

CHAPTER 4: ALL TALK AND NO ACTION: ACCESS TO CANADIAN MARKETS UNDER THE *GENERAL AGREEMENT ON TRADE IN SERVICES*

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With an increase in international trade in services comes the realization that foreign credential recognition within Canada is affected by international agreements, most notably the World Trade Organization (WTO)'s General Agreement on Trade in Services (GATS). Foreign citizens and temporary residents to Canada often come with foreign credentials and work experience, but many are restricted from working in corresponding Canadian occupations. To demonstrate this as well as the impact other international instruments such as free trade agreements and mutual recognition agreements may have on opening the Canadian marketplace to temporary foreign workers, this paper looks to legal services within Canada as an illustrative example.

To ensure that regulated occupations in Canada are accessible to foreign-trained workers:

- *The federal government should work with other WTO Member countries at the Doha Development Round (DDR) to increase the scope of activities enumerated on Canada's schedule under the GATS relating to mode four, or workers temporarily in Canada.*

To guarantee that domestic regulations do not pose unnecessary barriers to labour mobility for sectors listed in WTO Members' schedules of commitments:

- *The Canadian government should work with the Council for Trade in Services under the GATS, with input from the provincial governments and professional bodies, to extend the model of the Accountancy Discipline horizontally across other service sectors.*

To ensure that timely and effective progress is made towards increasing labour mobility for temporary and long-term service providers:

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- *The federal government should work alongside provincial and territorial governments to promote agreements with foreign governments, at both the national and sub-national levels, for the mutual recognition of credentials.*

To ensure that foreign credentials are appropriately assessed and recognized:

- *The federal and provincial governments should encourage professional bodies to negotiate with their foreign counterparts to generate harmonized recognition standards; and*
- *The federal government should strive to keep recognition assessment criteria and related statistics transparent for the Canadian and international public.*

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I. INTRODUCTION

The proverbial example of a foreign-trained brain surgeon who drives a taxicab on arrival in Canada hints at a serious problem currently facing the Canadian public: despite attempts to open them, our markets remain far more restrictive to foreign labour than necessary. While Canada has begun to open its domestic services market, it is not as accessible to foreign-trained workers as it reasonably could be. International instruments such as the mutual recognition agreements, regional trade agreements and the World Trade Organization (WTO)'s agreements, may all help Canada liberalize its labour mobility policies.

High social costs arise from Canada's failure to grant foreign-trained workers fair access to the occupations they studied and practised in their home countries. First, Canada as a whole loses: the economy is artificially constrained, diversity is reduced, innovative transfers are curtailed and consumer choice dwindles. The Organisation for Economic Cooperation and Development (OECD) states that "[overall], the results [of market openness] can be tangibly measured in terms of economic growth, productivity, a higher standard of living, further innovation, stronger institutions and infrastructure, and even promotion of peace."¹ A closed market, in contrast, may not allocate resources economically and does not allow for incremental market adjustments reflecting the true marketplace. Countries that maintain closed markets risk eventual dislocation, or forced market correction with little ability for countries or their leaders to direct or control the correction. These dislocations often come with harsh consequences: closed systems typically crumble under the weight of their own inefficiency. Second, long-term workers face challenges and frustrations relating to relocating, integrating into a new society, and seeking employment in their chosen fields. A Statistics Canada survey from 2005 found that roughly half the skilled workers who immigrated to Canada were employed in their intended occupations.² Examinations and mandatory retraining, some of which may not be strictly needed, pose financial as well as time burdens on newcomers. Short-term workers, however, also face heavy restrictions though they are of a different variety. In most cases, the qualifications of short-term workers must be recognized and approved by the appropriate bodies before arrival or entry will be denied. Difficult and restrictive recognition procedures serve to robustly limit mobility of short-term workers to Canada. This denies these workers an opportunity to broaden their professional experiences and skills in Canadian society.

¹ "Trade and Economic Recovery: Why Open Markets Matter", *Organization for Economic Cooperation and Development* (May 2010) at 3, online: OECD <www.oecd.org>.

² Statistics Canada, *Longitudinal Survey of Immigrants to Canada: Progress and Challenges of New Immigrants in the Workforce*, by Tina Chui & Kelly Tran (Ottawa: StatCan, 13 October 2005) at 6, online: StatCan <<http://www.statcan.gc.ca>>.

The study of foreign credential recognition and granting of market access is no longer confined to domestic norms and practices alone. With growth in international trade and agreements, recognition of foreign qualifications has necessarily and gradually taken on more of an international component. The primary document currently regulating recognition procedures for temporary foreign workers is the WTO's *General Agreement on Trade in Services* (GATS).³ This agreement is global in its scope and, for our purposes, relates exclusively to temporary labour mobility. Continuing to implement the GATS, however, could have significant domestic spill-over effects. Temporary workers might choose to immigrate to Canada or, on return to other countries, encourage other workers to visit or immigrate to Canada following their work-term experience. A broader domestic impact of the GATS stems from the framework it is intended to set up: under the GATS, the federal government is strongly encouraged to work alongside the provincial governments and self-regulating professions to develop principles and methods best-suited for evaluating foreign competencies. With the proper adjustments, these developments could also apply to long-term service workers and immigrants to assist their permanent entry into Canadian regulated professions. The GATS also allows for mutual recognition agreements and trade agreements that affect labour mobility; if these agreements are pursued vigorously by the Canadian government, they could also serve as a valuable tool for increasing short and long-term, as well as permanent, labour mobility.

Appreciating the role of international agreements on labour mobility requires exploring the GATS context and its system of rules as well as recent developments in the area, including the proliferation of regional and bilateral agreements. For the reader's convenience, this article will discuss labour mobility by referencing the legal services sector. The goal of this paper is to set out coherent and plausible recommendations that will encourage temporary and eventually long-term labour mobility in Canada through an appropriate application of the GATS.

