LEGAL SERVICES AND PROFESSIONAL REGULATION INTERNATIONALLY? AUSTRALIA ABROAD

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I INTRODUCTION

This article provides insight into the emerging global-local and public-private nature of professional regulation. Specifically, it reports on recent cross-border interaction to modify professional regulation involving the recognition of qualifications, rights of practice and discipline and ethics. That interaction reveals how – loosely - the regulation of legal competence and conduct has been drawn into a web of global governance. A particular interest is the prominent role that Australian practitioners and officials have played in both multilateral and bilateral relations.

In characterising the way governance of regulation has gone global, Picciotto describes it as a networked field.[1] The governance of regulation has spilled over national borders, yet it has not moved cleanly upwards into a regime of binding public international law. Global governance lacks a clear regulatory hierarchy. Regulatory relations extend out horizontally as well as vertically and they blur the boundaries between public and private regulators.[2] A variety of normative forms are used to express regulation, including different forms of law. Global governance contains elements of power, order and rationality but it is often constructed through interaction, discourse and compromise.[3] Consequently, its pattern is multi-level, multi-polar and multi-modal; its orientation is progressive and constructivist.[4]

The study finds this largely to be true of legal professional regulation. Competence and conduct have mainly been regulated nationally and often subnationally. Given the business associated with multi-jurisdictional service supply, certain lawyers, supported by their home states, work to see that regulation relaxed. They now have a global frame of reference, the Word Trade Organization ('WTO') General Agreement on Trade in Services ('GATS'), supplemented in some cases by the services chapters of

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1 Sol Picciotto, 'Regulatory Networks and Multi-Level Global Governance' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (2008) 315.

2 Anne-Marie Slaughter, *A New World Order* (2004).

3 For example, Roger King, *The Regulatory State in an Age of Governance: Soft Words and Big Sticks* (2007).

4 In another context, Susan Sell, 'The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions' (2004) 77 *Temple Law Review* 363.

the free trade agreements ('FTAs'). Increasingly, the regulatory issues are discussed in terms of the liberalisation of 'trade in services' and local regulation is placed on the defensive. Yet, local regulation is very detailed and very tenacious. Internationalists must forge coalitions and make cases to influence change. Change strengthens the hand of national governments as well as international lawyers. Furthermore, the international lawyers display some ambivalence towards such change. They see the need to coordinate the regulation of multi-jurisdictional practice, yet they are watchful that local liberalisation does not lead to an international standards regime. They want to retain freedoms from public regulation, national or international.

Within the confines of this article, it is difficult to capture the complex and fluid nature of this governance. Nonetheless, in today's world, it is important to do so — otherwise the picture that is presented will always be incomplete. And that picture should not simply be 'schematic', that is, a chart of all the possible actors and institutions. It should be filled out empirically as far as possible, tracing the actual processes of interaction. Therefore, after giving some structure to the field of governance, the article examines the evidence of two attempts at governing. The first is the multilateral WTO work on disciplines for the domestic regulation of professional services, where Australia, and to a lesser extent the United States ('US') have endeavoured to take a lead with proposals and negotiations. The second is a bilateral United States-Australia initiative to work on liberalising foreign lawyers' rights of practice and recognising qualifications in return for cooperation on disciplinary matters.

These experiences are able to convey a sense that the interactions are intricate and the outcomes are mixed. The trend is essentially towards global governance and the regulation is now often networked. But that does not mean it has converged; sometimes it even fails to be connected. Such findings are significant for the fate of local lawyers and law schools and for the future of international legal practice. They provide insights into the general theory of governance too.

II INTERNATIONAL LEGAL SERVICES

First, it is necessary to ask why the field is both globally and locally defined. How does the supply of legal services give the field transnational or global scope? Markets for legal services have spilled over the boundaries of the local and national jurisdictions, where professional regulation has largely been based. Clients who extend their operations and investments over borders seek assistance, if not with a new *lex mercatoria* (transnational contracts and commercial arbitration), then with multi-jurisdictional law. Lawyers develop services to meet that demand. The pattern to these services is the subject of empirical study now. The study is made more interesting by the fact that supply also affects the nature of the services. Lawyers do not merely respond to client demands, they take the initiative to construct services that appeal to clients who want to operate transnationally.[5]

Certain kinds of lawyers prosper with globalisation. Their services started out quite specialist in terms of the clients involved and the jobs to be done, but now global

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5 For example, Doreen McBarnett, 'Legal Creativity: Law, Capital and Avoidance' in Maureen Cain and Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (1994) 73.

economic activity is extensive. Certain lawyers have enjoyed an advantage because their home country law was often the international choice of law. Increasingly, suppliers need to be able to command economies of scale and scope, if not to provide a full range of service to clients, then at least to be multi-jurisdictional and multi-functional within a particular sector.[6]

The case for the *lex mercatoria* suggests that transnational economic activities have broken free of local ties and the regulation of the nation state. Floating free, clients and their lawyers regulate their own world.[7] Yet, law has to come down to the ground some time and this gives each jurisdiction a point of attachment. States will not entirely defer to transnational arrangements and even contract and arbitration law are subject to jurisdictional differences, regulatory competition and cultural differences. The new *lex mercatoria* shows its limits, when the parties fall out, or the local jurisdiction asserts a public interest;[8] the off-shore survives with the complicity of key national powers.[9]

In these markets for services, supply has to be local as well as global. It should be possible to supply services in local law from a distance, that is, through the cross-border mode of supply such as the fly in, fly out visit ('FIFO') or electronic communication. Clients will also travel to the location of the supplier and indeed clients are attracted to centres where business services are congregated (and not just legal services).[10] Globalisation may mean that markets in some locations, such as the global cities, in particular New York, and regional centres (perhaps Sydney), matter more than others.[11] But in these markets at least, if not more locally again, lawyers need to site some services physically close to major clients, law makers, administrative agencies, local courts and other service providers; it also takes time to get to know local languages, gain access to tacit knowledge and build personal relationships. Recent mapping identifies how international lawyers establish a commercial presence and 'in-source' work to local lawyers in complex and variable relationships; sometimes they need to gain entry to the local profession to operate effectively.[12]

III LOCAL REGULATION

So, regulation has a geography in which local regulation retains some hold over supply. While the contours of professional regulation are well known, it is useful to present them from the perspective of the foreign supplier seeking access to a local jurisdiction. In doing so, the article will give Australian and US examples of this kind

6 Wendy Becker, Miriam Herman, Peter Samuelson and Allen Webb, 'Lawyers Get Down to Business' (2001) 2 *McKinsey Quarterly* 45. Under this system, certain US and UK firms have become very large international practices.

7 Gunther Teubner (ed), *Global Law without a State?* (1997).

8 Richard Applebaum, William Felstiner and Volkmar Gessner (eds), *Rules and Networks: The Legal Culture of Global Business* (2001).

9 Angus Cameron and Ronen Palan, *The Imagined Economies of Globalization* (2004).

10 Saskia Sassen, *The Global City: New York, London, Tokyo* (2nd ed, 2002).

11 William Henderson and Arthur Alderson, 'The Changing Economic Geography of Large U.S. Law Firms', Paper Presented at the Meeting of Canadian and United States Law and Society Associations, Montreal, May 2008.

12 Carole Silver, 'Local Matters: Internationalizing Strategies for U.S. Law Firms' (2007) 14 *Indiana Journal of Global Legal Studies* 67; Sida Lieu, 'Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market' (2008) 42 *Law and Society Review* 771.

of regulation. Both the US and Australia have been active in multilateral negotiations and it is with Australian-US bilateral relations that this study ends. It is appreciated that they are countries with much in common. Across the countries of the WTO, regulation varies considerably and global governance becomes more demanding.

