of the Bar Council;
> (k) to provide for the election of its members;
> (l) to perform all other functions conferred on it by or under this Act.
> (m) to do all other things necessary for discharging the aforesaid functions[.]

*Id.* § 7.

89. *Id.* § 29 ("[T]here shall . . . be only one class of persons entitled to practise the profession of law, namely, advocates.").

90. *Id.* § 24. The Act defines an Advocate as a person "entered in any roll under the provisions of this Act." *Id.* § 2(1)(a). Section 2(1)(k) provides that a "'roll' means a roll of advocates prepared and maintained under this Act." *Id.* §

The Act does not specifically address to what extent foreign-licensed lawyers may advise clients in India, either on a temporary basis, or on the grounds that their activities somehow do not constitute the practice of law. On these matters the Act is largely silent. Unlike U.S. legal practice, the practice of law in India is regulated by a single national system of uniform rules promulgated by Parliament and administered by the monolithic Bar Council and its state affiliates.[91]

Recently, India's high courts, faced with the reality of India's sudden economic popularity, have undertaken the task of defining the contours of the Act. In 2009, the Bombay High Court addressed the issue of whether various U.S. and U.K. law firms, engaged in transactional work for the Reserve Bank of India (RBI), were practicing law in violation of the Act though their work was limited to "non-litigious matters."[92] In *Lawyers Collective,* a group of Indian lawyers and law students brought suit in the Bombay High Court under the Act to oppose the opening of liaison offices by foreign law firms in India.[93] The petitioners challenged the authority of the RBI to grant the respondents, foreign law firms, permission to open liaison offices and employ foreign lawyers to practice in non-litigious matters under Section 29 of FERA.[94] The core issues were (1) whether the

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2(1)(k). Section 24 specifies conditions for admission to the Indian Bar. *Id.* § 24. Lastly, section 29 grants the right to practice law only to advocates. *Id.* § 29.

91. *See About the Council*, BAR COUNCIL OF INDIA, http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/ (last visited Apr. 6, 2013).

92. Lawyers Collective v. Bar Council of India, Writ Petition No. 1526 of 1995, paras. 1, 3, 5 (1995), *available at* http://barandbench.com/userfiles/files/File/Lawyers%20Collective%20foreign%20firms%20Bbay%20HC.pdf; *see also* Phil Taylor, *Court Clarifies Legality of Foreign Lawyers Activities in India*, INT'L B. ASS'N (Jan. 3, 2012), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f4023622-dd3b-433b-a664-d749ffd8868c; Terry, et al., *supra* note 11, at 574 n.76; Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 61, 65-69 (2010).

93. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 4; *see also 14-Year Epic Battle Draws to a Close as Bombay High Court Rules Against Liaison Offices for Foreign Firms*, B. & BENCH (Dec. 16, 2009), http://barandbench.com/index.php?page=brief&id=400&full= .

94. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 1, 4. The FERA provides for what restrictions can be placed on establishing a place of business in India:

(1) Without prejudice to the provisions of section 28 and section 47 and

permission granted by the RBI to the foreign law firms was legal and valid, and (2) whether practicing in non-litigious matters amounts to "practicing the profession of law" under Section 29 of the Act.[95] The petitioners contended that the liaison offices were a "backdoor entry" for foreign law firms and a convenient way of circumventing the provisions of Section 29 of the Act.[96] The court acknowledged that "[a] person can be said to be practicing in non-litigious matters, when he represents to be an expert in the field of law and renders legal assistance to another person by drafting documents, advising clients, giving opinions, etc."[97] Petitioners argued that such persons must still enroll as an advocate under the Act.[98] Counsel for the petitioners cited U.S. and Australian cases to support this argument.[99] Counsel

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> notwithstanding anything contained in any other provisions of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, (a) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under Section 28; or (b) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company.

The Foreign Exchange Regulation Act, No. 46 of 1993, § 29(1), INDIA CODE (1993).

95. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 1.

96. *See* Gitanjali Shankar & Amba Uttara Kak, *Litigation Versus Non-Litigation: 'Practice of Law' Under the Advocates Act*, 3 NUJS L. REV. 299, 300 (2010) (providing detailed analysis of the High Court judgment in *Lawyers Collective*) (India).

97. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 3.

98. *Id.* para. 4.

99. *See id.* paras. 12, 14. In *In re New York County Lawyers Association*, the New York Court of Appeals held "when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with law of New York or any other law." *In re* New York Cnty. Lawyers Ass'n, 144 N.E.2d 24, 27 (1957), *quoted in Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 12. The Supreme Court of Western Australia held that:

> [t]he practice of law includes the giving of legal advice and counsel to others as to their rights and obligations under the law, and the preparation

for White & Case,[100] the main contesting foreign law firm, and the respondent in the case, argued that RBI did not violate the Act by granting permission to the firm to open liaison offices.[101] Respondent's counsel relied strongly on entry 77 and 78 to the Seventh Schedule of the Indian Constitution.[102] These entries "relate to . . . organization of the Supreme Court and the High Courts [of India] as well as the persons entitled to practice before the Supreme Court and before the High Courts."[103] The court distinguished non-litigious matters from litigious matters by noting the former constitutes the rendering of "legal assistance to another person by drafting documents, advising clients, giving opinions, etc."[104] In contrast, the court defined litigious matters as rendering legal assistance by "acting, appearing and pleading on behalf of another person before any Court or authority."[105] At no time had the foreign lawyers in question registered under rules prescribed by the Act or the

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> of legal instruments by which legal rights are either obtained, secured or given away, although such matters may not then, or ever, be the subject of proceedings in a court.

*Legal Practice Bd. v. Van Der Zwaan* [2002] WASC 133 para. 6 (Austl.).

100. White & Case is a global law firm with offices in the United Kingdom, United States and over twenty-eight other countries. *See About the Firm*, WHITE & CASE, http://www.whitecase.com/about/ (last visited Oct. 12, 2012); *Locations*, WHITE & CASE, http://www.whitecase.com/about/ (last visited Oct. 12, 2012).

101. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 24.

102. *See id.* paras. 24, 27. The Constitution of India entered into force on January 26, 1950. *The Constitution of India*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/details.jsp?id=6771. The Seventh Schedule, items 77 and 78 provide:

> 77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.
>
> 78. Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

INDIA CONST. art. 246, §§ 77 & 78.

103. *Lawyers Collective*, Writ Petition No. 1526 of 1995, para. 24.

104. *Id.* para. 3.

105. *Id.*

Bar Council of India.[106] The foreign law firms argued in support of an exception for purely transactional legal matters.[107]

Relying on U.S., Australian, and other Indian cases as precedent, the Indian petitioners argued that the right to practice law encompasses both litigious and non-litigious matters.[108] They also argued that because the Act restricted the practice of law solely to advocates, it operated as a complete bar to the practice of law in matters both litigious and non-litigious by anyone who is not an advocate.[109] According to the petitioners, the Act subjected foreign law firms to the rules set forth by the Bar Council of India.[110] While the High Court agreed with the foreign law firms that they were clearly practicing only in non-litigious matters, the court rejected their proposal for an exception based on that distinction.[111] The court reasoned that the Act "clearly provides that from the appointed day only advocates are entitled to practise the profession of law whether before any Court / authority or outside the Court by way of practise in non-litigious matters."[112] Therefore, the High Court held that the foreign law firms were operating in violation of the Act, and that "the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India under Section 29 of the 1973 [Foreign Exchange Regulation] Act."[113] In so holding, the *Lawyers Collective* court eliminated a loophole that had permitted a limited transactional practice of law by foreign lawyers under FERA. Further, it confirmed that the Act governs the practice of litigious and non-litigious matters and remains the final arbiter of the regulation of the practice of law in India by both domestic and foreign firms.

In early 2012, foreign lawyers seemed to have scored a modest victory when the Madras High Court narrowly interpreted the Act as

106. *See id.* para. 9.

107. *See id.* para. 27.

108. *Id.* paras. 11-23. See *supra* note 99 and accompanying text, for a description of the U.S. and Australian cases relied upon by petitioner.

109. *Lawyers Collective*, Writ Petition No. 1526 of 1995, paras. 11-23.

110. *Id.* para. 9.

111. *Id.* paras. 41, 49.

112. *Id.* para. 49.

113. *Id.* para. 60.

barring foreign lawyers only from practicing Indian law in India.[114] That is, the court considered whether foreign law firms advising Indian clients on a fly-in fly-out ("FIFO")[115] basis were violating the Act.[116]

*Balaji* was another challenge to foreign lawyers brought under the Act and addressed a question left open by the *Lawyers Collective* opinion. The *Balaji* court described the issue in the case as "whether a foreign lawyer visiting India for a temporary period to advise his client on foreign law can be barred under the provisions of the Advocates Act."[117] In that case, an Indian advocate sued thirty-one U.S. and U.K.-based law firms, alleging they were practicing law in India without proper licenses.[118] The petitioner, a law graduate of India, contended that only "Advocates" specified in Section 29 of the Act are entitled to practice the profession of law in India.[119] The petitioner submitted that should foreign law firms be permitted to practice the profession of law, Section 47 of the Act provides for reciprocity by the country of the foreign firm.[120] The petitioner further contended that law graduates from India are not allowed to practice the profession of law in the United Kingdom, the United States, Australia, and other countries;[121] therefore, such a privilege should not be given to law graduates from the same countries when the Bar Council of India has not recognized law degrees from those countries as provided in Section 24 of the Act.[122] The foreign law firms defended on the basis that they were advising Indian clients on

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114. Balaji v. Gov't of India, Writ Petition No. 6514 of 2010, para. 6 (Madras H.C., Feb. 21, 2012), *available at* http://www.scribd.com/raghul_sudheesh/d/82286874-Judgment-in-Foreign-Law-Firms-Case.