II. GATS

The rising importance of "trade in services for the growth and development of the world economy"⁴ prompted a closer look at the service industry during the

³ *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995), being Annex B to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 ILM 1143 (entered into force 1 January 1995) [GATS].

⁴ *Ibid.*, Preamble.

Uruguay Round, which lasted from 1986 until 1993.⁵ To illustrate this importance, services now represent the global economy's fastest growing sector, accounting for one third of the world's employment and almost 20% of international trade.⁶ In recognition of this, the drafters of the *General Agreement on Trade in Services* (GATS) set out to encourage more growth by formulating a regime that called for Members to continually open services markets by reducing trade barriers; this is known as progressive liberalization.⁷⁸ The GATS formally came into effect, along with the World Trade Organization itself, in January 1995.⁹ It was the "first multilateral, legally enforceable agreement covering cross-border trade, investment and movement of producers or consumers in the service sector."¹⁰

The GATS is a government-to-government agreement that applies to all measures by all Members of the WTO. 'Measures by Members' refer to any steps affecting trade in services taken by central, regional, or local governments and authorities.¹¹ The GATS also applies to measures taken by non-governmental bodies through exercised delegated authority, such as self-regulatory professional bodies or law societies.¹² There is, all the same, no private cause of action available for individuals to enforce the trade in services provisions laid down by the GATS.¹³

Most interestingly, the GATS does not define 'services.' Only "services supplied in the exercise of governmental authority," defined as services not supplied in competition or on a commercial basis, are generally exempt from the application of the GATS.¹⁴ The GATS, similarly, does not apply to individuals

⁵ The Uruguay Round was a formidable trade negotiation touching on all forms of trade between 123 countries; its culmination led to the creation of the World Trade Organization. See WTO, *Understanding the WTO – The Uruguay Round*, (Geneva: WTO, 2011), online: WTO <<http://www.wto.org>>; see also WTO, *The General Agreement on Trade in Services: An Introduction*, (Geneva: WTO, 2006) at 2, online: WTO <www.wto.org/english/tratop_e/serv_e/gsintr_e.doc 3776.4>

[WTO, *GATS: An Introduction*]; see also WTO, *A Handbook on the GATS Agreement* (New York: Cambridge University Press, 2005) at 2 [WTO, *A Handbook on the GATS*].

⁶ WTO, *Understanding the WTO—Services: rules for growth and investment* (Geneva: WTO), online: WTO <<http://www.wto.org>>.

⁷ *GATS*, *supra* note 3, Preamble.

⁸ Rafael Leal-Arcas, "The Resumption of the Doha Round and the Future of Services Trade" (2007) 29 *Loy LA Int'l & Comp LJ* 339 at 374 [Leal-Arcas].

⁹ WTO, *A Handbook on the GATS*, *supra* note 5 at 1.

¹⁰ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (Oxford: Oxford University Press, 2007) [Delimatsis] at 85.

¹¹ *GATS*, *supra* note 3, art I: 3(a) (i).

¹² *Ibid*, art I: 3(a) (ii).

¹³ Laurel S Terry, "GATS' Applicability to Transnational Lawyering and its Potential Impact on US State Regulation of Lawyers" (2001) 34 *Vand J Transnat'l L* 989 at 1012-1013 [Terry, "GATS' Applicability"].

¹⁴ *GATS*, *supra* note 3, art I: 3(b) &(c).

looking to permanently join a domestic employment market and it is not to affect measures relating to citizenship or residency, except possibly in a secondary capacity.¹⁵ For the purposes of the GATS, then, what constitutes a service?

The GATS categorizes trade in services under four modes of supply.¹⁶ The modes are classified according to where the service is provided and where the service provider is located. Mode one addresses cross-border supply, where a service is supplied from one territory into any other territory.¹⁷ Mode two is concerned with consumption abroad, where a service is provided in one state to a consumer from another state.¹⁸ Mode three speaks to the commercial presence of a service supplier of one state in the territory of another.¹⁹ Mode four looks at natural persons from one country temporarily in another state offering services. Physical presence, or mode four, is of particular interest to this paper and the broader study of recognizing foreign credentials, though discussion surrounding the GATS does not directly concern or affect immigration or residency policies.²⁰

When it comes to structure, the GATS is a complex system that contains eight annexes, a series of national schedules and various working papers. It recycles many of the central concepts from its predecessor, the *General Agreement on Tariffs and Trade* (GATT),²¹ such as most-favoured-nation, national treatment and transparency. However, the GATS gives its Members more control and greater flexibility in determining how to adopt the agreement.²² In practice, the GATS operates as a hybrid agreement, using a positive list where Members choose which sectors they commit to liberalize, along with a negative list where Members may specifically limit their obligations.²³ Members may make different commitments for each sector, as well as for each mode of supply within each sector.²⁴ In this way, Members may decide the exact degree to which they will liberalize certain sectors.

The rules that are enshrined within the twenty-nine articles of the GATS apply on two distinct levels. One set of rules applies generally to all measures that affect trade in services, subject only to the above listed constraints. The other set is sector-specific and applies only according to positive, voluntary

¹⁵ *Ibid*, art XXIX: Annex on Movement of Natural Persons Supplying Services under the Agreement.

¹⁶ *Ibid*, art I (1) & (2).

¹⁷ *Ibid*, art I: 2(a).

¹⁸ *Ibid*, art I: 2(b).

¹⁹ *Ibid*, art I: 2(c).

²⁰ *Ibid*, art I: 2(d) & XXIX: Annex on Movement of Natural Persons Supplying Services under the Agreement; for a discussion on “temporary”, see text accompanying notes 69 - 72.

²¹ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, Can TS 1947 No 27 (entered into force 1 January 1948) [*GATT 1947*].