A Qualifying for the local profession

The core of regulation is the areas of practice reserved to members of the local profession. The greater the areas reserved, the more important the conditions for entry into the profession.[13] In some countries, such as the People's Republic of China ('PRC'), only nationals may gain entry to the profession.[14] In other countries, the educational and training qualifications for admission have become the key requirements.[15] To gain admission, foreigners need to study locally; the alternative is to seek recognition for home qualifications, if that option is available.[16]

In the Australian states, for example, admission depends on covering, within any law degree at any of the university law schools, the areas of legal knowledge prescribed by the state supreme courts, together with some practical legal training. The admitting authorities may give foreign lawyers credit for home qualifications, on a case by case basis, especially to lawyers from other 'common law countries'.[17] Still, such qualified lawyers have been required to complete local law subjects. The Australian states only give admission without further requirement to those qualified in the other states and, interestingly, in New Zealand.

In the US states, applicants must complete a three year JD at an American Bar Association ('ABA') accredited law school if they are to sit the state bar examination. These requirements are set by the state appellate courts. Waiver is informal but, currently, it is reported that fourteen states are prepared to modify the full three year requirement on a case by case basis for foreigners, some, it is said, readily.[18] No state

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13 If law is not central to state or market power, affairs are ordered and disputes resolved in other ways, then the monopoly of the legal profession will not be so significant; see Yves Dezalay and Bryant Garth, *The Internationalisation of the Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (2002). True in Japan, for instance, for many years, though lawyers have been influential in other roles.

14 Richard Guo, 'Piercing the Veil of China's Legal Market: Will the GATS Make the China More Accessible for US Law Firms?' (2002) 13 *Indiana International and Comparative Law Review* 147; Chris Arup, 'Experimenting with Regulation: Liberalisation of Professional Services in the People's Republic of China' (2006) 8 *Australian Journal of Asian Law* 1.

15 Organisation for Economic Co-operation and Development, *International Trade in Services: Assessing Barriers and Encouraging Reform* (1997).

16 The EC member countries are probably the most advanced down this track with the 1988 Directive on Mutual Recognition of Diplomas and the 1999 Home Title Directive. For evaluation, see Irina Katsirea and Anne Ruff, 'Free Movement of Law Students and Lawyers in the EU: A Comparison of English, German and Greek Legislation' (2005) 12 *International Journal of the Legal Profession* 367.

17 Law Council of Australia, *Foreign Lawyers and the Practise of Foreign Law in Australia: An Information Paper* (2008) <http://www.lawcouncil.asn.au/shadomx/apps/fms/msdownload.cfm?file_uuid=314C0D0B-1C23-CACD-2253-F19A22E78A87&siteName=lca> at 28 September 2009.

18 See Law Council of Australia, *LCA Brief, US Opportunities for Australian Lawyers* (2007) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8B6E3BD8-1C23-CACD-2205-4909377D55F6&siteName=lca>

recognises foreign degrees for the purpose of giving direct access to the bar examination or the right to practise. Indeed, the US states do not give mutual recognition to qualified lawyers from other states within the country; the District of Columbia is an exception.

B Limited licences

Admission to the local profession meets obstacles everywhere and certain countries, such as France,[19] make this the only form of the practice of law that is possible. Some WTO members grant a limited licence to practise foreign law. They include the US and Australia on a state by state basis. Based on home country expertise, this licence is easier to obtain, yet it is a limited licence, the scope of the lawyer's activities is confined. For instance, advice on third country law or international law may be an activity reserved to the local profession. The foreign lawyer is usually barred from representing clients in the local courts, even if foreign law is involved; maybe the courts are given the discretion to hear an individual practitioner. A variable concession is participation in commercial arbitration proceedings that are being conducted in the host country.[20] In some countries, foreign lawyers may only advise home country clients, though that restriction is disappearing.

The interest of the exporting lawyers is obvious, but why would the host country wish to give access to such foreign practitioners? Some countries prefer to rely entirely on local lawyers. The outward looking regulator may intend to make the foreign lawyers' expertise available as a way of attracting international business activity to the location or, more directly, to cultivate an international legal services centre. There will be opportunities for locals to provide complementary and supporting services. They will also benefit from skills transfer. Local lawyers will learn about additional areas of law, improve their techniques of 'lawyering', and be exposed to higher standards of practice management.

Yet, local interests do not want to see foreigner lawyers dominating the local profession, taking the best work and employing the best talent. A broader regulatory concern, at least in some countries, is the possible challenge to local institutions. It is thought that the foreign lawyers may import methods inimical to local styles of doing business or resolving disputes. They may be the agent to open up insider industry-government dealing or give locals a readier conduit to offshore financial opportunities. Thus restrictions are not just for the protection of local lawyers, they reveal broader economic, political and cultural preferences. They may signify suspicion of private lawyers generally, not just foreign lawyers.

Where this access is allowed, the fine grained regulation aims to get the benefit of international services without allowing direct competition with local providers. Restricting the foreigner's scope of activities is the main way to do so. However, in the legal sector, restrictions extend to the nature of associations with member of the local profession. Licensed foreign lawyers may be required to refer any matters of local host

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at 28 September 2009. For example, New York State will give recognition on the basis of a one year local masters degree.

19 Lucien Karpik, *French Lawyers: A Study in Collective Action, 1274 to 1994* (Nora Scott trans, 1999) [trans of: *Les Avocats entre l'État, le Marché et le Public 1274 -1994*].

20 It has, eg, been a sensitive issue in Japan, see Chris Arup, *The World Trade Organization Knowledge Agreements* (2nd ed, 2008) 256.

country law to local practitioners or to take their counsel before advising clients. Locals may employ foreign lawyers but, at the same time, foreigners are prohibited from going into partnership with or employing locals. So, if the foreign lawyers want to combine with locals, rather than operate a stand-alone office, they find the arrangements are complicated to make.

These restrictions are complemented by the restrictions placed on the business structures for the practice of law. If local legal professionals were able to practise law through multi-disciplinary partnerships ('MDPs') or from corporations supplying legal services, the foreign lawyers could associate with the locals without undergoing professional regulation. In most countries, the opposition to the liberalisation of business structures has remained strong, citing the threat to the professional's independence and the confidentiality of the relationship with the client, though sometimes it might be motivated by fear of competition from different types of lawyers and other professionals.

In Australia, the limited licence, to practise foreign law, is offered by all states. The Australian government has been promoting liberalisation. Variations still remain, notably two of the smaller states have been more restrictive regarding the foreigners' associations with local lawyers. Yet, beginning with New South Wales, the bigger Australian states have been front runners in making the MDP and corporate forms available to house the practice of law. This legislation permits registered foreign lawyers (and non-lawyers) to be partners and directors in these new business structures.[21] Floating the company on the stock exchange, as Slater and Gordon has done, opens up the ownership further.

In the US, the foreign legal consultant ('FLC') rule is now established in 29 states. The national body, the ABA has promulgated a model rule for some time. The scope of activities and conditions of establishment vary in detail between the states; so too the extent of association with local practitioners.[22] Some states do allow foreigners to partner with or employ local practitioners. In the US, the MDP has been vigorously debated. The professional associations, including the ABA, have remained opposed.[23]

C Professional responsibility

On admission to the local profession, the lawyer will be subject to all the professional requirements, including those of conduct and ethics. Where foreigners obtain a limited license, they are generally made subject to the local host rules of professional conduct too. The need to secure adherence to these professional standards, for the protection of clients, colleagues, courts and other legal bodies, is a reason why foreigners are not allowed to practise at all. It can also be a reason why foreigners are required to establish a commercial presence and observe residency periods, while temporary or FIFO modes of supply are not permitted. Some local professional regulation says that a presence is the only way the foreigner may operate with due respect for local clients,

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21 For example, see *Legal Profession Act 2004* (Vic), s 2.8.7.

22 The variations are examined in Carole Silver, 'Regulatory Mismatch in the International Market for Legal Services' (2003) 23 *Northwestern Journal of International Law and Business* 487; for the latest details, see *United States Initial Services Offer*, WTO Doc TN/S/O/USA (2003) (Initial Services Offer - Communication from the US) .