115. *See* Terry, *supra* note 1, at 896, 950, & 950 n.272 (discussing the background of FIFO, the ABA Report on limited licensing, and the ABA Model Rule for Temporary Practice of Foreign Lawyers).

116. *See Balaji*, Writ Petition No. 6514 of 2010, para. 63(ii).

117. *Id.* para. 45.

118. *See id.* para. 2; *see also Foreign Law Firms Case: Post Match Conference!*, B. & BENCH (Feb. 24, 2012, 5:19 PM), http://barandbench.com/brief/2/2099/foreign-law-firms-case-post-match-conference.

119. *Balaji*, Writ Petition No. 6514 of 2010, para. 2.

120. *Id.*

121. *Id.*

122. *Id.*

international commercial transactions with merely an "Indian element."[123] To the extent the matters concerned Indian law, they argued that the foreign firms brought Indian counsel into the discussion.[124] The petitioner argued that the *Lawyers Collective* decision defined the scope of the Act as reaching only advocates.[125]

In deciding the issue, the court acknowledged that the *Lawyers Collective* court had left open the question of whether foreign lawyers may temporarily practice non-Indian and international law while in India.[126] Though it affirmed the holding of the *Lawyers Collective* court—which barred foreign lawyers from becoming licensed to practice Indian law in India—the *Balaji* court held that the Act did not ban foreign lawyers from advising clients on a FIFO basis.[127] In so doing, the court noted how India's membership in the WTO had fueled a cottage industry in international commercial arbitration.[128] In the court's words:

> [I]nternational establishments entering into trade agreements would require to [sic] consult legal experts on the implications of such agreements on their country's laws, and advocates practising Indian law would not be competent to offer them advise on their laws. Therefore, this makes it utmost necessary for foreign legal experts to visit India, stay here and offer advice to their clients in India on their respective laws, and there is no specific provision in the Act prohibiting a foreign lawyer to visit India for a temporary period to advise his/her clients on foreign law.[129]

Ultimately, the court rested its decision on the policy consideration that a decision against the foreign lawyers would have "a counter productive effect on the aim of the Government to make India a hub of International Arbitration."[130] But, the victory by foreign lawyers in *Balaji* was short lived. The Bar Council of India

123. *Id.* para. 14.
124. *Id.* para. 47.
125. *Id.* para. 21.
126. *Id.* para. 24.
127. *Id.* para. 63.
128. *Id.* para. 24.
129. *Id.*
130. *Id.* para. 51.

appealed, seeking to clarify the differing judgments in *Lawyers Collective* and *Balaji*.[131] The Supreme Court of India reversed the holding and ordered, "[T]he Reserve Bank of India [shall] not . . . grant any permission to . . . the foreign law firms to set up liaison offices in India under Section 29 of the Foreign Exchange Regulation Act, 1973 . . . ."[132] Further, the court:

> clarified that "the expression 'to practice the profession of law' under Section 29 of the Advocates Act, 1961, covers the persons practising litigious as well as non-litigious matters . . . and, therefore, to practice non-litigious matters in India the foreign law firms, by whatever name called or described, shall be bound to follow the provisions contained in the Advocates Act, 1961."[133]

### *D. The Role of the Society of India's Law Firms (SILF)*

After the *Balaji* judgment, President Lalit Bhasin[134] of the Society of India's Law Firms (SILF) commented that the court's ruling upheld the "status quo" and that the Madras High Court had echoed SILF's own position on the matter.[135] Bhasin continued:

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131. *See* J. Venkatesan, *Supreme Court Tells RBI to Bar Foreign Law Firms*, THE HINDU (July 5, 2012), http://www.thehindu.com/news/national/article3602986.ece?css=print (discussing the Supreme Court's judgment).

132. *Id.*

133. *Id.* (quoting Transcript of Record of Proceedings, Petition for Special Leave of Appeal at 1-3, Bar Council of India v. Balaji, (Supreme Court of India Feb. 21, 2012) (Civil) No(s). 17150-17154/2012) (India)).

134. Mr. Bhasin also served as Co-Chair, India Committee, American Bar Association Section of International Law from 2008-2010, when he led the Committee discussion on the outcomes of *Lawyers Collective* and *Balaji* cases, and their impact on future relations between the Bar Council of India and U.S. lawyers. *See, e.g.*, A.B.A. Sec. Int'l L.: India Comm., *About This Issue*, INDIA L. NEWS, Spring 2010, at 2, *available at* http://meetings.abanet.org/webupload/commupload/IC906787/newsletterpubs/India_Law_News_-_Spring_2010_%28May_24,_2010%29_final_PDF_version_1.5.pdf. He has made meaningful contributions to on-going conversations on cross-border lawyering between the United States and India.

135. Nikhil Kanekal & Kian Ganz, *Bar Council May Appeal HC Ruling*, LIVEMINT.COM (Feb. 24, 2012, 12:26 AM), http://www.livemint.com/2012/02/24002628/Bar-Council-may-appeal-HC-ruli.html.

> [The *Balaji* decision] has dealt with the issues of entry of foreign lawyers and it says very clearly that they cannot practice in India. But at the same time it has upheld their rights to fly-in, fly-out. In SILF, we have taken this very stand and that stand has been fully upheld by the high court. We said foreign lawyers cannot practice here. But we said lawyers can come with their clients for isolated arbitration, transactions and other such work. [The decision] does not legitimize anything. No one had stopped [foreign lawyers] from coming in here with clients. Actually, we Indian lawyers also go abroad with our clients. That has been happening for decades.[136]

Bhasin told IBA delegates in March 2009, "[w]e can't help those countries where legal services are facing negative growth by letting their firms come to India. India's legal sector is not for sale."[137] Unfortunately, India's memberships in international trade organizations, such as the WTO[138] and its current GATS commitments, provide little guidance for India's courts and bar regulators in resolving the inevitable questions about the extent foreign lawyers will be permitted to advise clients there.

## IV. GATS' FRAMEWORK IN CROSS-BORDER LAWYERING

### *A. Introduction and an Overview*

The GATS,[139] a successor of the GATT,[140] was the first multilateral agreement to address trade and investment in services.[141] While the GATT established the legal framework for negotiating trade

136. *Id.*

137. Wong, *supra* note 77.

138. India became a member of the WTO and GATS on January 1, 1995. *Member Information: India and WTO*, *supra* note 85.

139. Text of the General Agreement on Trade in Services (GATS) is contained in Annex 1B to the Final Act Embodying the Results of the Uruguay Rounds of Multilateral Trade Negotiations. GATS, *supra* note 4.

140. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, arts. VI, XVI (1994) [hereinafter GATT 1994].

141. Robert F. Taylor & Philippe Metzger, *GATT and Its Effect on the International Trade in Legal Services*, 10 N.Y. INT'L L. REV. 1, 14 (1997).

and reducing trade barriers in goods, not in services,[142] the GATS established the legal basis for future negotiations to eliminate barriers that deny market access or otherwise discriminate against foreign service-providers.[143]

The GATT was established after World War II together with other multilateral economic institutions, such as the World Bank and the International Monetary Fund (IMF).[144] The original aim of the GATT was to create a third institution "to handle the trade side of international economic cooperation," and to join the World Bank and the IMF (together known as the "Bretton Woods" institutions).[145] For the forty-seven years of its existence (1947-1994), the GATT failed to create this third institution, to be known as the International Trade Organization (ITO);[146] therefore, for that period the GATT operated only as a "provisional agreement and organization."[147] The GATT entered into force in January 1948.[148]

The GATT focuses on themes of "multilateral reciprocity, most-favored-nation (MFN) treatment, national treatment, exceptions (safeguards), transparency and surveillance, . . . dispute settlement, and special and differential treatment for developing countries."[149] The GATT "provid[ed] a forum for trade negotiations through which international trade could be liberalized and . . . predict[ed]."[150] But, by the 1980s, many countries realized that the GATT was not adequate to provide safeguards for increasing competition in trade in goods and services.[151] Countries further recognized that the GATT's dispute resolution mechanism was inadequate to resolve trade

142. UNDERSTANDING THE WTO, *supra* note 4, at 10, 17.

143. *Id.* at 33-34, 37.

144. *See id.* at 15, 18.

145. *Id.* at 15.

146. *Id.* The ITO Charter contained "ambitious" terms that went "beyond world trade disciplines to include rules on employment, commodity agreements, restrictive business practices, international investment, and services." *Id.*

147. *Id.*

148. Taylor & Metzger, *supra* note 141, at 10.

149. *Id.* GATT article I provides for most-favored-nation (MFN) treatment, article III discusses national treatment, and article XX delineates exceptions. GATT 1994, *supra* note 140, arts. I, III, & XX.