²² Delimatsis, *supra* note 10 at 31.

²³ WTO, *A Handbook on the GATS*, *supra* note 5 at 29.

²⁴ Delimatsis, *supra* note 10 at 28.

commitments made by each Member.²⁵ Therefore, the GATS imposes both unconditional and conditional obligations on its Members. With respect to unconditional obligations, member states must meet requirements of most-favoured-nation, transparency, and progressive liberalization, amongst others, to be discussed below in further detail.²⁶ When it comes to specific commitments Members enter into in their schedules, the primary provisions countries must adhere to are obligations regarding national treatment, market access and domestic regulation. A brief overview is contained in Table 1: Overview of the GATS Structure, which can be found below. We shall begin our discussion by looking at some of the unconditional obligations.

²⁵ *Ibid* at 130.

²⁶ *Ibid* at 27.

TABLE 1: OVERVIEW OF THE GATS STRUCTURE		
Unconditional Obligations		
These provisions apply whether or not a Member has made a specific commitment in a given service sector.		
Element or Rule	Article	Description
Most-Favoured Nation	II	A principle of non-discrimination, MFN obliges Members to treat like service suppliers equally, regardless of their country of origin;
Exceptions	II	Initial exemptions were permitted for up to 10 years, subject to negotiation after 5 years;
Opt-Outs	VI	Members may enter into economic agreements with other countries outside of the <i>GATS</i> in order to facilitate trade provided the agreements do not raise the overall barriers to trade;
Economic Integration Agreements	VII	Members may recognize professional qualifications obtained in other countries unilaterally or through an agreement, other Members must be given the opportunity to show their professional standards ought also to be recognized.
Recognition	III	Members must make all measures that pertain to the <i>GATS</i> publicly available; they must also notify the WTO of the introduction of new, or changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by the Members' specific commitments under the <i>GATS</i> ;
Transparency	XIX	A built-in agenda that requires members to enter into successive rounds of negotiation to determine specifically how the <i>GATS</i> will govern trade in services.
Progressive Liberalization	VI: 2	Members must have a way to review administrative decisions affecting trade in services;
Domestic Regulations	VI:4	This provision gives the Council on Trade in Services a mandate to create disciplines so that domestic regulations across various sectors do not pose unnecessary barriers.
Review		
Develop Disciplines		
		Example
		Bulgaria & Singapore, amongst others, exempted legal services
		<i>NAFTA</i> , <i>AUSTEA</i>
		<i>Quebec-France Understanding on the Mutual Recognition of Professional Credentials</i>
		The National Committee on Accreditation (NCA) regularly publishes Policy Guidelines
		The Doha Development Round (DDR)
		See e.g. s. 9 of <i>Ontario's Fair Access to Regulated Professions and Compulsory Trades Act</i> Accountancy Disciplines

Conditional Obligations			
These provisions apply only if a Member has made a specific commitment in a given service sector.			
Element or Rule	Article	Description	Example
Market Access	XVI	Members must provide access to their services markets in a manner that is no less favourable than what is provided in their schedules; any barriers to market access must be specifically provided for in the Member's Schedule of commitments.	Canada may not restrict access to the Canadian legal services market more than is scheduled. Where a Member chooses to remain.
National Treatment	XVII	Domestic and foreign service providers must be treated equally within a market; any derogation from that non-discrimination principle must be specifically scheduled.	Canada's horizontal commitments allow for different treatment of foreign and domestic professionals for tax purposes.
Domestic Regulation			
All measures	VI:1	All measures affecting trade in services must be applied in a reasonable, objective and impartial manner;	The NCA sends a confirmation email within 10 business days of receiving the application and applicants can expect to wait at least 3 months for a decision.
Reasonable time	VI:3	Members must inform applicants to supply services of their decision within a reasonable time;	These standards and procedures are outlined in the NCA's Policy Guidelines.
Qualification requirements	VI:5	Qualification requirements must be based on objective and transparent criteria, they must be no more onerous than necessary and should not restrict trade;	
Awarding recognition	VI:6	Members must have standards and procedures to award recognition.	

A. Unconditional Obligations

1. *Most-Favoured-Nation (MFN)*

The Most-Favoured-Nation (MFN) provision in Article II is a cornerstone of the GATS.²⁷ In essence, MFN is a principle of non-discrimination that obliges each Member to immediately and unconditionally give both services and service suppliers of any other Member “treatment no less favourable than that it accords to like services and service suppliers of any other country”.²⁸ The rule, succinctly, is “favour one, favour all.”²⁹ Preferential treatment, including preference through reciprocal agreements, is prohibited.³⁰ Demanding that the best access conditions given to one country be automatically extended to all Members, by definition, seeks to install a rule-based system that equalizes nations lacking political or economic influence with nations wielding clout.³¹ It is worth noting that MFN does not actually require any degree of market openness.³² Rather, it merely requires that to the extent a Member chooses to provide access to its markets, the same access must be extended equally to all WTO countries.

2. *Exceptions to MFN*

There are three exceptions to MFN: opt-outs, economic integration agreements and recognition.³³

i. Opt-Outs

Opt-outs originate from the formation of the GATS. At that time, or upon accession for acceding countries, Members could choose to seek exemptions to MFN for specific sectors.³⁴ These can be found in the country-specific lists and Schedules. In principle, these exemptions were not to exceed ten years and, after that time, they were to again come under review and be subject to negotiation in the following negotiation round for progressive liberalization.³⁵

ii. Economic Integration Agreements

The second exception arises through Article V, or the economic integration provision, which allows Members to negotiate economic integration agreements

²⁷ WTO, *A Handbook on the GATS*, *supra* note 5 at 8.

²⁸ GATS, *supra* note 3, art II.