23 Bryant Garth, 'Introduction: Multidisciplinary Practice after Enron: Eliminating a Competitor but not the Competition' (2004) 29 *Law and Social Inquiry* 591.

colleagues, and institutions. Another version is a bar on local citizens taking legal services from abroad, say cross-border electronically or by travel to the supplier's site. However, the access to these kind of services is extremely hard to control.[24]

If lawyers are to provide services from off-shore or make temporary visits, the host countries will really have to rely on them showing a record of practice and good standing in their home countries. Some host countries already apply this requirement. They would feel reassured if the authorities in the home countries were prepared to cooperate in cross-border disciplinary action, starting with the exchange of information.[25] However, cooperation is not just a practical, logistical matter; how the loyalties or responsibilities of the lawyer are characterised will vary. A key is how the interests of the client are to be balanced with the administration of justice and relations with colleagues and the courts, maybe the government too.[26]

Cooperation is also complicated by the number and variety of regulators. In Australia, responsibility for lawyer ethics and discipline is shared. State governments, universities, public boards, professional associations, tribunals and courts are involved, as well as the lawyers and firms themselves. In recent years, there has been a move away from regulation by the professional associations to public oversight through the operation of statutory commissions.[27] The state supreme courts still exert considerable influence over standards at the point of admitting or disbarring individual practitioners. In the US, lawyer discipline rests with the state appellate courts, though they liaise with the bar associations, and the national ABA is active in developing model rules for professional conduct, including multi-jurisdictional practice.

IV WTO GATS MULTILATERAL GOVERNANCE

Transnational suppliers have sought assistance from sympathetic governments to gain access to the legal services markets of other countries. Much of this access has been negotiated on a bilateral reciprocal basis, country to country, where suppliers hold a particular interest. However, a new layer was added in 1995 with the establishment of a multilateral trade in services treaty, the GATS.[28]

A GATS track one — liberalisation

The GATS placed the topic of services supply within a framework of trade liberalisation. It also applies a particular legal frame, some would say rather arcane,

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24 A new issue has been the outsourcing of certain tasks, eg, by US firms to Indian services — does this involve the practice of law? See Adam Sechooler, 'Globalization, Inequality, and the Legal Services Industry' (2008) 15 *International Journal of the Legal Profession* 231.

25 Laurel Terry, Carole Silver, Ellyn Rosen, Carol Needham, Robert Lutz and Peter Ehrenhaft, 'Transnational Legal Practice (International Legal Developments in Review)' (2008) 42 *International Lawyer* 833, 850.

26 Mary Daly and Roger Goebel (eds), *Rights, Liabilities and Ethics in International Legal Practice* (1995).

27 Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347.

28 *Marrakesh Agreement Establishing the World Trade Organization Annex 1 B General Agreement on Trade in Services*, opened for signature 15 April 1994 1867 UNTS 3 (entered into force 1 January 1995).

that begins to give its own shape to regulation.[29] Yet, that frame is light. The GATS contains very few direct requirements to liberalise. Instead, it sets in train a process, whereby member governments may negotiate commitments to liberalise. They are meant to work towards two goals: (a) to give foreign suppliers no less favourable treatment than locals (national treatment) and (b) to open up service sectors to more competition generally (market access). Member governments may choose not to put legal services into negotiations at all. Or they may decide only to negotiate commitments within a service sub-sector, such as foreign law.[30]

Once a government decides to negotiate, the process has followed an iterative request and offer pattern. Once a service sector is 'exposed' to the GATS, the onus falls on the host state to enter, within its schedule of commitments, any limitations on national treatment that it wishes to retain.[31] The same is true of market access, at least for the 'quantitative limitations' it wishes to retain, which the GATS identifies in art XVII to be numerical limits, for instance on the number of suppliers, restrictions on the choice of legal entity/business structures, and limits on the extent of foreign equity. These entries in the schedules can be quite detailed; the US lists its limitations state by state.

While the Uruguay Round reaped few new commitments in the sectors they exposed to the GATS, members can now only extend their commitments; they cannot tighten up or add to their limitations once again. Legal arguments could arise, about the extent of the member's commitments, but there has been very little litigation of the provisions of the GATS and nothing regarding legal services. So, for those countries that did take part, the GATS establishes a floor, and subsequent negotiations target quite specific restrictions.[32]

Both the US and Australia have made commitments under the cover of the GATS. In the Uruguay Round, the US exposed to the GATS two sub-sectors, both 'the practise of law as and through a qualified US lawyer' and 'consultancy on law of the jurisdiction where the supplier is qualified as a lawyer'.[33] Though the Australian states do give foreigners some access to the local legal profession, the Australian Government decided it would only include the practice of home country law (the limited licence model) within its schedule of commitments.[34]

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29 Some scholars attribute a major role to law in shaping globalization, see Terrence Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norms and National Lawmaking in the Globalization of Corporate insolvency Regimes' (2007) 112 *American Journal of Sociology* 1135.

30 For information on the commitments that member countries made in 1995, see Council for Trade in Services, Legal Services, *Background Note by the Secretariat*, WTO Doc S/C/W/43 (1998) .

31 Working Party of the Trade Committee, Trade Directorate, OECD, *Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services*, OECD Trade Policy Working Paper No 2, TD/TC/WP(2003)40/FINAL (2004) (written by Massimo Grosso).

32 Some member countries, largely developing countries, still have not been prepared to enter negotiations at all, eg, India.

33 *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, WTO Doc GATS/SC/90, (1994) (United States – Schedule of Commitments).

34 *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, WTO Doc GATS/SC/6, 94-1005 (1994), (Australia – Schedule of Commitments).

The second round of negotiations for liberalisation was commenced in 2000. Requests and offers have been made; in some cases the offers have been revised. Both the US and Australia have made offers.[35] The WTO leadership has been concerned about the conservatism of the offers, and several procedural devices have been tried to encourage progress, such as fixing modalities for making commitments, drawing up lists of jobs to do, and convening meetings of groups of members together (plurilateral meetings). At the same time, the GATS negotiations have been folded into the overall WTO Doha Round, where they now seem dependent on the outcome of negotiations in other sectors such as agriculture. These negotiations are now called GATS Track One.

B GATS track two — domestic regulation

Where members have made commitments, the GATS provides some exceptions on which the members may rely to excuse certain nonconforming regulation. The exceptions that seem most relevant to professional regulation are for measures that further the regulatory objectives of national security, public morality, the protection of health and life, tax collection, and securing compliance with local laws including laws for the prevention of fraudulent and deceptive practices and the protection of privacy of individuals. In deciding whether measures fit the exceptions, methods are scrutinised as well as objectives: the measures taken must be considered 'necessary' to the furtherance of these regulatory objectives.

More generally, given the GATS approach to the listing of commitments, said to be a negative listings approach, each member can choose to maintain measures that do not conform to the goals or norms of national treatment and market access. The GATS accepts that members will continue to regulate domestically. Indeed, to encourage them to enter into commitments, members have been reassured that they have the 'right to regulate'.[36] Offsetting this discretion to regulate, the GATS applies certain requirements or 'disciplines' to the members' domestic regulation.

Thus, to further the transparency of such measures, art III requires members to publish, promptly, all relevant measures of general application which pertain to or affect the operation of the Agreement. Then the GATS applies administrative law style standards to domestic regulation. Article VI.1 requires members to ensure, in sectors where specific commitments have been made, that measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Article VI.2 requires members to maintain or institute judicial, arbitral or administrative tribunals or procedures for prompt review of decisions affecting trade in services. Article VI.6 requires members, in sectors where specific commitments have been made, to provide for adequate procedures to verify the competence of professionals of other members.

In relation to qualification and licensing requirements, the so-called 'qualitative limitations', the GATS approach is something more than global administrative law. It

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35 WTO Doc, above n 22; *Australia Conditional Revised Offer*, WTO Doc TN/S/O/AUS/Rev.1, 05-2204 (2005) (Revised Services Offer - Communication from Australia).