150. Taylor & Metzger, *supra* note 141, at 10.

151. *Id.* at 13; *see also* UNDERSTANDING THE WTO, *supra* note 4, at 17.

issues.[152] Because of these inadequacies, the GATT contracting parties initiated another round of negotiations to create new remedies.[153] By December of 1993—after over seven years of what became known as the Uruguay Rounds of negotiations[154]—the parties concluded several trade agreements signed in Marrakesh on April 15, 1994.[155]

The Uruguay negotiations resulted in the formation of the WTO. The WTO came into being in 1995.[156] The purpose of the WTO is to effectively implement trade agreements and provide a forum for trade negotiations in order to "help trade flow smoothly, freely, fairly and predictably."[157] According to the WTO's Director-General, "[t]he WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities."[158] As of August 24, 2012, there were 157 members of the WTO.[159]

The GATS was a "landmark achievement[]" of the Uruguay Round of negotiations.[160] WTO Members created the GATS to

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152. UNDERSTANDING THE WTO, *supra* note 4, at 17.

153. Taylor & Metzger, *supra* note 141, at 13.

154. *Id.* The negotiations were concluded at Punta Del Este, Uruguay. *Id.*

155. *Id.*

156. *Id.* at 10; *see also The WTO in Brief: Part 1, The Multilateral Trading System—Past, Present and Future,* WTO, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited July 27, 2012) (describing the WTO's creation and history).

157. *The WTO in Brief: Part 2, The Organization*, WTO, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited July 27, 2012).

158. *About the WTO—A Statement by the Director-General*, WTO, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited July 30, 2012).

159. *Understanding the WTO: The Organization—Members and Observers*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 30, 2012). Russia and Vanuatu joined the WTO on August 22 and 24 of 2012, respectively. *Id.* The accessions of the Russian Federation and Vanuatu demonstrate the continuing importance of trade and their commitment to the mission of the WTO. *See* Press Release, World Trade Org., WTO Membership Rises to 157 With the Entry of Russia and Vanuatu (Aug. 22, 2012), http://www.wto.org/english/news_e/pres12_e/pr671_e.htm.

160. *GATS: Objectives, Coverage, and Disciplines*, *supra* note 4.

achieve a "progressively higher level of liberalization" through ongoing rounds of negotiations.[161] All WTO members are also signatories to the GATS; each signatory has assumed commitments under the GATS, regardless of national trade policies, albeit at differing extents.[162] Thus, the legal services market of every WTO Member State is in some respect regulated by the GATS.[163] The treaty entered into force in January 1995 for the purpose of "extend[ing] the multilateral trading system to services."[164]

The GATS takes a realistic and flexible approach to liberalization of trade in services. Professor Laurel S. Terry, a GATS scholar, has proposed a simple framework for analyzing the structure of the GATS. She divides the GATS into four categories of provisions: "(1) automatic obligations; (2) optional obligations; (3) future obligations; and (4) the MFN exemption . . . ."[165] The first category of obligations is unconditional and binding on every GATS signatory simply because it is a WTO Member State ("Member").[166] The second category of provisions pertains to those commitments each Member makes by opting in.[167] To "opt-into" a provision, a Member will make specific commitments to a particular service sector by including that sector on a "Schedule of Specific Commitments," and listing its level of commitment next to that sector.[168] Many Members have also made horizontal commitments, which operate like their specific

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161. WORLD TRADE ORG., THE GENERAL AGREEMENT ON TRADE IN SERVICES—AN INTRODUCTION 1 (2006) [hereinafter GATS—AN INTRODUCTION], *available at* www.wto.org/english/tratop_e/serv_e/gsintr_e.doc. Article XIX of the GATS provides that member states "shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO and periodically thereafter, with a view to achieving a progressively higher level of liberalization." GATS, *supra* note 4, art. XIX.

162. *GATS: Objectives, Coverage, and Disciplines*, *supra* note 4.

163. Terry, *supra* note 1, at 901.

164. GATS—AN INTRODUCTION, *supra* note 161.

165. Terry, *supra* note 1, at 901; *see also* Laurel S. Terry, Professor, Pa. State Univ., Presentation at the International Bar Association Meeting: *GATS, Legal Services and the IBA* (May 20, 2005), *available at* www.ibanet.org/Document/Default.aspx?DocumentUid=700E6D51-3E55-4AA4-AD51-06E90C82974E.

166. Terry, *supra* note 1, at 901.

167. *Id.*

168. *Id.*

commitments, but cut across all types of services without regard to specific sectors.[169] The third category contemplates future action required by Members; these obligations are the subject of negotiations known in the legal services context simply as "Track #1" and "Track #2."[170] Last, the fourth category concerns a provision permitting a Member to establish certain MFN treatment exemptions at the time it joins or assents to the WTO.[171]

### *B. Automatic Provisions of GATS*

In the legal services context, the most relevant automatic provisions in Part II of the GATS are MFN treatment (Article II),[172] Transparency (Article III),[173] Recognition (Article VII),[174] and

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169. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WTO, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Feb. 23, 2012) [hereinafter *Guide to Reading the GATS*].

170. Terry, *supra* note 1, at 901.

171. *Id.*

172. GATS, *supra* note 4, art. II. The GATS generally prohibits members from discriminating between any of their trading partners. *See id.* art. II(1). In general, GATS "MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners—whether rich or poor, weak or strong." UNDERSTANDING THE WTO, *supra* note 4, at 11. The Article generally requires all members to treat each other equally. *Id.*; *see also* INT'L BAR ASS'N, GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS 10 (2002), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=4F39B8D5-2110-4A8A-BDAF-7CB1D7083236 (discussing the interpretation of the GATS article II MFN provision).

173. GATS, *supra* note 4, art. III. The GATS "Transparency" provision has five paragraphs requiring members to promptly publish the following:

> all relevant measures of general application which pertain to or affect the operation of this Agreement"; "[to] Council for Trade in Services . . . any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services . . . ."; prompt "respon[se] . . . to all requests by any other Member for specific information on any of its measures of general application . . . ."; and "notif[ication] to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement."

*Id.*

General Exceptions (Article XIV).[175] Article II embodies a non-discrimination policy, requiring that a Member treat all other WTO Members alike.[176] The transparency requirement of Article III facilitates further negotiations by imposing a duty on Members to disclose their measures to other Members, and to respond to requests for information by other Members.[177] Article VII promotes the recognition by Members of qualifications of service suppliers of another Member.[178] Lastly, the MFN exemption permits a Member to adopt trade restrictions that are "necessary to protect the public morals or to maintain public order," so long as their application is not used as "a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on trade in services."[179]

### *C. Optional Provisions*

The GATS' optional provisions operate through each WTO Member's Schedule of Specific Commitments ("Schedule").[180] By listing a specific commitment in its Schedule, the Member undertakes obligations in two areas—market access and national treatment—*vis-a-vis* the listed service sector, across each of four "modes of supply."[181] The modes of supply are derived from the GATS

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174. *Id.* art. VII. The GATS "Recognition" provision requires that:

> [w]hen two (or more) governments have agreements recognizing each other's qualifications (for example, the licensing or certification of service suppliers), GATS says other members must also be given a chance to negotiate comparable pacts. The recognition of other countries' qualifications must not be discriminatory, and it must not amount to protectionism in disguise. These recognition agreements have to be notified to the WTO.

UNDERSTANDING THE WTO, *supra* note 4, at 35.

175. GATS, *supra* note 4, art. XIV. The "Security Exceptions" provision requires members to notify the WTO Council of necessary measures taken to protect "essential security interests." *Id.* art. XIV *bis*. See Terry, *supra* note 2, at 901-02, for a general discussion of the "Automatic Provisions."

176. GATS, *supra* note 4, art. II; *see also supra* text accompanying note 172.

177. GATS, *supra* note 4, art. III; *see also supra* text accompanying note 173.

178. GATS, *supra* note 4, art. VII; *see also supra* text accompanying note 174.

179. GATS, *supra* note 4, art. XIV.

180. *See* Terry, *supra* note 1, at 903.

181. *Id.* at 904.

definition of services and essentially describe delivery mechanisms for each type of service listed.[182] At the time of the initial GATS signing, forty-five Members listed legal services in their Schedules; the majority of the nations who have assented to the GATS since that time, including China, have also listed legal services in their Schedules.[183] The horizontal and specific commitments become binding once made, and, if not kept, become the subject of further negotiations among aggrieved nations and possibly WTO Dispute Resolution procedures.[184]

The four modes of supply merely expound upon the GATS' definition of trade in services as the supply of a service in the following ways:

> (a) from the territory of one Member into the territory of any other Member;
> (b) in the territory of one Member to a 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.[185]

Thus, when a Member lists a specific commitment on its Schedule, it assigns a mode of supply to that commitment that describes how the service is provided.

In light of the Indian High Court decisions, the most conspicuous requirements of the optional provisions are the market access and national treatment provisions.[186] The market access provision prohibits a variety of activities, such as monopolies, quota systems, quantity limitations, and other mechanisms that limit market access to other Members' service suppliers.[187] If a Member wishes to persist in

182. GATS, *supra* note 4, art. I (2).

183. Terry, *supra* note 1, at 903.

184. *See* GATS, *supra* note 4, art. XXI (Modification of Schedules).

185. *Id.* art. I(2).

186. These two requirements are also the most commonly discussed when referring to the legal services sector. *See* Terry, *supra* note 1, at 904.