²⁹ WTO, *A Handbook on the GATS*, *supra* note 5 at 3 & 27.

³⁰ International Bar Association, *GATS: General Agreement on Trade in Services: A Handbook for International Bar Association Member Bars* (IBA, 2002) at 10, online: IBA <<http://www.ibanet.org>> [IBA, *A Handbook for IBA Member Bars*].

³¹ WTO, *A Handbook on the GATS*, *supra* note 5 at 8.

³² Paul D Paton, “Legal Services and the GATS: Norms as Barriers to Trade” (2003) 9 *New Eng J Int’l & Comp L Ann* 361 at 366 [Paton].

³³ IBA, *A Handbook for IBA Member Bars*, *supra* note 30 at 10.

³⁴ WTO, *A Handbook on the GATS*, *supra* note 5 at 8.

³⁵ GATS, *supra* note 3, art XXIX: Annex on Article II Exemptions, s 6.

that permit preferential treatment.³⁶ To qualify under this provision, such agreements must, among other things, “be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors”.³⁷ Economic integration agreements, also known as free trade agreements (FTAs) or regional trade agreements (RTAs),³⁸ are often referred to as preferential trade agreements (PTAs) under the GATS scheme as the agreements are preferential in nature because they exclusively benefit their signatories.³⁹ NAFTA is an example of such an agreement between the US, Canada, and Mexico.⁴⁰

To create a trade agreement outside of the GATT or the GATS that is exempt from MFN, Members must notify the WTO and give notice of any subsequent changes to the agreement. Members must also make periodic reports.⁴¹ These economic agreements may address a wide range of topics, including recognition of qualifications, investment rules and competition laws.⁴² Like NAFTA, these agreements may also strive for increasingly higher levels of market openness while allowing for greater integration between negotiating parties. Bargaining bilaterally or with a small group of regionally connected nations may be more effective and more fruitful than multilateral negotiations,⁴³ as we shall consider shortly.

iii. Recognition

The last exemption to MFN occurs via the recognition provision of GATS, which permits differential and even preferential treatment of WTO Members. This section allows Members to fully or partially recognize qualifications of foreign service suppliers, either autonomously or through negotiated agreements with other countries, without necessarily extending the same recognition to all

³⁶ GATS, *supra* note 3, art V.

³⁷ *Ibid*, art V: 4.

³⁸ IBA, *A Handbook for IBA Member Bars*, *supra* note 30 at 10.

³⁹ The World Bank, “East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?” by Carsten Fink & Martin Molinuevo in *Trade Issues in East Asia: Liberalization of Trade in Services (East Asia and Pacific Region Poverty Reduction and Economic Management, 2007)* at 5, online: The World Bank <siteresources.worldbank.org> [The World Bank, “Roaring Tigers or Timid Pandas”].

⁴⁰ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

⁴¹ GATS, *supra* note 3, art V: 7.

⁴² Martin Khor, “Bilateral/Regional Free Trade Agreements: An Outline of Elements, Nature and Development Implications”, (paper delivered at the Regional Trade Workshop on Doha and Beyond: Incorporating Human Development into Trade Negotiations, Penang, Malaysia, 17-18 December 2007) at 1 [Khor].

⁴³ The World Bank, “Roaring Tigers or Timid Pandas”, *supra* note 39 at iv.

service suppliers.⁴⁴ Arguably, this recognition article is not actually an exemption to the MFN principle; despite any agreements or unilateral decisions, similar qualifications from different states ought to be treated more or less the same. The GATS orders that all Members not included in a recognition agreement or given preferential treatment under a Member's domestic regime must be afforded adequate opportunities to either negotiate a similar recognition agreement or to demonstrate that "education, experience, licenses, or certifications obtained or requirements met in that ... Member's territory should be recognized."⁴⁵ Standards for recognition must also not be discriminatory or amount to a "disguised restriction on trade in services."⁴⁶ Recognition decisions must thus be based on relevant criteria, such as international standards or, in the case of self-regulating professions, recognition criteria developed by intergovernmental and non-governmental organizations.⁴⁷ Members also have ongoing obligations to notify the WTO about their recognition measures, agreements and subsequent modifications.⁴⁸ This allows the WTO to monitor each Members' procedures and degrees of market openness with respect to recognizing foreign credentials.

Mutual recognition agreements (MRAs) allow individuals to avoid repeating already completed education and training.⁴⁹ These agreements can be very relevant for accredited and regulated professions such as law.⁵⁰ An MRA signifies that the regulatory authority in charge of authorization within a host country accepts, either in whole or in part, the authorization already given by a home country for an individual to act in a particular capacity.⁵¹ Generally, recognition is associated with the terms 'acceptance' and 'equivalency'.⁵² Rarely does this mean that foreign professionals receive automatic or unrestricted access to a host country's market; the host country retains residual powers and, in the case of law especially, there may still be limitations on a foreign professional's access.⁵³

⁴⁴ *GATS*, *supra* note 3, art VII: 1 & 2.

⁴⁵ *Ibid*, art VII: 2.

⁴⁶ *Ibid*, art VII: 3.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*, art VII: 4.

⁴⁹ Simonetta Zarrilli, "Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS" (Paper delivered at the United Nations Conference on Trade and Development, 21 February 2005), UNCTAD/DITC/TNCD/2005/2, at 2-5, online: UNCTAD < http://www.unctad.org/en/docs/ditctncd20052_en.pdf > [Zarrilli].

⁵⁰ *Ibid* at 5.

⁵¹ *Ibid* at 11.

⁵² Canadian Information Centre for International Credentials, *Guide to Terminology in Usage in the Field of Credentials Recognition and Mobility: English Version* (Toronto: CICIC, 2003) at 19, online: CICIC < <http://www.cicic.ca/docs/guide/guide2003.en.pdf> > [CICIC, *Guide to Terminology*].