36 See principally the preamble to the *Marrakesh Agreement Establishing the World Trade Organization Annex 1 B General Agreement on Trade in Services*, opened for signature 15 April 1994 1867 UNTS 3 (entered into force 1 January 1995). The point was reaffirmed in *Ministerial Declaration*: *Annexes*, WTO Doc WT/MIN(05)/DEC (2005) (Declaration from the Hong Kong Ministerial Meeting).

makes demands of a substantive nature on this regulation. Under art VI.4, the Council for Trade in Services ('the Council') has been charged to develop disciplines to ensure that such measures do not constitute unnecessary barriers to trade (a 'necessity' test again). In particular, those disciplines are to ensure that the requirements: (a) are based on objective and transparent criteria, such as competence and the ability to supply the service; (b) are no more burdensome than necessary to ensure the quality of the services; and (c) in the case of licensing procedures are not themselves a restriction on the supply of a service. Should the Council develop these WTO disciplines, it seems they may apply to all the relevant domestic regulation of the members, not just the regulation in the sectors or sub-sectors in which they have made commitments.[37]

The GATS also contains a provision regarding recognition (art VII). It allows for members to recognise the education or experience obtained, requirements met, or licenses or certifications granted in other countries. It can be seen that the article is encouraging liberalisation, yet it also expresses a concern that the recognition is placed on a multilateral, non-discriminatory basis. As well as ensuring opportunities that third countries can join agreements on recognition, it exhorts the members to work in cooperation with relevant intergovernmental and non-governmental organisations towards common standards for recognition *and* for the practice of services, trades and professions. A footnote to art VII specifies that these organisations must be international bodies whose membership is open to the relevant bodies of at least all members of the WTO.

On commencement of the operation of the GATS, the Council began its work on disciplines with the accountancy sector and rapidly produced two documents — concerning Guidelines for the Recognition of Qualifications and Disciplines on Domestic Regulation.[38] The Council took the view it should, in these documents, identify certain legitimate objectives for domestic regulation. Then it should indicate the kinds of requirements that would have the least restrictive effect on trade in meeting them. For example, the Disciplines nominate as legitimate objectives for accountancy regulation, the protection of consumers, quality of service, professional competence and the integrity of the profession. Regarding the choice of measures, they urge members to consider measures less restrictive than a residency requirement for supply of a service. Requirements relating to qualifications should take account of qualifications acquired in the accountants' home territory on the basis of equivalence in education, expertise and/or examination requirements.[39]

C Legal sector disciplines?

After adopting the accounting disciplines, the Council turned to other professional services sectors, considering whether to formulate generic disciplines that cover all sectors or disciplines that are sector–specific. The accountancy disciplines attracted criticism, so the Council had to think strategically about who to involve in the work. WTO negotiations are conducted by representatives of national trade ministries, while

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37 Markus Krajewski, *National Regulation and Trade Liberalization in Services* (2003).

38 *Guidelines for Recognition of Qualifications in the Accountancy Sector,* WTO Doc PRESS/73, 97-2279 (1997) (Press Release Regarding Adoption of Guidelines by the WTO); *Disciplines on Domestic Regulation in the Accounting Sector*, WTO Doc S/L/64, 98-5140 (1998) (Regulations Adopted by the Council for the Trade in Services on 14 December 1998).

39 This approach echoes the *Council Directive (EC) No 89/48/EEC of 21 December 1998 on a General System for the Recognition of Higher–Education Diplomas* [1988] OJL 19, 16.

professional services are mainly regulated, as noted above, by domestically oriented and quite possibly subnational ministries such as justice and by the professional associations themselves.

A study by Woll and Artigas identifies a general shift at the national level away from protectionist politics and towards regulatory trade policy.[40] There are still local suppliers who lobby domestic politics for protection from competition. However, industry–government alliances form to push for market access in institutionalised arenas like the WTO. They couple the bid for access with agreement to regulatory reform. Industry's technical expertise is combined with government's policy options to shape the new trade regulation. Where professional regulation is still largely subnational and private, these elements are actually pushing for more national coordination in order to present a unified international outlook. To overcome the vagaries of local politics, these elements may favour the legalisation of commitments to liberalisation.[41] In the case of legal services, this outward looking perspective coincides with state regulation to modernise legal practice, to make it more responsive the need of business and consumers. The state re-regulates to stimulate more competitive practices within the sector, opens out structures to get more business involvement, and gives consumers representation in complaints and discipline systems.[42]

In other words, the coordination is achieved at the national level and it is carried over into the international arena. However, this trend does not seem to be borne out by the experience with the WTO disciplines. The WTO Secretariat did see the need to involve the functional regulators and professional associations in deliberations, if further commitments and disciplines were to be obtained.[43] Members were encouraged to consult domestically with stakeholders and to include functional regulators in the delegations they sent to participate in WTO deliberations. But this approach proved problematic.

In some countries, the sheer number of regulators makes coordination difficult. If anything, the new regulation has a tendency to add to the variety of regulators rather than to merge them. In the US and Australia, as federal systems, the states have constitutional powers over regulation. Even Australia, with only six states, has had trouble obtaining full agreement from the smaller states, which feel they have the least to gain from internationalisation.[44] Why make major changes all for the sake of the

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40 Cornelia Woll and Alvaro Artigas, 'When Trade Liberalisation Turns into Regulatory Reform: The Impact of Business-Government Relations in International Trade Politics' (2007) 1 *Regulation and Governance* 121.

41 See Nitsan Chorev, *Remaking US Trade Policy: From Protectionism to Globalization* (2007).

42 See King discussing the UK reforms: King, above n 3, ch 8. He places Australia in this category too.

43 *Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services*, WTO Doc JOB(05)280 (2005): ('there is a need for domestic coordination between trade ministries and regulating agencies, so that the eventual disciplines do not overly impinge on regulatory autonomy and are in keeping with the objectives of the GATS'). The drafts are not published by the WTO, but they can be viewed through an ABA website, see ABA, Center for Professional Responsibility, *Track 2 of the GATS* <http://www.abanet.org/cpr/gats/track_two.html> at 11 October 2009.

44 The Commonwealth Government is now contemplating legislation based on the constitutional corporations power to overcome State differences; see Attorney-General's Department 'Legal Profession Reform to Strengthen Australian Economy' (Press Release, 3

small layer that is multi-jurisdictional? It was an argument about regulatory expertise too. After the accountancy work, such functional regulators expressed concern that WTO disciplines might override their discretion to shape standards for professional qualifications and conduct.[45] Those standards can be tacit within local relationships in the profession and the courts. So, with their different perspectives, the functional regulators seemed to complicate discussions at the WTO.

The WTO Secretariat also contemplated consulting directly with professional associations. This approach became caught up in a general issue at the WTO about the role of global civil society. Member governments have been very wary of any moves to dilute their authority to make decisions, not the least the smaller and developing nations which feel that the private–public regulatory networks might fix arrangements to which they have not contributed.[46]

In line with the GATS footnote to art VII, member governments insisted that the list of professional associations be limited to international organisations that were open to the relevant bodies of all the members of the WTO, not bodies that were purely regional for example. Members would need to consult with domestic associations themselves individually and then inform the WTO of their soundings. The Canadian and US governments also cautioned that direct consultations with international professional organisations should not cause misunderstandings.[47]

If the WTO's communications were inhibited, the process was a catalyst for the professional associations to extend their own conversation regarding core principles. The International Bar Association ('IBA') pushed ahead strongly. After the commencement of the GATS and the series of conferences the Organisation for Economic Co-operation and Development ('OECD') ran to promote liberalisation, a forum was convened. The Paris Forum was organised by the ABA section of the IBA, together with the Council of Bars and Law Societies of Europe ('CCBE') and Japanese Federation of Bar Associations ('JFBA'), around the theme of the transnational practice for the legal profession.[48] The Law Council of Australia ('LCA') sent a delegation to this conference.