187. GATS, *supra* note 4, art. XVI.

certain actions barred by the market access prohibition, it must make an affirmative reservation either by listing its current or future intentions to take to a contrary position, or by marking that part of the Schedule with the word "unbound" in respect to the commitment.[188]

The national treatment provision is essentially an equal protection clause, preventing discrimination between domestic and foreign service suppliers on the basis of nationality, except as described in the Member's Schedule.[189] For example, in the legal sector, the national treatment provision means that Members may not treat its own lawyers differently than those of other countries, *except* as that country provides in its own Schedule.[190] Like the market access provision, if a Member wishes to make a reservation, it may state its current or future intentions to operate an incompatible scheme, or simply state "unbound."[191] Declaring itself unbound to either the market access or the national treatment provision is sufficient to create a reservation for a Member as to that entire provision; it is not necessary that a Member specifically state unbound as to each and every element of the provision.[192] Thus, a country that lists legal services on its Schedule of commitments is permitted to treat foreign lawyers differently from domestic lawyers, provided it discloses any

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188. *See* Terry, *supra* note 1, at 906.

189. *See* GATS, *supra* note 4, art. XVII. The GATS 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.*

190. Terry, *supra* note 1, at 907.

191. *Id.*

192. *See Guide to Reading the GATS*, *supra* note 169; *see also* INT'L BAR ASSOC., *supra* note 172, at 24.

form of market access of national treatment limitations on its Schedule.[193]

The GATS' Domestic Regulation provisions operate to ensure "measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."[194] It further requires Members to maintain procedures "for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services."[195] Finally, the GATS "additional commitments" provision functions as a "catch-all" provision, permitting a Member to undertake discretionary commitments in specific sectors.[196]

### *D. GATS Future Action*

Two further GATS provisions contemplate future steps to be taken by Member States. First, GATS requires Members to return to negotiations after five years from the January 1995 effective date of GATS.[197] Second, Members agreed to discuss "necessary disciplines" to fend off domestic regulations that unnecessarily restrict trade.[198] The current round of Doha negotiations is the fulfillment of the first obligation.[199] The product of a successful Doha Round would be the updated Schedules of Specific Commitments, containing (ideally) even fewer restrictions on trade in legal services than was found in their original Schedules.[200] This is known as Track #1.[201] The Track #1 negotiations have been in a holding pattern since July 2008, with little to no progress accomplished since then.[202] Participants in the

193. Laurel S. Terry et al., *Transnational Legal Practice*, 42 INT'L LAW. 833, 835 (2008).

194. GATS, *supra* note 4, art. VI(1).

195. *Id.* art. VI(2).

196. *Id.* art. XVIII.

197. *Id.* art. XIX.

198. *Id.* art. VI(4).

199. Terry, *supra* note 1, at 912-13; *see also Service Negotiations*, WTO, http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (last visited Feb. 23, 2012).

200. *See* Terry, *supra* note 1, at 913.

201. *Id.*

202. *See Doha Deadlock Continues*, FORBES (Apr. 15, 2010, 6:00 AM),

most recent rounds of negotiations conceded that little had changed "since the submission of a progress report in December 2007."[203] Although revised Track #1 offers were due October 15, 2008, and final commitments were due December 1, 2008, as of the time of this writing, no WTO nation has met that deadline.[204] In sum, the Doha Round, which began in 2000, has not yet concluded.[205] Nonetheless, at present, and even if talks fail altogether to produce new commitments, all Members remain bound by their 1995 Uruguay Round obligations.[206]

Track #2 negotiations, meanwhile, concern the commitments of all Members to discuss the adoption of "disciplines" on domestic regulation of legal services to reduce the danger that such regulations in effect restrict the cross-border supply of legal services.[207] The fate of the Track #2 negotiations appears more certain.[208] In the absence of an agreement on Track #2 disciplines, the GATS Article VI(5) default rule would impose a set of default disciplines on all Members.[209] Because of this inevitability, Track #2 negotiations will remain a critical issue to domestic and foreign lawyers and those who represent them at the domestic and international level.

The final optional provision of the GATS is the exemption from the MFN obligation.[210] The GATS grants a Member a one-time opportunity to exempt itself from the automatic MFN obligation, essentially permitting it to avoid altogether the duty to treat all

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http://www.forbes.com/2010/04/14/doha-trade-wto-business-oxford-analytica.html (listing some of the reasons why the negotiations have stalled).

203. Special Session of the Council for Trade in Services, *Report by the Chairman: Negotiations on Trade in Services*, 5, TN/S/36 (Apr. 21, 2011), *available at* http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/s/36.doc; *see also* Special Session of the Council for Trade in Services, *Report by the Chairman, Negotiations on Trade in Services*, 2, TN/S/35 (Mar. 22, 2010), *available at* http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/s/35.doc.

204. Terry, *supra* note 1, at 948-49.

205. *See Doha Deadlock Continues*, *supra* note 202.

206. Terry, *supra* note 1, at 949.

207. *See Services Negotiations*, *supra* note 199.

208. *See* Terry, *supra* note 1, at 961.

209. *Id.*

210. GATS, *supra* note 4, art. II(2) & art. XXIX (Annex on Article II Exemptions).

Members the same with regard to trade in services.[211] Each Member has the opportunity to execute this exemption just once—upon joining the WTO.[212] At the time of this writing, five States had exempted themselves entirely from the MFN obligation with respect to legal services and another four had done so with respect to professional services, of which legal services are a subcategory.[213] Nevertheless, all Members are free to enhance or upgrade their commitments to further liberalization of trade in services at any time, without any formalities.[214]

### *E. GATS Enforcement*

The GATS is a "government-to-government agreement," and its provisions are enforced by governments, not individuals.[215] Therefore, an individual cannot sue a State to enforce its GATS obligations.[216] While GATS pushes Members back to the negotiating table, the ultimate consequence of a Member's failure to keep its promises under GATS could be retaliatory trade sanctions; the WTO Appellate Body has the ultimate authority for resolving disputes among Member's brought by another Member.[217] With the above overview of GATS and its application, it is pertinent to examine at this time India's commitment to the GATS' automatic and optional provisions, which relate to cross-border lawyering.

## V. INDIA AND THE GATS (OFFERS AND COMMITMENTS)

While India's WTO membership influenced the Madras High Court's decision in the *Balaji* case,[218] the progressive liberalization of

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211. *See id.*

212. *See id.* art. XXIX (Annex on Article II Exemptions).

213. Council for Trade in Services, *Background Note by the Secretariat: Legal Services*, 18, S/C/W/318 (June 14, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/wto_legal_services.pdf.

214. *GATS: Objectives, Coverage, and Disciplines*, *supra* note 4.

215. INT'L BAR ASS'N, *supra* note 172, at 7.

216. *See id.*

217. *Id.*

218. *See* Balaji v. Gov't of India, Writ Petition No. 5614 of 2010, para. 24

trade in services envisioned by the architects of the GATS has yet to remove barriers to India's market for cross-border lawyering.

### *A. Horizontal Commitments*

India made limited horizontal commitments to trade in services pursuant to the Uruguay Round.[219] In the "cross-border trade" and "consumption abroad" modes of supply, India has not stated a commitment.[220] This indicates India is bound by the treaty, except to the extent of the limitations stated in its Schedule.[221] In terms of the "commercial presence" mode of supply, India has stated a preference in its "national treatment" obligation favoring suppliers offering India the best terms regarding transfer of technology.[222]

Finally, for the "presence of natural persons" mode of supply, India has carved out exceptions to limitations in both its market access and national treatment optional obligations on the same terms.[223] India is unbound to both obligations, subject to three limitations: (1) business people may stay in India for up to ninety days to conduct negotiations, or to start up new enterprises; (2) managers, executives, and certain specialists employed by corporations may be present in India under a corporate transfer for up to five years; and (3) certain professionals credentialed in the sciences may provide consulting services pursuant to a services contract for up to one year and three

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(Madras H.C. Dec. 21, 2012). There, the lawyer for the respondent foreign law firms emphasizes the fact that India signed the World Trade Agreement and is a member of the WTO. *Id.*

219. See *International Trade—India & World Trade Organization (WTO)*, DEP'T OF COMMERCE, GOV'T OF INDIA, http://commerce.nic.in/trade/international_trade_matters_service_indianpapers_generalagreement.asp, for India's Schedule of Specific Commitments and Supplements.

220. *See Horizontal Commitments of India*, WTO, http://tsdb.wto.org/ (select "India in the dropdown menu under "Get just the horizontal commitments for a given Member;" then click on the "go" icon) (last visited Feb. 23, 2013); *International Trade—India & World Trade Organization (WTO)*, *supra* note 219 (providing the position of the Government of India, Ministry of Commerce and Industry, Department of Commerce relating to Trade in Services under the General Agreement on Trade in Services).

221. *See Horizontal Commitments of India*, *supra* note 220.

222. *Id.*

223. *See id.*

months.[224] Legal services are not covered by any of these limitations, rendering India's official position as unbound as to the "natural persons" mode of supply, but bound as to the rest.[225]

### *B. Specific Commitments*

India has stated no limitations in its Schedule specifically relating to the legal services sector.[226] Thus, it appears India considers itself bound in legal services across both market access and national treatment obligations. Theoretically, India's horizontal commitments are the more specific of the two sets of obligations and, therefore, they control. Practically speaking, however, India's current GATS obligations vest India's courts and bar regulators with great discretion to craft rules that openly discriminate against foreign lawyers without running afoul of India's commitments to the WTO.