⁵³ *Ibid* at 16.

While there may be exceptions where recognition is based on trust between regulators and acceptance that there may be multiple ways to achieve competence through a certificate-for-certificate recognition model, in practice recognition is normally based on equivalency between qualifications in the home and host countries. This is complicated by localized rules and regional variations in credentials that require countries to assess visitors' education and work experience. A host country's regulatory objectives are addressed by regulations or requirements already present in its education system; foreign workers must be brought within that context. Recognition is defined within Canada as the "acknowledgement and/or acceptance of prior academic, professional, or vocational training, work experience, or credentials, and the granting of full or partial credit for it or them with respect to entry into an academic institution...or a trade or profession."⁵⁴

Unless a country is bound by a recognition agreement, domestic regulations govern how a foreigner's credentials are assessed. Assessment may occur through tests, examinations or other prescribed activities.⁵⁵ Assessing qualifications in order to grant recognition is often a difficult task that greatly impedes recognition: regionalized standards and divergent systems may be very complex to compare.⁵⁶ This requires looking at "frameworks established to meet different sets of cultural and social circumstances."⁵⁷ The effectiveness of comparing credentials depends on the degree of similarity between the different systems and traditions of the countries involved.⁵⁸ The GATS encourages mutual recognition agreements (MRAs) based on multilaterally agreed criteria to further facilitate this process.⁵⁹ Even with the possibility of forming agreements, global heterogeneity makes recognition across all WTO Members impracticable for a sector such as law because practices are simply too divergent. In other words, it would be more likely that recognition could be achieved in common law Canadian jurisdictions for lawyers from England, as these nations share a common legal tradition and language, in contrast to lawyers from Germany, which shares neither. While full recognition is rare and partial recognition is more common legal credentials from a country such as Sri Lanka, which employs

⁵⁴ Alliance of Credential Evaluation Services of Canada, Canadian Information Centre for International Credentials & Council of Ministers of Education, Canada, *Pan-Canadian Quality Standards in International Evaluation* (Toronto: Council of Ministers of Education, Canada, 2009) at 10, online: CICIC <<http://www.cicic.ca/docs/2009-report-standards-evaluations.en.pdf>> [CICIC, *Pan-Canadian Quality Standards in International Evaluation*].

⁵⁵ *Ibid.*, CICIC, *Guide to Terminology*, *supra* note 52 at 6.

⁵⁶ *Ibid.*

⁵⁷ Shin-yi Peng & Benjamin Y Li, "Facilitating Market Access for Taiwanese Lawyers in China" (2006) 23 UCLA Pac Basin LJ 172 at 193 [Peng & Li].

⁵⁸ *Ibid.*

⁵⁹ *GATS*, *supra* note 3, art VII: 5.

customary, civil and common law, may not be adequately equivalent to common law Canada for full recognition to be granted.

These three MFN exceptions allow Members greater flexibility in determining how they wish to reduce barriers to trade in services. They permit Members to autonomously liberalize outside the GATS framework on a bilateral or regional basis rather than solely at the more cumbersome multilateral level.

3. *Transparency*

Transparency is a fundamental principle of the GATS. It requires Members to promptly publish all relevant measures affecting the Agreement, with limited exceptions. There are exceptions for confidential information that would be prejudicial to legitimate commercial interests, contrary to the public interest, or that would hinder law enforcement if released.⁶⁰ Members are also required to answer any inquiries by other Members and to set up enquiry points to provide information to other Members. Where Members have made specific commitments, they are required to notify the WTO at least once a year of any new rules or changes to existing laws that would affect trade in services of specified sectors.⁶¹

4. *Progressive Liberalization*

Article XIX, the progressive liberalization provision of the GATS, requires Members to participate in successive rounds of negotiations “with a view to achieving a progressively higher level of liberalization.”⁶² This gives Members an opportunity to bargain for increased specific commitments for themselves and other Members. The provision explicitly states that negotiations are to occur five years or less after the GATS came into effect and periodically thereafter.⁶³ Pursuant to this, new services negotiations began in January 2000 and the Doha Development Round (DDR) officially commenced in late 2001, when a comprehensive negotiation agenda was agreed upon.⁶⁴ The DDR was scheduled to conclude no later than 1 January 2005;⁶⁵ however, that deadline was not met and many negotiations continue to be stalled.⁶⁶ This is primarily due to disagreement over agricultural barriers; some Members require substantive agricultural progress before they are willing to move ahead with negotiations in any other sector.⁶⁷

⁶⁰ *Ibid*, art III: 1.

⁶¹ *Ibid*, art III: 4.

⁶² *Ibid*, art XIX: 1.

⁶³ *Ibid*.

⁶⁴ WTO, *A Handbook on the GATS*, *supra* note 5 at 35-36.

⁶⁵ *Ibid* at 36.

⁶⁶ Louise L Hill, “Services as Objects of International Trade: Bartering the Legal Profession” (2006) 39 Vand J Transnat’l L 347 at 357 [Hill].

⁶⁷ Delimatsis, *supra* note 10 at 181.