While the Forum produced no resolution, the WTO and OECD interventions stimulated the IBA to think hard about the regulation that should survive any liberalisation. Its subsequent deliberative meetings produced the Core Values Resolutions in 1998 and 2001, the IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers ('the Statement') in 1998, and the IBA Standards and Criteria for the Recognition of Professional Qualifications of

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February 2009); further Alex Boxsell, 'State A-Gs to Lose Regulatory Control', *Australian Financial Review* (Sydney), 6 February 2009, 24.

45 Sydney Cone, 'Legal Services and the Doha Round Dilemma' (2007) 41 *Journal of World Trade* 245.

46 See Gkoutzinis regarding WTO adoption of the prudential regulation recommendations of the central bankers' network, the Basel Committee: Apostolos Gkoutzinis, 'International Trade in Banking Services and the Role of the WTO' (2005) 39 *International Lawyer* 877.

47 See Laurel Terry, 'Lawyers, GATS and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolution' (2004) 22 *Penn State International Law Review* 695, 708, fn 34. An academic lawyer, Laurel Terry is also able to report from the 'inside' as an IBA and ABA committee member.

48 Ibid 723.

Lawyers (' the Standards') in 2001. These statements have been followed, in 2006, by an IBA set of General Principles for the Legal Profession signed by over 100 bar association presidents.[49]

Yet, for an association with such a diverse membership, the going was not easy. On the issue of the foreign lawyer's practice rights, the 1998 Statement trod a fine line. It seemed to say that both admission to the profession and the limited licence were acceptable options. The first is problematic for those countries that maintain a nationality requirement. But the second is objectionable to those countries that say nothing less than integration in the local profession is appropriate.

Likewise, on the issue of recognition of qualifications, the 2001 Standards first make mention of considerations that it believes are unique to the legal profession. They include the special role of the legal profession, the heterogeneity of substantive knowledge and the (often subnational) regulatory structure of the profession. These considerations put a brake on recognition. The Standards then recommend that, apart from these considerations, recognition should be tailored to the specific regime in the host jurisdiction. Thus, as the appropriate standards and criteria for recognition, the Standards identify home jurisdiction regulation and discipline, character and fitness, education and/or practical training, and professional experience.

The 2001 Standards also reveal concern about the GATS art VII preference for recognition to be multilateral. It says that where the licence includes the right to practise the law of the host jurisdiction, then the similarity of the two legal systems is in fact a legitimate criterion for deciding whether to recognise home qualifications or not.[50]

More recently, with development of a skills transfer resolution, the IBA is playing a more facilitative part. Yet, not surprisingly, given the variety of bar associations, this coordination effort has encountered resistance too. The skills transfer resolution was debated through five meetings before being adopted in Buenos Aires in 2008. The resolution sweetens the pill of market access for foreign lawyers in host jurisdictions with an obligation to impart skills to the local lawyers. It is not certain all jurisdictions will value these skills, especially if they are not confined to the technical. Diplomatically, the resolution balks at recommending a form of association between foreign and local lawyers, that is, the right of foreign firms to employ and partner with local lawyers.[51]

D The IBA communication to the WTO — regulation with freedom

It was to take the WTO three years to agree on the contents of an official consultation letter and a list of professional organisations to which to send it. When the IBA finally

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49 The texts of these various resolutions can be viewed through the IBA, *IBA Resolutions* <http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx> at 11 October 2009. For background, see Laurel Terry, 'U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives' (2005) 4 *Washington University Global Studies Law Review* 463.

50 This has remained an issue in the EC with the Home Title Directive, see Katsirea and Ruff, above n 16.

51 IBA, *Resolution of the IBA Council on transfer of skills and liberalization of trade in legal services* (2008) <http://www.ibanet.org/PPID/Constituent/Legl_Profession_World_Orgs/WTO_Working_Group/Default.aspx> at 11 October 2009.

received the letter from the WTO in 2003, it convened another forum. Forty-nine bar associations spanning six continents were involved. The forum formulated a set of amendments to the accountancy sector disciplines that might make them appropriate for the legal sector. At its annual meeting in San Francisco that year, the IBA Council approved the Communication to the WTO on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector (' the Communication'). This Communication is particularly instructive for the ambivalence it reveals about the governance of regulation.

In the Communication, the IBA again argued that the legal profession has special attributes and that it could not be regarded as just another service sector. Using the Accountancy Disciplines as a starting point, it sought to include a statement that stressed the social role of the legal profession in protecting rights and the rule of law and the integrity of the legal system. The IBA also engaged the objectives of regulation. Regulations should be 'designed and administered in a manner which promotes the interests of clients and facilitates the delivery of services to the fullest extent practicable, consistent with the protection of the public in the host jurisdiction, the maintenance of professional standards, and the independence of the legal profession of the host jurisdiction'.[52] The legitimate objectives for such regulation should include: the protection of the independence of the profession, the protection of client confidentiality and the professional secret, the avoidance of conflicts of interest and the integrity of the profession.

The IBA was concerned that the application of the GATS' necessity test would narrow the kind of measures that could be employed to further these objectives. It wished to make it clear that, for the legal profession, ethical rules and rules of professional conduct form an essential part of qualification and licensing requirements. At the time, the liberalisation of business structures was a particularly sensitive point. The ABA, CCBE, JFBA and the Canadian Bar Association ('CBA') were apprehensive that the allowance for MDPs in certain countries (such as Australia) could be used to argue that the traditional limitations on business structure were not necessary to achieve regulatory objectives.[53]

E International regulatory coordination?

In these responses to the GATS, it is evident that the IBA is seeking to build a framework that will enable liberalisation to be furthered in a manner consistent with the core values of a liberal profession. The IBA's response reveals ambivalence to regulation. It wants to see the liberalisation of practice rights, yet it supports the right of the WTO member governments to regulate. At the same time, the principles it is promoting stress independence from the state and freedom for self-regulation.

It is worth remembering that there are states among the members of the WTO that do not accept the independence of a legal profession and its role as an intermediary between the state and the market or civil society. This attitude to a liberal profession is part of the hostility to the rule of law. Even the physical safety of the lawyer is under threat. Nonetheless, some governments have become concerned how economic

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52 IBA, *Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector* (2003) <http://www.ibanet.org> at 11 October 2009.

53 Terry, above n 47, 714, fn 60.

liberalism and global circulation undermine their competence to regulate activities like money laundering, corruption, tax evasion and financial volatility. In these processes, professional intermediaries are seen as conduits or, in the words of the Bank for International Settlements Financial Action Task Force, as 'gate-keepers'.[54]

Consequently, some governments have sought to apply checks, placing responsibilities on professionals within corporate governance, anti-trust and financial transactions laws. However, disclosure and reporting requirements cut across the lawyer's code of ethics and particularly the professional relationship with the client. The confidentiality and privilege of the client's communications with its lawyers are reinforced by general protections regarding bank secrecy and information privacy. In liberal capitalist societies, it is a serious step to override these protections.[55]

Governments face challenges even if they are given scope to regulate. Where borders are porous, the 'right to regulate' locally, the permission to apply national measures, gives only so much support to government. Once service flows are liberalised (transport, communications and finance as well as law), it becomes difficult to regulate effectively from any one jurisdiction. On this view, professionals are legitimate subjects of international regulation; they can be active devising means to avoid national regulation.[56]

In theory, the international coordination of regulation might include agreement on core responsibilities and cooperation between authorities on lawyer discipline. The professional associations have tended to resist these added social responsibilities. When new international regulation challenges the outer limits of client confidentiality and professional privilege, the professional associations are protective. In some European Union member countries, the national bar associations have opposed the implementation of the money laundering directives and the CCBE has counselled less haste on the third directive.[57] The US Securities and Exchange Commission took criticism of the Sarbanes-Oxley Act from within the US, and from other countries such as Australia, including from the LCA, when it was evident that the legislation would have extraterritorial reach. When the Financial Action Task Force put out its 'Forty Recommendations', the bar associations issued a joint statement raising objections to the proposals.[58] And, in all this, it should be said that these are the responsible associations; absent from these conversations are the practitioners who are operating in the outlying areas of financial transactions between the borders of regulation.[59]

Meanwhile, the work on the WTO professional services disciplines has been folded into the Doha Round and become GATS Track 2. The WTO continues to report good progress among the members on developing disciplines. The discussions have

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54 OECD, Financial Action Task Force on Money Laundering, *Review of the FATF Forty Recommendations* Consultation Paper (2002).