While it remains to be seen what India will do in the Doha Round, India's revised offer is even clearer about its intentions to discriminate against foreign lawyers. India's revised offer commits India to ease trade restrictions across several new sectors but not legal services.[227] In leaving legal services out of its revised offer, India appears unwilling to budge from its restrictive practices in legal services, even as it offers to make more liberalized commitments in other sectors during the Doha negotiations.[228]

As it now stands, India remains bound by its horizontal commitments and the obligations common to all GATS Members, meaning that it will comply with its MFN treatment as applied to all Members, and the obligation to provide transparency in support of ongoing trade liberalization efforts.[229]

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224. *Id.*

225. *See id.*

226. *See id.*

227. *See* Special Session of the Council for Trade in Services, *Revised Offer—India*, 1-2, TN/S/O/IND/Rev.1 (Aug. 24, 2005), *available at http://commerce.nic.in/trade/revised_offer1.pdf.*

228. *See id.* For example, India's revised offer eases trade restrictions in sectors, such as architectural, engineering, tourism, and research and development services. *Id.*

229. *See GATS: Objectives, Coverage, and Disciplines*, *supra* note 4.

## VI. GATS, THE ABA, AND ITS IMPLICATION FOR U.S. LAWYERS

### *A. The Legal Profession Under GATS*

The profession of advocate/lawyer has traditionally been reserved for the professional whose role is to counsel clients or make appearances in court.[230] Traditionally, national or domestic laws govern the legal profession, and local bars control the location of the advocate/lawyer.[231] The mode of the practice of law differs from country to country.[232] In some countries, the advocate or solicitor may either represent a client in a business setting or in a court before a judge respectively.[233] In other countries, the professional trained in law may be a general practitioner with no barriers of representation.[234] Despite this distinction, the practice of law is a regulated profession controlled by national laws.[235] While domestic legal practice rules and regulations are settled from country to country, international legal practice is filled with technicalities.

In the past decades, the internationalization of economies resulted in the increased growth of international legal practice.[236] Lawyers involved in transactional practice are increasingly faced with issues involving multiple jurisdictional questions.[237] The international advocate/lawyer is consistently required to provide services in multiple jurisdictions that involve rules and regulations foreign to their domestic practice.[238] The obstacle to international legal practice for the lawyer is the "predominantly national character of the law and . . . the national character of legal education" of the different countries where the lawyer desires to practice even on a temporary

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230. *See* Council for Trade in Services, *Background Note by the Secretariat: Legal Services*, 2, S/C/W/43 (July 6, 1998), *available at* www.wto.org/english/tratop_e/serv_e/w43.doc.

231. *Id.*

232. *See id.*

233. *See id.* at 3 (explaining the distinctions in various countries between roles of counselors, advocates, and notaries).

234. *See id.*

235. *Id.* at 2.

236. *See id.* at 1.

237. *Id.*

238. *Id.*

basis.[239] Though there are similarities between national laws in their legal structures, such as a common body of case law and codes, the difference appears to be in the qualification requirements in legal services.[240]

GATS Article 1(1) stipulates that the GATS applies to measures by Members affecting trade in services.[241] This broad definition of trade in services covers any measures, whether it be a "law, regulation, rule, procedure, decision, administrative action, or any other form."[242] Services under the GATS may be supplied in four Modes:[243] from the territory of the supplier to another (Mode 1-Cross-Border Trade);[244] at the location of the service consumer (Mode 2-Consumption Abroad);[245] service through commercial presence of the service consumer (Mode 3-Commercial Presence);[246] and service through the natural presence of the service provider in the territory of the consumer (Mode 4-Presence of Natural persons).[247] The definition of trade in services under GATS and the scope of its application provide a clear difference in what the GATT represented (trade in goods), and what GATS provides (trade in services).[248] While trade in goods requires the movement of tangible products, trade in services is the movement of intangibles.[249] The definition of services under GATS includes all services except services provided in the exercise of

239. *Id.*

240. *Id.*

241. GATS, *supra* note 4, art. I(1) ("This Agreement applies to measures by Members affecting trade in services.").

242. *Id.* art. XXVIII(a).

243. *See id.* art. I(2).

244. *Id.* art. I(2)(a) ("[F]rom the territory of one Member into the territory of any other Member.").

245. *Id.* art. I(2)(b) ("[I]n the territory of one Member to the service consumer of any other Member.").

246. *Id.* art. I(2)(c) ("[B]y a service supplier of one Member, through commercial presence in the territory of any other Member.").

247. *Id.* art. I(2)(d) ("by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.").

248. *See id.* art. I(2).

249. Aly K. Abu-Akeel, *Definition of Trade in Services under the GATS: Legal Implications*, 32 GEO. WASH. J. INT'L L. & ECON. 189, 190 (1999) (describing four main differences between trade in goods and trade in services).

governmental authority.[250] The WTO classifies "legal services" within the Business Services sector and the Professional Services subsector, found within the Services Sectoral Classification List.[251] The classifications were a product of the original Uruguay Round of multilateral trade negotiations that took place in July 1991.[252] To

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250. GATS, *supra* note 4, art. I(3). GATS provides that,

> [f]or the purposes of this Agreement:
> (b) 'services' includes any service in any sector except services supplied in the exercise of governmental authority;
> (c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

*Id.*

251. GATT Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991). According to the Secretariat, "[t]his entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification . . . ." Council for Trade in Services, *supra* note 213, at 8. The Central Product Classification (CPC), first published in 1990,

> constitutes a complete product classification covering goods and services. It was intended to serve as an international standard for assembling and tabulating all kinds of data requiring product detail including industrial production, national accounts, service industries, domestic and foreign commodity trade, international trade in services, balance of payments, consumption and price statistics. Other basic aims were to provide a framework for international comparison and promote harmonization of various types of statistics dealing with goods and services.

Central Product Classification CPC Version 1.1, Version submitted to the United Nations Statistical Commission March 5-8, 2002, U.N. Doc. DRAFT ESA/STAT/SER.M/77/Ver.1.1 (Feb. 21, 2002), *available at* http://unstats.un.org/unsd/statcom/doc02/cpc.pdf. *See generally* Am. Bar Ass'n Ctr. for Prof'l Responsibility, *Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/track_one_class.html (last visited Apr. 6, 2013). See also Laurel S. Terry, representing the International Bar Association, *Materials Submitted to the Technical Subgroup (TSG) of the Expert Group on International Economic and Social Classifications*, U.N. Doc. TSG/27 (Oct. 18, 2004), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/27-IBA_un_documents.pdf, for a compilation of GATS and trade-services related documents, including both versions of the CPC.

252. Council for Trade in Services, *supra* note 213, at 8. The Note explains that the Classification System as follows:

> In the WTO 'Services Sectoral Classification List' . . . 'legal services' are listed as a sub-sector of '(1) business services' and '(A) professional

understand the application of the GATS to U.S. lawyers, it is helpful to discuss how the United States has approached the GATS since it came to force.

### *B. The ABA and the GATS*

The United States became a member of the WTO in January 1, 1995,[253] and signed the GATS.[254] By virtue of its membership, the United States is bound by the terms of the agreement, for which there are no exceptions.[255] The GATS has an impact on U.S. lawyers, legal educators, judges, legal service state regulators, and the ABA.[256] However, the Office of the U.S. Trade Representative implements the GATS, rather than state or local bar entities,[257] because the GATS is implemented as a government-to-government agreement.[258]

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> services.' This entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification. In the UN CPC the entry 'legal services' is sub-divided in 'legal advisory and representation services concerning criminal law' (86111), 'legal advisory and representation services in judicial procedures concerning other fields of law' (86119), 'legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.' (86120), 'legal documentation and certification services' (86130) and 'other legal and advisory information' (8619).

*Id.*

253. *Member Information: The United States of America and the WTO,* WTO, http://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Aug. 11, 2012).

254. *See GATS: Objectives, Coverage, and Disciplines*, *supra* note 4. GATS negotiations concluded in 1993, the final agreements were signed on April 15, 1994 in Marrakech, Morocco and took effect January 1, 1995. INT'L B. ASS'N, *supra* note 172.

255. 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, 1010-11 (2001) (discussing the applicability of GATS to the United States and the impact on the legal profession). The article illustrates the extent of the United States' Schedule of Commitments and Exemptions under the GATS. *Id.* According to Terry, the United States listed legal services in its Schedule, making it subject to many GATS provisions. *Id.*

256. *See generally* Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICH. ST. J. INT'L L. 635 (2007).

257. *See generally* Office of the U.S. Trade Representative, *Services & Investment*, USTR, http://www.ustr.gov/trade-topics/services-investment (last

Before discussing specific nations' statuses on the GATS, the next section evaluates some recent developments in the regulation of cross-border practice of law, including changes to the ABA Model Rules respecting transnational law practice and multijurisdictional practice. The following subsections c and d, elaborate on efforts of the ABA and the IBA to pursue liberalization of trade in legal services through lobbying and advocacy efforts.

### *C. Cross Border Legal Practice and the Current ABA Model Rule*

The ABA's House of Delegates created the Model Rules of Professional Conduct ("Model Rules") in 1983, outlining ethical conduct and professional responsibility for U.S. lawyers.[259] The rules are merely recommendations or models, and are not legally binding.[260] Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility.[261] Model Rule 5.5 is concerned primarily with making it possible for U.S. lawyers licensed in one state to practice in other states provided they meet certain

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visited Aug. 13, 2012); Office of the U.S. Trade Representative, *Services in the WTO*, USTR, http://www.ustr.gov/trade-topics/services-investment/services/services-wto (last visited Apr. 6, 2013).