B. Conditional Obligations

Conditional obligations apply to Members depending on the sectors and respective modes they choose to liberalize in their Schedules of Commitments. A Member's Schedule may contain horizontal commitments, which apply across all services, as well as sector-specific commitments. For specific commitments, first a sector is listed positively in a Member's Schedules, following which a Member may enumerate limitations or conditions respective to each mode of supply.⁶⁸ Such limits may affect obligations known as market access or national treatment and they may have an impact on possible domestic regulations. As such, countries are free to open their markets fully, not at all, or partially depending on their commitments.⁶⁹ Members, while bound to the commitments, may also legally modify their schedules by following the procedures set out in article XXI of the GATS.⁷⁰ There appears to be sufficient international pressure once a commitment has been made, however, not to modify or revoke it except in exceptional cases. To date, only two WTO Members, the EU and the US, have submitted modifications under the GATS framework.⁷¹

Some writers have argued that the market access and national treatment provisions within each Member's Schedules essentially create a "standstill" in that sector. This is because commitments must be met unless a Member chooses to modify its obligations. While Members are obliged to enter into progressive liberalization negotiations no provision specifically requires Members to continually open their service markets; members are only required to negotiate. There is no enforceable rule that a country must persistently make market access less restrictive.⁷² Members could choose to autonomously grant greater access to their service markets, but without reciprocal agreements guaranteeing similar and corresponding access for its citizens elsewhere, this possibility seems somewhat unlikely.⁷³ Strong offers and counter-offers in the negotiations stage could serve as the best impetus for Members to liberalize their respective sectors.

⁶⁸ *Ibid* at 29.

⁶⁹ Gary Hufbauer & Sherry Stephenson, "Services Trade: Past Liberalization and Future Challenges" (2007) 10 J Int'l Econ L 605 at 611 [Hufbauer & Stephenson, "Services Trade"].

⁷⁰ After three years from the time a commitment was made a Member may modify or withdraw its obligations by giving notice to the Council for Trade in Services at least three months before the intended change is to take effect. This allows WTO Members that are affected by the amendment to identify themselves as affected Members and give notice of their possible interest in a compensatory claim. Compensatory adjustments owed to affected countries are then determined through negotiations.

⁷¹ Paul Kruger, "The modification of GATS Schedules", tralac - Trade Law Centre for Southern Africa, (8 June 2010), online: tralac <www.tralac.org>.

⁷² Terry, "GATS' Applicability", *supra* note 13 at 1005.

⁷³ Ryan W Hopkins, "Liberalizing Trade in Legal Services: the GATS, the Accountancy Disciplines, and the Language of Core Values" (2005) 15 Ind Int'l & Comp L Rev 427 at 436 [Hopkins].

1. *Market Access*

Article XVI, the market access provision, requires that where a particular sector is scheduled the Member must provide access to that sector in a manner no less favourable than is set out in its schedule.⁷⁴ Specifically, the market access obligation requires Members to abstain from six forms of trade restrictions unless Members schedule proper limitations. These restrictions include limits on: the number of service suppliers, the value of service transactions, the number of operations or quantity of output, the number of people supplying a service, the type of legal entity or the use of foreign capital.⁷⁵ These limitations would not necessarily be discriminatory against foreign service suppliers and could equally apply to national suppliers.⁷⁶ The question market access asks is not whether domestic providers are favoured, but, more broadly, whether access to the market, under any of the modes, is hampered in any capacity.⁷⁷

2. *National Treatment*

National treatment is covered in Article XVII. It obliges a Member to accord no less favourable treatment to foreign service suppliers “than it accords to its own like...service suppliers.”⁷⁸ National treatment is concerned with operations within a market, whereas market access deals with entry to a market.⁷⁹ Once access to a market has been granted, the national treatment provision states that foreign and domestic service providers must be treated equally.⁸⁰ This equal treatment obligation can be met by providing formally identical treatment or different treatment, whichever does not modify the conditions of competition in favour of domestic service suppliers.⁸¹ Notice, however, that how “like...service suppliers” is defined—and it is not defined within the text itself—could substantially change the impact of this provision.

3. *Domestic Regulation*

Domestic regulations address the qualitative components in a Member’s domestic scheme that affect trade in services.⁸² This typically involves looking at qualification requirements and procedures, technical standards and licensing requirements within the domestic regime.⁸³ Most of these measures are not listed in a Member’s Schedule of commitments, which implies that in order to have a full understanding of the barriers that may face foreign service suppliers, one

⁷⁴ *GATS*, *supra* note 3, art XVI: 1

⁷⁵ *Ibid* at art XVI: 2.

⁷⁶ WTO, *A Handbook on the GATS*, *supra* note 5 at 8.

⁷⁷ IBA, *A Handbook for IBA Member Bars*, *supra* note 30 at 131.

⁷⁸ *GATS*, *supra* note 3, art XVII: 1.

⁷⁹ CICIC, *Pan-Canadian Quality Standards in International Evaluation*, *supra* note 54 at 353.

⁸⁰ WTO, *A Handbook on the GATS*, *supra* note 5 at 8.

⁸¹ *Ibid* at 18.

⁸² Delimatsis, *supra* note 10 at 148.

⁸³ WTO, *A Handbook on the GATS*, *supra* note 5 at 23.

must look beyond the Schedules alone. This undoubtedly complicates the procedure for individuals from other Member countries who wish to practise abroad, and reduces the effectiveness of the GATS. For the purpose of the GATS, the domestic regulation provisions attempt to create a fair playing field for foreign-trained workers wishing to gain entry into a domestic service industry. The domestic regulation provision contains six subsections, four of which apply only to scheduled services.⁸⁴ Subsection one is critical in that it requires Members to ensure that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”⁸⁵ Under subsection three, Members must inform applicants of the status of the decision relating to their applications within a reasonable period of time.⁸⁶ Pending the enactment of more disciplines, which provide guidance for a given sector, Members are limited by subsection five in how they can apply qualifications requirements.⁸⁷ For example, measures related to qualification requirements must be based on objective and transparent criteria, they must be no more onerous than necessary to ensure quality control, and licensing requirements may not restrict the supply of the service.⁸⁸ International standards are used to determine whether these stipulations are met.⁸⁹ The last subsection that applies exclusively to scheduled services, subsection six, specifies that Members who make commitments for professional services must “provide for adequate procedures to verify the competence of professionals of any other Member.”⁹⁰ Therefore, recognition itself is not required, but reasonable steps must be taken to corroborate decisions on granting recognition.