55 In Australia, one issue is whether the privilege extended to communications with foreign lawyers, see *Kennedy v Wallace* [2004] FCA 332 (Unreported, 25 March 2004).

56 John Braithwaite, *Markets in Vice, Markets in Virtue* (2005).

57 Robert Lutz, Philip von Mehren, Laurel Terry, Peter Ehrenhaft, Carole Silver, Clifford Hendel, Jonathan Goldsmith and Masahiro Shimojo, 'Transnational Legal Practice Developments' (2005) 39 *International Lawyer* 619, 626.

58 Terry et al, above n 25, 846. For the Recommendations, see: http://www.fatf-gafi.org/dataoecd/32/3/34046414.pdf.

59 For example, William Brittain-Catlin, *Offshore: The Dark Side of the Global Economy* (2005).

gravitated towards disciplines for domestic qualification and licensing requirements generally, horizontal disciplines, rather than disciplines specific to the legal service sector. The drafts concentrate heavily on procedure rather than substance, especially on the transparency of regulation. This position is now favoured by the US amongst others.[60]

V UNITED STATES-AUSTRALIA BILATERAL GOVERNANCE

A The partners' regulatory trade policies

With multilateral governance failing to connect, could activity shift elsewhere within the circuits of the network? The theory would anticipate a certain amount of forum shifting in search of more favourable regulation, some of it cooperative and some competitive.

US positions

While the local professions in many states of the US remain conservative, internationalists at the ABA have been working to advance liberalisation, both through the WTO where regarded as desirable and through other routes such as FTAs and civil society associations. The ABA has established a taskforce on international trade in legal services.[61] In 1994, the ABA circulated a model rule for licensing FLCs; the rule was updated in 2006. Through the taskforce, the ABA has made a series of recommendations to the Office of the United States Trade Representative ('USTR') regarding the negotiating position it should take both on the GATS and on the FTAs it has been pursuing. They include recommendations regarding legal practice rights for outbound US lawyers in other countries, inbound FLCs, and temporary practice for foreign lawyers inbound to the US.

The USTR has consulted regularly with the ABA and the ABA has a representative on its Industry Trade Advisory Committee. Again, the connection is not complete. The USTR takes its own course, and often its negotiating position is confidential until after the event. Yet the USTR itself must be mindful of local reservations. The USTR was prepared to put the US legal services market into the Uruguay Round GATS negotiations; it was interested in gaining access for its exporters to foreign markets such as in Japan.[62] However, its bargaining position was constrained by its own states. Likewise, the USTR's offer in the post-2000 GATS negotiations essentially updates the positions of the various states.

Beginning with the NAFTA treaty, the US FTAs have generally contained chapters on trade in services. They tend to adopt the approach of the GATS, embodying basic principles and norms and creating a process for making commitments to liberalisation.

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60 See, eg, Working Party on Domestic Regulation, *Room Document, Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4* (2008) ABA <http://www.abanet.org/cpr/gats/track_two.html> at 11 October 2009.

61 On these committees and delegations, ABA practitioners combine with academic experts, the same experts who write informatively about regulation, such as Bob Lutz (Southwestern University), Carole Silver (Northwestern/Georgetown University) and Laurel Terry (Penn State University).

62 Richard Self, 'Legal Services and the Emergence of a Service Economy: Considerations' in Linda Elliot (ed), *Michigan Yearbook of International Legal Studies: Issues of Transnational Legal Practice* (1985) 269.

The US FTAs include agreements with Jordan, Singapore, Chile and Australia; agreements with Columbia, Peru, South Korea and Panama are currently seeking Congressional approval.[63] In several respects, these FTAs are 'GATS-plus'. For example, the Australia-US FTA ('AUSFTA') includes a provision for 'non-establishment'.[64] That is, unless they schedule a specific limitation, the partner governments may not insist that suppliers establish a commercial presence; the suppliers are entitled to temporary entry. Overall, AUSFTA takes what is called a positive rather than negative approach to listing limitations, that is, the governments are bound fully to national treatment and market access except to the extent they have entered reservations.[65]

The ABA has supported the USTR efforts to develop transparency disciplines for domestic regulation at the WTO. Its recommendation also supports the USTR's participation in the development of additional disciplines on domestic regulation that are necessary within the meaning of GATS artVI.4. The proviso is that they 'do not unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States'.[66] The Conference of Chief Justices adopted a resolution urging the ABA to strike out the word 'unreasonably' before acting on its recommendation.[67]

On the strength of a special commission, the ABA has developed its own model code of conduct for multi-jurisdictional practice.[68] Drawing on input from foreign bar associations, the code relates to the practice both of US and foreign lawyers. The ABA also has model rules for lawyer disciplinary enforcement. Initiatives have been taken 'to facilitate lawyer discipline cooperation and perhaps to develop a model protocol with the CCBE and with professional regulators in Australia'.[69] The IBA is one forum for its views but the ABA also works directly with its counterparts.

Australian positions

The Department of Foreign Affairs and Trade ('DFAT') conducts the Australian Government's trade negotiations. On legal services, it receives advice from a number of sources, including the International Legal Services Advisory Council ('ILSAC'), which is attached to another government department, the Attorney-General's Department.

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63 Details of FTAs at USTR, *Free Trade Agreements* <http://www.ustr.gov/trade-agreements/free-trade-agreements > at 11 October 2009.

64 *AUSFTA*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005),, Chapter Ten: Cross-Border Trade in Services, art 10.5 .

65 Chris Arup, 'Services and Investment in the Free Trade Agreements: Liberalization, Regulation and Law' in Ross Buckley, Vai Lo and Laurence Boulle (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008).

66 ABA, Center for Professional Responsibility, Standing Committee on Professional Discipline et al, 'Recommendation and Report', (2006) ,.

67 Conference of Chief Justices, *Resolution 5 Regarding the Proposed Recommendation Pending Before the House of Delegates of the American Bar Association on the Legal Services Portion of the General Agreement on Trade in Services (GATS)*, (2006) <http://ccj.ncsc.dni.us/IndependenceofStateJudicialSystems/resol5GATS.html> at 10 October 2009.

68 Now known as the ABA Center for Professional Responisbility, *ABA Model Rule for the Licensing and Practice of Foreign Consultants* (2006) <http://www.abanet.org/cpr/mjp/FLC.pdf> at 15 November 2009.

69 Terry et al, above n 25, 850.

ILSAC is largely comprised of partners from the large commercial law firms that do legal business overseas.[70]

The LCA, the peak body and counterpart to the ABA, gives support to the Government's liberalisation initiatives. The LCA is not represented directly on ILSAC. Its secretariat is in Canberra and it works with government departments from time to time, though it is also a lobby and at times an external critic of government (for example regarding its anti-terrorism laws). In its own endeavours, it too must work with the state law societies. In the state societies, a divide has been growing between the small local practitioners, who make up the bulk of the membership, and the very large firms that are national and international in outlook. The LCA has to be mindful of the wishes of the large firms, lest they consider severing their connections with the professional associations.