258. INT'L BAR ASS'N, *supra* note 172, at 7.

259. MODEL RULES OF PROF'L CONDUCT PREFACE (2012), *available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html*; *see also* Stuart Taylor Jr., *Bar Group Adopts Model Ethics Code*, N.Y. TIMES, Aug. 3, 1983, at A1.

260. Taylor, *supra* note 259.

261. *Am. Bar Ass'n Ctr. for Prof'l Responsibility, ABA Model Rules of Professional Conduct-About the Model Rules*, AM. BAR ASS'N, *available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html*. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (1980), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf. The ABA Model Code states: "The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980."
*Id.*

requirements.[262] The current form of the rule does not fit foreign-licensed lawyers, though change may be on the horizon.[263]

In July 2000, the ABA established the Commission on Multijurisdictional Practice ("Commission") "to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law."[264] In 2002, the House of Delegates adopted amendments to Rules 5.5 and 8.5, based on the Commission's recommendations.[265]

In addition, the ABA adopted two new resolutions concerning the multijurisdictional practice of law, which contemplate the cross-border practice of law: Recommendation 8[266] and Recommendation 9.[267] Recommendation 9 encouraged U.S. States to adopt a rule

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262. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983). Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice Of Law provides:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction . . . .

*Id.*

263. There had a been series of amendments to the Model Rules between 1983 and 2002 when the ABA House of Delegates amended the rules and comments on fourteen occasions. *Model Rules of Professional Conduct*, *supra* note 259. "[T]he [ABA] created the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") to comprehensively review the Model Rules and propose amendments as deemed appropriate. On February 5, 2002 the House of Delegates adopted a series of amendments that arose from this process." *Id.*

264. *Id.*

265. *Id.*; *see also* AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 6 (2002) [hereinafter REPORT OF THE COMMISSION].

266. REPORT OF THE COMMISSION, *supra* note 265, at 50-55 ("The ABA encourage [sic] jurisdictions to adopt the ABA Model Rule for the Licensing of Legal Consultants.").

267. *Id.* at 56-58 ("The ABA adopt [sic] the proposed Model Rules for

permitting foreign lawyers to practice temporarily in U.S. States, on terms similar to those available to U.S.-licensed lawyers under Model

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Temporary Practice by Foreign Lawyers . . . .").

The proposed Model Rule for Temporary Practice by Foreign Lawyers states:

> A lawyer who is admitted only in a non-United States jurisdiction shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services in this jurisdiction that:
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so
> authorized;
> (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;
> (4) are not within paragraphs (2) or (3) and
> (i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
> (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
> (5) are governed primarily by international law or the law of a non-United States jurisdiction.
> (b) For purposes of this grant of authority, the lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

*Id.* at 56.

Rule 5.5.[268] Recommendation 9 deals with what is often called "fly-in fly-out" or "FIFO" practice.[269]

Likewise, Recommendation 8 was aimed at promoting state rules permitting foreign-licensed lawyers to establish a more permanent practice in U.S. States as foreign legal consultants (FLCs), without taking a prerequisite U.S. qualification exam.[270] As of October 23, 2012, some states had rules that allow FLCs, but most states have not adopted nor made a rule similar to Recommendation 8.[271] The states have not uniformly adopted either of the recommendations.[272] The ABA is currently reviewing proposals to revise Model Rule 5.5 to encompass not only domestic multijurisdictional practice, but also international cross-border practice by lawyers licensed in the United States.[273]

### *D. Temporary Practice by Foreign Lawyers*

At present, forty-four states have adopted rules governing cross-border practice.[274] Adopted by the ABA in 2002, Model Rule 5.5 eased restrictions on domestic multijurisdictional practice.[275] The

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268. *See id.*; *see also* Terry, *supra* note 1, at 966.

269. *See* AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201J: REPORT TO THE HOUSE OF DELEGATES (2002), *available at* http://www.abanet.org/cpr/mjp/201j.pdf.

270. *See* AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201 H: REPORT TO THE HOUSE OF DELEGATES (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.pdf.

271. *See* AM. BAR ASS'N CTR. PROF'L RESPONSIBILITY, FOREIGN LEGAL CONSULTANT RULES (2012) [hereinafter FOREIGN LEGAL CONSULTANT RULES] *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/foreign_legal_consultants.authcheckdam.pdf (showing states that have adopted or have similar rules to Recommendation 8 on FLCs).

272. *See* Terry, *supra* note 1, at 966-67.

273. *See* AM. BAR ASS'N COMM'N ON ETHICS 20/20, ISSUES PAPER ON MULTIJURISDICTIONAL PRACTICE, 1-2 (2011) [hereinafter ISSUES PAPER ON MULTIJURISDICTIONAL PRACTICE], *available at* http://www.abanet.org/ethics2020.

274. *See* AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MJP POLICIES (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

275. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002).

Model Rule has become the subject of proposed revisions to better accommodate the international cross-border practice of law.[276] In 2009, Virginia joined other states with rules authorizing temporary practice by foreign lawyers by amending its rules to include a version of ABA Model Rule 5.5.[277]

Under Recommendation 9, foreign lawyers licensed in a non-U.S. jurisdiction would be permitted to practice law in a U.S. state having adopted such a rule on a temporary basis provided: (1) they associate with a U.S. lawyer admitted to practice in the jurisdiction; (2) they are preparing in the U.S. for a proceeding in a foreign court, arbitration, or mediation; (3) they perform services in the U.S. for a foreign client in a foreign matter or related to a foreign occurrence; or (4) the law governing the matter is primarily foreign or international.[278]

### *E. Permanent Establishment by Foreign Lawyers as Foreign Legal Consultants*

A second ABA resolution, meanwhile, would also give states power to permit some cross-border legal practice on a permanent basis. Recommendation 8 calls upon all states to adopt the Model Rule for the Licensing of Foreign Legal Consultants, which would allow foreign lawyers to practice law permanently as foreign legal consultants (FLCs) without taking a U.S. qualification exam.[279] The Model Rule for the Licensing of Foreign Legal Consultants was amended in 2006.[280] To date, about thirty-two states have enacted such a rule, including Virginia.[281]

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276. *See* AM. BAR ASS'N, STATE IMPLEMENTATION OF MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW) (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf; AM. BAR ASS'N COMM'N ON ETHICS 20/20, MODEL RULE 5.5 AND FOREIGN LAWYERS (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf.

277. *See* Va. State Bar, *The Supreme Court of Virginia Approved Proposed Amendments to Rules 5.5 and 8.5*, VSB, http://www.vsb.org/site/regulation/rules-55-and-85-of-rules-of-professional-conduct (last visited Mar. 3, 2013).

278. *See* REPORT OF THE COMMISSION, *supra* note 265, at 56.

279. *Id.* at 50.

280. *Commission on Multijurisdictional Practice*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/committees_commis

In 2004, the Virginia State Bar created a Multijurisdictional Task Force in order to "develop new rules . . . to better accommodate limited practice . . . by lawyers licensed only in other U.S. jurisdictions or in foreign countries."[282] The Virginia State Bar went a step further than the ABA by adopting a rule permitting a foreign lawyer to practice *in-house* without passing a prerequisite test, as a "Corporate Counsel Registrant."[283] Approximately five other states have similar rules.[284] The ABA has not taken a formal position on foreign lawyers practicing across borders as in-house counsel, but there was discussion at its recent meeting, in August 2012, on the recommendations of the ABA Commission on Ethics 20/20 Report.[285]

The ABA Task Force on GATS is responsible for studying the effect of the GATS on the practice of law by U.S. lawyers. Since the promulgation of Recommendation 8, this Task Force has urged the

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sions/commission_on_multijurisditional_practice.html (last visited Mar. 30, 2013).

281. The following states have adopted the rules on Foreign Legal Consultants: Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington. FOREIGN LEGAL CONSULTANT RULES, *supra* note 271; *see also* Terry et al., *supra* note 11, at 569; VA. SUP. CT. R. 1A:7 (2009).

282. Barbara J. Balogh & James M. McCauley, *Multijurisdictional Practice in Virginia,* 54 VA. LAW. 52, 52 (2005), *available at* http://www.vsb.org/docs/valawyermagazine/jul05multijurisdictional.pdf.

283. *See* VA. SUP. CT. R. 1A:5 (2011).

284. Besides Virginia, Delaware, Florida, Georgia, Pennsylvania, and Washington, D.C. each permit temporary practice by foreign non-U.S. lawyers. ISSUES PAPER ON MULTIJURISDICTIONAL PRACTICE, *supra* note 273, at 3-4, n.7.