While subsection six was meant to ensure fairness and objectivity in determining recognition, the term “adequate” is not defined within the text. However, in 1995, the Council on Trade in Services set out three objectives for the Working Party on Professional Services (WPPS), one of which was to recommend guidelines for recognizing foreign qualifications.⁹¹ In 1997, the WPPS incorporated their suggestions into the *Accountancy Disciplines*: verification of qualifications on the basis of equivalency of education and/or experience requirements should occur within six months the application’s submission.⁹² Complete or substantial re-qualification may only be required

⁸⁴ See *GATS*, *supra* note 3, art VI: 1, 3, 5 & 6.

⁸⁵ *Ibid*, art VI: 1.

⁸⁶ *Ibid*, art VI: 3.

⁸⁷ *Ibid*, art VI: 5.

⁸⁸ *Ibid*, art VI: 5(a), 4(a), (b) & (c).

⁸⁹ *Ibid*, art VI: 5(b).

⁹⁰ *Ibid*, art VI: 6.

⁹¹ Decision on Professional Services, *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 ILM 1143 (entered into force 1 January 1995) at 415, online: WTO <<http://www.wto.org>>.

⁹² WTO News, Press Releases, Press/118, “WTO adopts disciplines on domestic regulation for the accountancy sector” (14 December 1998) online: WTO News

where it is necessary to meet legitimate policy objectives such as quality of service.⁹³ Where re-qualifications are required, Members must identify what applicants lack.⁹⁴ The *Accountancy Disciplines* give Members some indication of what is expected of them and what is meant by the word ‘adequate.’

The remaining two subsections within Article VI are applicable generally and therefore unconditionally because they apply whether or not a service sector has been scheduled. The first subsection obliges Members to establish a system of administrative review for decisions that affect trade in services.⁹⁵ The second provides the Council on Trade in Services with a mandate to develop any necessary disciplines, or comprehensive rule systems governing each service sector, aimed at ensuring that domestic regulations “do not constitute unnecessary barriers to trade in services.”⁹⁶ Disciplines work towards facilitating entry for foreign workers while at the same time recognizing legitimate objectives that may take precedence over immediate access. Where Members have made specific commitments for a service sector that subsequently comes to be governed by a discipline, those members are then bound by the discipline.⁹⁷ To date, however, the *Accountancy Disciplines* is the first and only discipline and it has yet to come into full effect.⁹⁸ It compels Members who have scheduled the accountancy sector to maintain transparency, consider bilateral and mutual recognition agreements and remove citizenship or nationality requirements, amongst other topics.⁹⁹ Table 2: Highlights from the *Accountancy Disciplines*, below, provides more information about how Member countries ought to approach the accountancy sector. In particular, the *Disciplines* set out standards for how the accountancy profession ought to be regulated; much of this applies generally in order to facilitate access for foreign-trained workers though some aspects, such as qualification requirements, set out how foreign credentials are to

<<http://www.wto.org>> [WTO News, Press/118]; WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, Council for Trade in Services, S/L/64 (17 December 1998), art VII: 22, online: WTO <<http://docsonline.wto.org>> [WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*].

⁹³ Aaditya Mattoo & Deepak Mishra, “Foreign Professionals in the United States: Regulatory Impediments to Trade” (2009) 12 J Int’l Econ L 435 at 455 [Mattoo & Mishra].

⁹⁴ WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, *supra* note 92, art VII: 22.

⁹⁵ *GATS*, *supra* note 3, art VI: 2(a).

⁹⁶ *Ibid*, art VI: 4.

⁹⁷ WTO, Council for Trade in Services, *Legal Services—Background Note by the Secretariat*, WTO Doc WT/S/C/W/43 (1998) at para 66, online: WTO <<http://www.docsonline.wto.org>> [WTO, *Legal Services Background Note*, 1998].

⁹⁸ WTO News, Press/118, *supra* note 92; WTO, *A Handbook on the GATS*, *supra* note 5 at 23 (the *Accountancy Disciplines*, along with any future disciplines created by the WPPS, are to be integrated into the GATS by the end of the Doha Development Round and only then will they become legally binding).

⁹⁹ *Disciplines on Domestic Regulation in the Accountancy Sector*, *supra* note 92, arts 2, 3.1, & 6.1.

be evaluated. Discussions persist about extending the *Accountancy Disciplines* to other service sectors. All Members with commitments have an interest in the outcome of those discussions, as do the service industries themselves. The many stakeholders complicate this process but contribute valuable input to the Council on Trade in Services.¹⁰⁰

While Members may be limited by the domestic regulations they may enact, they nevertheless retain the power to regulate their respective economies for legitimate national policy reasons.¹⁰¹ For the *Accountancy Discipline*, these legitimate reasons include protecting consumers, ensuring quality and competency and preserving the profession's integrity. The goal of the limitations on domestic regulations is to increase transparency, which further improves legal certainty, accountability, legitimacy, and, thereby reduces arbitrariness. However, the limits placed on possible domestic regulations are commensurate with the goal of the GATS, which is not necessarily to promote de-regulation but to increase access in a way that is advantageous to all involved in trade in services.¹⁰²

¹⁰⁰ Aaditya Mattoo & Pierre Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead," in Aaditya Mattoo & Pierre Sauvé, eds, *Domestic Regulation and Service Trade Liberalization* (Washington, DC: World Bank and Oxford University Press, 2003) at 13, online: World Bank <<http://siteresources.worldbank.org>>.

¹⁰¹ *GATS*, *supra* note 3 at preamble; WTO, *A Handbook on the GATS*, *supra* note 5 at 41.

¹⁰² Delimatsis, *supra* note 10 at 162.