The Australian Government has been prominent in the GATS negotiations. Recently, Australia established and chaired within the WTO the Friends of Legal Services group and the plurilateral meetings to discuss legal services commitments. Earlier in the round, it has put a proposal for a sub-classification of legal services. Such classifications, it argued, would give member governments greater clarity about the activities they were exposing to the agreement and more confidence perhaps about making commitments.[71] Australia's own negotiating position has continued to focus on the limited licence. The scope of the foreign lawyer's activities should be extended from home country law to third country and public international law; it should also include participation in proceedings other than court, such as arbitration. Australia now requests that no limitations be placed on the number and type of voluntary commercial association between foreign and local lawyers, including fee sharing arrangements and employment of locals by foreigners.[72]

The Australian Government has conducted a number of legal services 'missions' to countries in the Asian region. They have obtained recognition for the law degrees of some Australian schools. Like the US, it has been seeking to include services chapters in the FTAs it is now pursuing. It has bilateral agreements so far with Thailand, Singapore, and as noted the US. Though progress is slow, it is endeavouring to negotiate agreements with Malaysia, Japan and the PRC and it is undertaking feasibility studies with South Korea and India.[73]

The Australian Government has also put forward a proposal regarding disciplines. In a 2005 Communication, it was Australia that took up the amendments the IBA had advocated to the WTO and so they have now entered the WTO as the position of a

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70 See ILSAC, *ILSAC Membership* (2007) <http://www.ilsac.gov.au/www/ilsac/ilsac.nsf/Page/Membership> at 10 October 2009.

71 *Negotiating Proposal: Legal Services Classification, Supplement*, WTO Doc S/CSS/W/67/Suppl.2, S/CSC/W/32 (2002) (Negotiating Proposal - Communication from Australia).

72 Now see DFAT, *Plurilateral Request from Australia, Draft #1* (2006) <http://www.dfat.gov.au/trade/negotiations/services/requests_cosponsored.html> at 10 October 2009.

73 For the current status of the negotiations, see the DFAT, *Free Trade Agreements* <http://www.dfat.gov.au/trade/ftas.html> at 10 October 2009.

member country.[74] The Australian Government also used this opportunity to put quite detailed proposals regarding the manner of regulation that needs to be applied. Those proposals aim to minimise the burden of regulation but at the same time to ensure that ethics and discipline are respected. The proposals were also controversial among the countries that insist on full integration within the profession, because, like the classification proposals, they took the limited licence access route to be a legitimate option.[75]

The LCA is an organisational member of the IBA. The internationalists from the LCA have attended IBA meetings for many years and several have had senior positions in the IBA.[76] The LCA has supported IBA Resolutions, for example in 2006 it took up the Resolution on Core Principles, but of course it is not alone in this respect. Similarly, Australian lawyers also regularly attend ABA meetings and a number have become members of its Center for Professional Responsibility.

B The 2006 bilateral initiative

The AUSFTA did not produce any further commitments to liberalisation. In relation to legal services, the US 'saved' all the nonconforming measures of its states. It also claimed all the limitations that art VII allows – the market access obligation applying only to the quantitative limitations listed there and not to qualitative limitations.[77] However, AUSFTA's legacy was a working group to facilitate development of mutually acceptable standards and criteria for licensing and certification of professional service suppliers. In May 2006, supported by briefing papers, representatives from the US and Australia met in Washington DC to initiate the group. The Australian delegation combined officers from DFAT, ILSAC, the LCA and the Council of Australian Law Deans ('CALD').[78] The US delegation was similarly constituted, the ABA performing a coordination role.[79]

Australian access to the US

The development of access was to be two-way. In the one direction, the initiative sought more liberal access rights for Australian lawyers in key US States. These rights were to be practice rights as a FLC and on a temporary FIFO basis. The second string was greater recognition for Australian law degrees, giving Australian lawyers readier

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74 *Development of Disciplines on Domestic Regulation in the Legal and Engineering Sectors,* WTO Doc S/WPDR/W/34 (2005) (Communication from Australia to the WTO Working Party on Domestic Regulation).

75 See subsequently the more agnostic proposal: *Joint Statement on Legal Services*, WTO Doc TN/S/W/37, S/CSC/W/46 (2005) (Communication from Australia and other countries to the WTO Council for Trade in Services, Special Session, Committee on Specific Commitments).

76 In particular, Russell Miller, a partner in Minter Ellison.

77 *AUSFTA*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005), Non-Conforming Measures (Services and Investment), Annex 1, Schedule of the United States-12 and Annex II, Schedule of the United States-8.

78 LCA, International Law Section, *Annual Report 2005-2006*, (2006) 6 < http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8B6D2F78-1C23-CACD-2251-4C17FD1ECCD2&siteName=lca> at 10 October 2009. The Law Deans were Michael Coper (Australian National University) and Michael Crommelin (University of Melbourne).

79 Terry et al, above n 25, 848.

access to the state bar examinations and practice as a US lawyer. At the same time, if liberalisation proceeded, the parties were to discuss lawyer discipline cooperation.

A single national level meeting was not enough. In July-August 2006, accompanied by ABA personnel, two LCA Presidents,[80] together with a partner in a large commercial law firm,[81] attended the Conference of Chief Justices ('CCJ') at their annual meeting in Indiana. In February 2007, the CCJ was to adopt two resolutions.[82] One encouraged state bar regulators to consider allowing Australian lawyers to sit for state bar associations (given their common law ties). The second urged the ABA to consider developing and implementing a program to certify the quality of the legal education offered by universities in other common law countries.[83]

The Chief Justice of the Delaware Supreme Court, representatives of the Delaware Board of Examiners, together with a representative from the State Bar of California, visited Australia for a legal services round table and the annual meeting of the LCA in March 2007. In May 2007, the LCA President, Tim Bugg, together with officers from DFAT and the Attorney-General's Department, visited four states, Delaware, Georgia, New York and California; they were accompanied by a party from the ABA.[84]

So far this initiative has produced several liberalisations. The most immediate was the US Government making temporary visas readily available to Australians. In October 2007, the Delaware Supreme Court made provision, for the first time, for the FLC right of practice as well as for temporary FIFO rights. The Delaware Court was also to consider giving Australian lawyers readier access to the State Bar examination.[85] The discussions with the other states have not borne fruit. The International Lawyer round-up comments: 'although California and New York have not been as responsive to the Australian efforts, discussions continue with both those states'.[86] California and New York do already have FLC rules — but they do not allow FIFO visits.[87] They are not among the fourteen states that formally grant direct access

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80 Outgoing President John North (a solicitor from country NSW), now a District Court judge, and incoming President Tim Bugg (a solicitor from Tasmania), now chair of ILSAC.

81 Dr Gordon Hughes, Blake Dawson partner, who has also been President of the LCA and President of Lawasia.

82 Attorney-General's Department, 'Better Access For Australians in the US', (Press Release 040/2007, 1 March 2007). See Conference of Chief Justices, *Resolution 7, Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations* (2007) < http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html> at 10 October 2009.

83 The ABA accredits US law schools. Australia does not at present have a law school accreditation system. Instead, the admitting authorities of the state supreme courts (for example the Council of Legal Education in Victoria) approve subjects that schools wish to offer as part of a law degree leading to qualification for admission to practise. CALD has since begun its own accreditation project, perhaps with the US interest as a catalyst, see: W J Ford, *ALTA Newsletter* (2008) 34 <http://www.cald.asn.au/docs/ALTAEdn2-08.pdf> at 10 October 2009. This will have huge implications for the small new schools. Another possibility might be for an Australian school to seek accreditation directly with the ABA; it is understood the University of Melbourne has considered this connection.

84 Terry et al, above n 25, 848.

85 Ibid 850.

86 Ibid 849.

87 See LCA, above n 18.

to the bar examination, though their current practice is to waive the full local education requirements for some Australian graduates.

How to weight the liberalisation that this painstaking initiative has produced? The US is the biggest single market for the export of Australian legal services. The instigation of the Delaware FLC rule and FIFO rights increases market access. While it is a small state, Delaware is the jurisdiction of choice for company registration in the US, with over half a million corporate entities. The FLC rule does not allow Australian lawyers to practise local Delaware law, but it could make it easier for them to be involved with the local bar, for example in registering companies for Australian investors and operators. In 2006, Rupert Murdoch's News Ltd, the biggest corporate entity in Australia, shifted the place of incorporation of its principal holding company from Australia to Delaware. The FLC presence might also give Australian lawyers closer contact with American corporate clients who want to invest or establish in Australia. Yet, it has to be said, Delaware's strength is quite specialist; New York is much more a service centre and the venue for share and financial securities trading.