285. *See* Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Comm'n on Ethics 20/20, to ABA Entities, et al. (Sept. 4, 2012), *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. The letter stated that the Commission "has decided not to further consider merging the ABA Model Rule for Temporary Practice by Foreign Lawyers into Model Rule 5.5." *Id.* The Commission has recommended that the ABA approve a rule that allows foreign lawyers to practice in the United States as in-house counsel for their employer, a foreign company. *Id.* Under the proposed rule, the foreign lawyer would be required to consult with a U.S. lawyer on questions of U.S. law; he would further be bound by the local jurisdiction's CLE requirements and disciplinary authority, as well as be required to follow local rules of professional responsibility. *Id.*

U.S. Trade Representative, who represents the United States in GATS negotiations, to seek a commitment from other GATS Members to accord U.S. lawyers the same treatment in foreign jurisdictions that U.S. jurisdictions give to lawyers authorized to practice under the Model Rule for Foreign Legal Consultants in the U.S.[286] While each nation's "requests" of other GATS Members are classified, the U.S. Trade Representative has made available a declassified summary of its legal services requests.[287]

### *F. ABA Commission on Ethics 20/20: Foreign Lawyers and In-House Counsel*

The ABA Commission on Ethics 20/20 was created in 2009 with a charter to study the impact of globalization and technology on legal practice and regulation.[288] Having studied the state of the non-uniform rules regulating the cross-border practice of law, the Commission presented proposed revisions to the ABA Model Rules of Professional Conduct at the meeting of the ABA House of Delegates in Chicago in the winter of 2013.[289]

The culmination of the Commission's work is an amended ABA Model Rule 5.5. Under the proposed rule, Model Rule 5.5 would provide for both temporary practice by foreign lawyers and limited practice authorization for foreign in-house council.[290] The Commission, recognizing that the demand for cross-border legal practice had been on a steady rise since the ABA adopted

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286. Am. Bar Ass'n, *Model Rule for the Licensing of Legal Consultants*, 2002 A.B.A. SEC. INT'L L. & PRAC. 1, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/silp.pdf.

287. *See GATS Requests by State*, USTR, *available at* http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf.

288. AM. BAR ASS'N, COMM'N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 1-2 (2009), *available at* http://www.abanet.org/ethics2020/outline.pdf.

289. AM. BAR ASS'N, COMM'N ON ETHICS 20/20, RESOLUTION & REPORT: MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL (2013) [hereinafter RESOLUTION & REPORT: MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL].

290. *See* AM. BAR ASS'N COMM'N ON ETHICS 20/20, PROPOSAL—MODEL RULE 5.5 AND FOREIGN LAWYERS 2 (2011) [hereinafter PROPOSAL—MODEL RULE 5.5 AND FOREIGN LAWYERS], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_model_rule_5_5_resolution_report.pdf.

Recommendation 8 and Recommendation 9 in 2002, had set out to integrate the two rules touching on foreign practice—Rule 5.5 and the Model Rule on Foreign Legal Consultants—into a single rule.[291] In the Commission's view, the adoption of a consolidated approach would encourage more state bar regulators to adopt uniform rules easing the cross-border practice of law for both U.S. and foreign-licensed lawyers.[292] The Commission believed the proposal would better equip lawyers to meet the needs of twenty-first century clients, while preserving safeguards for the courts, the profession, and the public.[293] At the ABA 2012 Annual Meeting in Chicago, the Commission decided not to further consider merging the Rules.[294] However, the Commission decided that its final recommendations to the House of Delegates would focus on measures that would make it easier for foreign lawyers to obtain limited authority to practice in U.S. jurisdictions.[295]

In summary, the ABA's efforts to liberalize the cross-border practice of law appear to be in harmony with the U.S. bargaining position in the current round of GATS negotiations. The United States' gradual adoption of the more liberalized rules recommended by the ABA will likely unlock further opportunities for foreign lawyers to practice in the United States. Additionally, this change will create a standard by which the United States can measure progress in its negotiations with foreign nations into whose markets U.S. lawyers seek entry. While U.S. restrictions are gradually lifting, making it easier for foreign lawyers to practice international law or foreign law within U.S. jurisdictions, WTO Members continue to negotiate on a multilateral basis to provide for global standards by which

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291. *Id.* at 4.

292. *Id.*

293. *See id.* at 3-5.

294. Letter from Jamie S. Gorelick & Michael Traynor, *supra* note 285.

295. *See* RESOLUTION & REPORT: MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL (2013), *supra* note 289, at 1; *see also* James Podgers, *ABA Legal Ethics: Ethics 20/20 Recommends Helping Foreign Lawyers to Practice in US, Sidesteps Nonlawyer Ownership*, A.B.A. J., Oct. 2012, at 1, *available at* http://www.abajournal.com/news/article/ethics_20_20_recommends_making_it_easier_for_foreign_lawyers_to_practice_in/ (discussing ABA Ethics 20/20 Commission proposal to amend Model Rule 5.5). The article also confirms that forty-four states have adopted the rule or have similar rules to the amended Rule 5.5. *Id.*

liberalization of cross-border trade in legal services is measured through GATS.

### *G. International Bar Association, Liberalization of Trade and the GATS*

As early as 1998, the IBA engaged the issue of cross-border practice of law as a proponent of liberalization.[296] The IBA signaled its support for liberalization of trade in legal services using either of two approaches.[297] The first approach was the "Full Licensing Approach."[298] This approach supported permitting foreign lawyers to become "fully licensed to practice the law of the host jurisdiction through examination or otherwise."[299] The second approach is known as the "Limited Licensing Approach" and consists of regulating "foreign lawyers as practitioners of foreign law for the limited purpose of permitting them to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host bar . . . ."[300] The IBA articulated its belief that it could achieve four general principles that cut across all lawyer regulation systems by any of its licensing approaches: (1) "the commitment to the independence of lawyers and the legal profession;" (2) "the commitment to preservation of client confidences;" (3) "the prohibition against conflicts of interest in the practice of law;" and (4) "the maintenance of high ethical standards."[301] Additionally, in 2002, the IBA published a handbook on GATS and legal services for its member bar associations.[302] The Handbook stated its primary purpose is to provide background information to IBA Members Bars about the GATS and the ongoing negotiations.[303]

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296. *See, e.g.*, INT'L BAR ASS'N, STATEMENT OF GENERAL PRINCIPLES FOR THE ESTABLISHMENT AND REGULATION OF FOREIGN LAWYERS (1998).

297. *See id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *See generally* INT'L BAR ASS'N, *supra* note 172.

303. *Id.* at 1-2.

## VII. LOBBYING FOR INDIA'S MARKET IN LEGAL SERVICES

India has one of the largest legal markets in the world, and local law firms feel threatened by the influx of foreign lawyers, especially those from developed countries.[304] India is a huge market that presents interesting opportunities for foreign attorneys.[305] India's growing economy has increased demands for lawyers with experience in international and trans-border commercial practice to provide legal services to India's growing multinational corporations, foreign investors, and Indian exporters.[306]

India's long-standing policy on competition in legal services is based on this fact and has the potential of affecting opportunities to build on its growing economy.[307] Critics of India's protectionist behavior view India's policy of regulating legal services trade as a contest between rivals.[308] But India's protectionism has not discouraged countries from lobbying for the expanding market in legal services. Australia's International Legal Advisory Council (ILSAC),[309] lobbying for Australian lawyers interested in providing

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304. *See* Debbie Legall, *Country Focus—Opening Up the Indian Legal Market*, INT'L BAR ASS'N, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3E29B776-5906-4B28-8969-341C5F267C15 (last visited Oct. 26, 2012) (discussing the impact of India's Limited Liability Partnership (LLP) Act passed in December 2008 on liberalization of the legal market).

305. *Id.*

306. INT'L LEGAL SERVS. ADVISORY COUNCIL, SUBMISSION ON LEGAL SERVICES TO THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE IN RESPECT OF AUSTRALIA-INDIAN FREE TRADE AGREEMENT FEASIBILITY STUDY 2 (2008), *available at* http://www.dfat.gov.au/fta/aifta/joint-feasibility-study/ILSAC/ILSAC.pdf.

307. *See* Legall, *supra* note 304.

308. *Id.*

309.

> The ILSAC is an advisory council established by the Australian Government with a mission to enhance the international presence and improve the international performance of Australia's legal and related services. To further this aim, ILSAC undertakes work in four key areas: global legal services and market access; international legal cooperation; international legal education and training; and international commercial dispute resolution.

INT'L LEGAL SERVS. ADVISORY COUNCIL, http://www.ilsac.gov.au/

legal services in India, points to "(i) a few prominent Indian firms currently benefitting from dominating the capture of transnational commercial work through informal arrangements with foreign law firms, and (ii) the close to a million domestic lawyers who have an unfounded fear of foreign lawyers encroaching into their areas of practice" as protectionist elements influencing India's trade policy in legal services.[310] The ILSAC also points to the "strong opposition from significant stakeholders, including the Bar Council of India and Indian law firms, who anticipate facing competition once the market is opened to foreign firms" as creating barriers to entry into India's legal market.[311] The ILSAC argues that expanding India's legal advisory services will foster mutual benefits for Australia and India's economies.[312] ILSAC's view aligns with others who also argue that the "opening up of India's legal market [to foreign lawyers] will help the Indian legal market to mature."[313] But, leading lawyers in India do not agree. According to Lalit Bhasin, liberalization efforts may bring "no benefits at all—on the contrary they would interfere with [India's] system of administration of justice."[314]

The ABA[315] has also lobbied for U.S. lawyers to practice in India's market through the U.S. Trade Representative in Washington, D.C.[316] Since 2002, the ABA's House of Delegates has adopted several resolutions that advocate for U.S. lawyers to practice in India and other countries.[317] The ABA has urged the U.S. government to

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Pages/default.aspx (last visited Oct. 26, 2012).

310. INT'L LEGAL SERVS. ADVISORY COUNCIL *supra* note 306, at 2-3.

311. *Id.* at 3.

312. *Id.* at 4.

313. *See, e.g.*, Legall, *supra* note 304.

314. *Id.*

315. The American Bar Association has close to 400,000 members most of whom are practicing lawyers with law firms located in over 100 countries. *About the American Bar Association*, AMERICAN BAR ASS'N, http://www.americanbar.org/utility/about_the_aba.html (last visited Oct. 26 2012).

316. *See, e.g.*, Letter from Thomas M. Susman, *supra* note 5 ("In 2002, the ABA adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers . . . .).

317. *See generally Am. Bar Ass'n Comm'n on Ethics 20/20*, AMERICAN BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Apr. 6, 2013).

"take steps to ensure that U.S. lawyers have . . . access to the legal services market of its key trading partners."[318] In March 2010, the United States and India signed the Framework for Cooperation on Trade and Investment.[319] The agreement "strengthens bilateral cooperation and seeks to build on recent rapid growth in U.S.-India trade, which has more than doubled over the past five years."[320] Although the agreement did not make reference to market access to

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318. *See* Rhonda McMillion, *ABA Urges Obama Administration to Ask India to Ease Restrictions on Foreign Lawyers*, A.B.A. J. (Jan. 1, 2011), http://www.abajournal.com/magazine/article/aba_urges_obama_administration_india_ease_restrictions_on_foreign_lawyers/. In 2005, the ABA requested the then Acting U.S. Trade Representative, Ambassador Peter F. Allgeier, to request countries members of the GATS to provide U.S. "lawyers with the ability to render legal services in the manner set forth in the . . . 1993 ABA Model Rule for Licensing of Legal Consultants," citing Japan, Brazil, China, Mexico, India and Indonesia as countries that possess de jure or de facto barriers with respect to partnership requirements that are more restrictive. Letter from Robert J. Grey, Jr., President, Am. Bar Ass'n, to Peter F. Allgeier, Acting U.S. Trade Representative (Mar. 29, 2005) (on file with author). In a letter dated November 3, 2010, ABA President, Stephen N. Zack, urged U.S. President Obama to seek reciprocity of treatment of U.S. lawyers by India's government and the Bar Council that allows U.S. lawyers to travel to India on an "in and out basis" to advise American clients about U.S. law without registration in India. Letter from Stephen N. Zack, President, Am. Bar Ass'n, to Barack Obama, U.S. President (Nov. 3, 2010) [hereinafter Letter from Stephen N. Zack to President Obama], *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/intlaw/2010nov3_ltrtopresident.authcheckdam.pdf. A similar letter was sent by the ABA to the Chairman of the Bar Council of India, on January 2011. Letter from Stephen N. Zack, President, Am. Bar Ass'n, to Gopal Subramaniam, Chairman, Bar Council of India (Jan. 25, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011jan25_indiabar_o.authcheckdam.pdf. On July 28, 2011, the ABA President requested the Secretary of State to urge the India government to adopt rules and regulations that are consistent with the ABA's Foreign Legal Consultant Rule. Letter from Stephen N. Zack, President, Am. Bar Ass'n, to Hillary Clinton, U.S. Sec'y of State (July 28, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011jul28_clinton_1.authcheckdam.pdf.

319. United States – India Trade Policy Forum: Framework for Cooperation on Trade and Investment, U.S.-India, Mar. 17, 2010, *available at* http://www.ustr.gov/webfm_send/1724.

320. Press Release, Office of the U.S. Trade Representative, U.S. and India Sign Framework for Cooperation on Trade and Investment (Mar. 17, 2010), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2010/march/united-states-and-india-sign-framework-cooperation-t.

legal services, the ABA communication of November 3, 2010 to the White House warned that the overwhelming obstacles created by the Government of India and the Bar Council could have serious consequences to the desired increase in U.S.-India trade relations contemplated under the agreement.[321] It is evident that there has been tension between the two countries on market access for legal services. It is important to note that ABA letters to U.S. government representatives cite law firms' parties to India High Court judgments practice by foreign law firms in India.[322]

## VIII. INDIA'S PROTECTIONISM AND THE VIRTUES OF TRADE

India's position has not changed since the *Balaji* judgment. There are several reasons indicated in that case that show why India is reluctant to open its legal market to foreign lawyers. Some of the reasons include the demand for reciprocity.[323] The petitioner stated that graduates from India are not allowed to practice the profession of law in the United Kingdom, the United States, Australia and several other countries without the requirement of a professional examination.[324] The petitioner referred to Section 47 of the Act, asserting that it requires reciprocity between India and other countries that allow Indian lawyers to practice the profession of law.[325] Reciprocity is part of the solution to a negotiated access to legal

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321. Letter from Stephen N. Zack to President Obama, *supra* note 318.

322. *See, e.g.*, *id.*

323. Balaji v. Gov't of India, Writ Petition No. 5614 of 2010, paras. 6, 8-10 (Madras H.C. Dec. 21, 2012).

324. *Id.*

325. *Id.* para. 2. Section 47 of the Act states:

> Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practicing the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practice the profession of law in India.
>
> Subject to the provisions of sub-section (1), the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognised for the purpose of admission as an advocate under the Act.

Advocates Act, No. 25 of 1961, INDIA CODE (1961), *available at* http://indiacode.nic.in/.

services for U.S. lawyers in India. As with other countries, access to any legal market requires bilateral agreement between the two countries. The ABA and the Bar Council of India have to continue to work together to arrive at a solution for lawyers in both countries. Section 24 of the Act gives the Bar Council of India the authority to recognize law degrees obtained from other universities outside India and to enroll such qualified lawyers to the practice of law.[326]

Another reason for the restriction contained in the *Balaji* judgment is foreign lawyers treat the profession of law "as a trade or a business for earning money," and do not carry out their conduct with intent to serve the social cause of the society.[327] The accusation on foreign lawyers did not expand further on the difference between a trade, business, and a noble profession. However, one issue that arises is that it seems to recognize the need for access to justice by the Indian society and suggests that foreign lawyers should contribute to providing justice to the poor in India and not necessarily taking the funds out of India. This is a true statement of the calling of the profession of law. If the needs of the poor may be served through the legal profession, then the profession should be seen as a service and not a business. To further illustrate the need for a service-oriented profession, we can take the example of Apostle Paul's devotion of his life to serve the needs of others while he preached the gospel at the same time. Access to justice can be accomplished when the service is available to as many as need it.

According to Professor Trentmann, "[p]rotectionism is bad for wealth, for democracy and for peace."[328] Good trade policies benefit the society and the economy of a nation and bad trade policies harm the economy of a nation, especially its citizens. Trade policies that are protective of a group of people harm the poorest of any nation. So do policies that restrict access to justice.

The *Balaji* petition also acknowledged that foreign lawyers who practice in India without enrollment are not restricted by the same rules and regulations as Indian lawyers. The petition contends that

326. *Id.* § 24.

327. *Balaji*, Writ Petition No. 5614 of 2010, para. 2(d).

328. Frank Trentmann, *The Forgotten Virtues of Free Trade*, PROJECT SYNDICATE (Nov. 18, 2008), http://www.project-syndicate.org/commentary/the-forgotten-virtues-of-free-trade (discussing the importance of free trade and fair justice in trade policies).

non-regulation of foreign lawyers could lead to the exploitation of Indian citizens.[329]

## IX. RECOMMENDATION AND CONCLUSION

International trade is as old as humanity. Nations have distinguished themselves and their people by it. Trade breaks barriers for nations and opens the door for wealth and economic growth. King Solomon, who was very rich through God's special wisdom and blessings, was very much involved in international trade to develop his kingdom.[330] It is no doubt that India wants a balanced relationship with the United States and other countries on trade in legal services. While decisions in *Lawyers Collective* and *Balaji* judgments answered questions about the legality of foreign law firms to set up liaison offices in India, they also dealt with the broader question of whether a foreign lawyer is authorized to practice law in India.[331] The decisions also have far greater consequences for U.S. lawyers and lawyers from other countries interested in cross-border trade in legal services. In addition, the decisions have an impact on Indian lawyers who are in partnership with the law firms that have been prohibited from practice of law in India.

India's High Court decisions also have implications for the implementation of the GATS. India's failure to make specific commitments in its Schedule on trade in legal services affects its ability to integrate a major obligation of the GATS in its economic policies.[332]

This article demonstrates the difficulties that face GATS implementation at country levels despite its laudable goals to eliminate barriers to international trade. The realities of India reveal that trade in legal services can be successfully accomplished through continued dialogue and negotiations. Cross-border lawyering requires greater bilateral arrangements between nations. One virtue of trade in

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329. *Balaji*, Writ Petition No. 5614 of 2010, para. 24.

330. 1 *Kings* 10:22 (English Standard Version). "For the king had a fleet of ships of Tarshish at sea with the fleet of Hiram. Once every three years the fleet of ships of Tarshish used to come bringing gold, silver, ivory, apes, and peacocks." *Id.*; *see also* 1 *Kings* 10:28-29.

331. Shankar & Kak, *supra* note 96, at 312-13.

332. *Id.* at 318-19.

legal services is the ability to meet the needs of the poor and expand economic growth in every country. Access to legal markets is access to justice for the poor and vulnerable minorities in a society. Barriers and protectionism lead to negative outcomes while reciprocity will always remain the key to successful trade opportunities.