For the US lawyers, such synergies may have value in attracting business to the US. Australians are more likely to be allies than major competitors in their local markets. The head of one of the largest Australian firms recognised this fact when he said that the US was too well-serviced by its own firms for his firm to establish there.[88] Still, it remains the case that all the states place restrictions on the foreigner's rights of practice; nearly half do not grant FLC access at all.

Who benefits from direct access to the bar examination? Individual Australian lawyers benefit from gaining access to the bar examination and the local profession's rights of practice. New York is a global centre and some Australians have successful careers there; others bring the skills they have learnt back to Australia.[89] Delaware might offer some useful experience too. For the US firms, Australian lawyers have been good workers. US firms have recruited graduates directly from certain law schools in Australia. Yet, there are advantages, certainly to the US universities, in the Australian graduates completing some legal education within the US. Often, they can work just as effectively in paralegal positions and cheaper too.

US Access to Australia

In promoting a liberal limited licence to foreign law practice, the Australian Government has argued that Australian lawyers, as well as the Australian economy, benefit from foreign lawyers gaining easier access to domestic markets.[90] There will be flow-on benefits for host country practitioners – for example from providing supporting or complementary services in home country law and from international commercial arbitration being conducted in the host country. One spur for this strategy is the campaign to make Sydney a regional arbitration centre. Access will also facilitate the transfer of professional knowledge and skills.

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88 David Hovenden, 'Solving the Chinese Puzzle', *Lawyers Weekly*, No 203, 6 August 2004, 9.

89 See, eg, Kate Gibbs, 'Australian Lawyers to Hit NY Bar', *Lawyers Weekly*, No 187, 16 April 2004, 1.

90 *Negotiating Proposal for Legal Services, Revision*, WTO Doc S/CSS/W/67/Suppl.1/Rev/, 01-3435 (2001) (Communication from Australia to the WTO Council for Trade in Service, Special Session, Committee on Specific Commitments).

In acceding to requests to liberalise inbound services, the Australian Government needs to get the agreement of the states. As noted above, agreement to a national profession is not complete. In particular, the small state South Australia holds reservations about commercial associations between foreign and local lawyers. Yet Australia exports more legal services than it imports and so far only a few US firms have been interested in establishing a presence or merging with a local firm within Australia.[91] The longstanding Baker McKenzie offices are really part of a confederation. A few US firms have established local presences; the biggest development is the Sydney DLA-Phillips Fox office of the US firm DLA-Piper.

Despite its affluence, Australia is a small market and the local firms service it well with lower fees and profit margins than the US firms; the Australian firms are big for a small country and they have proven difficult for a US firm to assimilate despite several serious discussions about mergers. But there is no doubt the US firms are bigger and the new MDP and legal services corporation vehicles will make investment easier. Potentially, that could lead to any sort of business providing legal services to the public. In the way that medical services have been provided by transport and food companies, commercial and household legal services could become part of the business of conglomerates.

This suggests that all the benefits are on the Australian side. Perhaps the US representatives have just been showing the Australians an old-fashioned courtesy? However, it is possible that the Australian firms hold attractions as a connection into Asia and into China in particular. Australian firms have made some inroads setting up representative offices in China. A more sophisticated US strategy might be a kind of triangulation, rather than a merger with or acquisition of Australian firms. Along these lines, the LCA President, Tim Bugg, attended an ABA conference in Hawaii in 2006 on this theme and more recently the LCA was part of an ABA Asia-US Legal Services Summit.[92] Both countries' lawyers are now interested in access to the Indian market, which has been closed to foreigners.[93] The Australian experiment with MDPs and the corporate form also seems to hold some interest as a model for reform of practice internationally.[94]

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91 ILSAC, *International Legal Services Statistics* < http://www.ilsac.gov.au /www/ilsac/ilsac.nsf/Page/RWPD9449DB5F45283E7CA257547002124E4> at 10 October 2009.

92 Terry et al, above n 25, 842.

93 ILSAC, *Submission on Legal Services to DFAT in respect of Australia-India Free Trade Agreement Feasibility Study* (2008) <http://www.ilsac.gov.au /www/agd/rwpattach.nsf/VAP/ (3A6790B96C927794AF1031D9395C5C20)~Australia+-+India+fta+feasibility+study+-ILSAC+submission+on+legal+services.pdf/$file/ Australia+-+India+fta+feasibility+study +-+ILSAC+submission+on+legal+services.pdf> at 10 October 2009. In late 2008, a US party visited India for discussions; an Australian mission is going in September 2009. On strategy, see Robert Sawhney, *Internationalisation for Australian Law Firms* (2009) Lawyers Weekly <http://www.lawyersweekly.com.au/blogs /opinion/archive/2009/07/15/ internationalisation-for-australian-law-firms.aspx> at 10 October 2009.

94 See, eg, the program for the 2009 ABA/Georgetown University Center for the Legal Profession Conference: *The Future is Here: Globalization and the Regulation of the Legal Profession* <http://www.law.georgetown.edu/legalprofession> at 10 October 2009. Steven Mark, NSW Legal Services Commissioner, presented a paper.

In April 2006, following the provision of a paper from ILSAC, the Standing Committee of Attorneys-General ('SCAG') resolved that consistent, uniform and transparent assessment processes in respect of admission of overseas qualified lawyers should apply across all jurisdictions in Australia.[95] To this end, ILSAC would work on a model with the national Law Admissions Consultative Committee ('LACC') and the state and territory admitting authorities, thus with the chief justices of the supreme courts. Already, US lawyers may be employed by Australian firms to practise US law. Few US lawyers seek to enter the local professions; they are likely to be migrants to Australia for family reasons. LACC in fact responded with a lengthy and prescriptive set of guidelines, which the Attorney-General, ILSAC and LCA have all criticised for impeding internationalisation.[96]

Nothing tangible has come so far of the cooperation on discipline.

VI CONCLUSIONS

This study of professional regulation is consistent with the notion of global governance as a loose network – a fluid, fragile mix of levels, actors and norms. While professional regulation is no longer simply local, it has moved only partially to an international level. The GATS provides a frame of reference but it cannot be expected to produce convergence and standardisation. Internationally, the governance network spreads out in several directions — horizontally as well as vertically. Global governance draws in private as well as public regulators and it builds up the influence of national and international bar associations. However, private regulators are already a part of local professional regulation, at least in liberal capitalist societies. The transnational suppliers work to see local restrictions relaxed but they resist the idea of an international regime being put in their place.

Consequently, the network connections are loose. Interaction increases but it is far from institutionalised and there are efforts to keep both local professions and lawyer-clients relations out of global governance. Global conversations are an opportunity for new ideas to be promoted; yet established interests and values are vigorously defended. Tension is most evident in the new high level connections, for example, as we have seen, between the WTO and the IBA; it is evident also in divisions at the national and subnational levels. Fault lines develop in several directions, for example between trade and justice departments, international law firms and small local practitioners, elite and new law schools, and governments and professional associations.

To strengthen connections gradually, the favoured normative forms are soft statements, recommendations and the waiver of requirements; the essential ground

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95 SCAG, *Communiqué* (November 2008) 6 <http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomesSCAG > at 10 October 2009.

96 See James Eyers, 'Push to relax admission rules', *Australian Financial Review* (Melbourne), 3 July 2009, 41. The document is: Law Admissions Consultative Committee, *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession* (2009) LCA <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=30440EFC-1C23-CACD-22AD-FF00728F08CE&siteName=lca> at 10 October 2009; It is reported the LACC has now wound back some of these requirements, see 'Hearsay', *Australian Financial Review*, 25 September 2009, 42.

work is done piecemeal by means of working groups, missions and visits, and personal contacts. It is tempting to assume that legal service supply will simply go global 'over the heads' of the regulators. Yet regulation matters and it will continue to evolve, along various lines, even if it never comes to resolution. Even small countries can continue to have an influence. Just when it looks as if one channel of regulation is closing, another opens up.