TABLE 2: HIGHLIGHTS FROM THE ACCOUNTANCY DISCIPLINES

Element	Article	Description
Purpose	I: 1	Facilitate trade by ensuring domestic regulations are not more trade restrictive than necessary to fulfill "legitimate objectives"
Legitimate Objective	II: 2	<ol style="list-style-type: none"> 1. Protecting consumers 2. Maintaining quality of accountancy services 3. Ensuring professional competency 4. Preserving the integrity of the accountancy profession
Transparency	III: 3-7	Ensure information regarding professional titles, regulated activities, licensing requirements, technical standards, how compliance is monitored, the review procedures for administrative decisions, as well as the names and addresses of licensing authorities, are all publicly; Members must be prepared to give legitimate reasons for any domestic regulations restricting trade
Licensing Requirements & Procedures	IV: 8-13 & V: 14-18	<p>Amongst other requirements, licensing requirements & procedures must:</p> <ul style="list-style-type: none"> • Be pre-established, publicly available and objective; • Be as least restrictive as possible while meeting the Members' legitimate objective; this includes re-considering residency requirements, not demanding unreasonable format requirements and allowing for the least burdensome authorization of documents; • Include only fees that are a reflection of the associated administrative costs and do not pose a burden; • Provide applicants with a decision within a reasonable time, suggested to be within six months; • Allow unsuccessful applicants to receive reasons if they so request.
Qualification Requirements & Procedures	VI: 19-21 & VII: 22-24	<p>Members must:</p> <ul style="list-style-type: none"> • Consider qualifications from within other Member states based on the equivalency of education, experience and/or examinations, giving an answer with a reasonable time, suggested to be 6 months; • Further examinations or qualification requirements must be offered regularly, or at least annually, and relevant to the specific activities for which the applicants seek authorization.
Technical Standards	VIII: 25-26	Develop, enact and use technical standards to fulfill a legitimate objective internationally recognized standards may help determine if this is done

III. LEGAL SERVICES

A. How do Legal Services Fit within the GATS?

Legal services act as an illustrative example of the functioning, failures and challenges facing the GATS system in liberalizing trade in services.

Even the most restrictive definition of “service”¹⁰³ is met by legal services, which thereby fall under the Agreement. Specifically, in the GATS’ optional classification system, legal services are in the “business services” sector and within the further sub-sector of “professional services”.¹⁰⁴ The optional services sector classification system aimed to allow comparisons and on par obligations between Members, and thus was intended to facilitate commitments.¹⁰⁵ The system simplified detailed categories from the United Nations’ Central Product Classification (CPC) and permits recourse to the CPC system if the distilled version is unclear.¹⁰⁶

Despite consensus that the legal profession is a part of the global service industry, a single definition for legal services remains elusive.¹⁰⁷ In the same way that law itself is localized and may vary widely, the role of a legal professional, and thus services offered, may also vary widely.¹⁰⁸ Under the CPC definition, legal services include representational and advisory services in different branches of law, including administrative law, as well as documentation and certification.¹⁰⁹ Note that the administration of justice, or prosecutions, along with the role of the judiciary, is expressly excluded from the GATS because it falls under the article I:3(b) exception as a service supplied under governmental authority.¹¹⁰

¹⁰³ Harvard Law School Center on Lawyers and the Professional Services Industry, *Overview of the Professional Services Industry and the Legal Profession*, by Sean Williams & David Nersessian, (Harvard Law School Center on lawyers and the Professional Services Industry, 2007) at 3, online: Harvard Law School <http://www.law.harvard.edu/programs/plp/pdf/Industry_Report_2007.pdf>.

¹⁰⁴ *Services Sectoral Classification List: Note by the Secretariat*, MTN GNS/W/120 (1991), online: WTO <http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc> [*Services Sectoral Classification List*].

¹⁰⁵ WTO, *A Handbook on the GATS*, *supra* note 5 at 56.

¹⁰⁶ *Ibid* at 57.

¹⁰⁷ Alison Hook, “Sectoral Study on the Impact of Domestic Regulation and Trade in Legal Services” (Paper delivered at the Sixth Services Experts Meeting, OECD & The World Bank, *Domestic Regulation and Trade in Professional Services*, Paris, 15-16 February 2007) at 4, online: OECD <http://www.oecd.org/secure/pdfDocument/0,2834,en_21571361_40531731_40778878_1_1_1_1,00.pdf>.

¹⁰⁸ *Legal Services Background Note*, 1998, *supra* note 97 at para 5.

¹⁰⁹ United Nations Statistics Division, *Classifications Registry: Detailed structure and explanatory notes*, online: UN Stats <<http://unstats.un.org>>; see specifically 8611, 8612, 8613, & 8619.

¹¹⁰ *Legal Services Background Note*, 1998, *supra* note 97 at 4.

This working definition of legal services, however, was over-broad to reflect the realities of international trade in legal services.¹¹¹ Instead, in order to better reflect the degree of market openness in any given country, Members chose to distinguish legal practice not based on the specific *type* of law being practised (family, business or criminal law, for example), but instead based on the *jurisdictional nature* of the service offered. Legal services are categorized into advisory and representational services relating to (a) host country law (the local domestic law), (b) home country law and third country law (the domestic law of other nations where a foreign national is entitled and qualified to practise), and (c) international law. Legal services include (d) legal documentation and certification, along with (e) other advisory and informational services as well.¹¹² International arbitration and mediation have also been considered their own respective categories of practice.¹¹³ Each class of legal service is then further divided into the four modes of supply described above, like all other services and sectors encompassed by the GATS. For further reference as to how these modes apply in the legal sector, see Table 3: Modes of Supply below. A multifaceted, use-based definition, such as is employed for legal services, allows Members a great deal of flexibility in determining licensing and qualification requirements; it enables Members to vary limits for each category of law and each respective mode of supply.¹¹⁴

¹¹¹ *Ibid* at 5.

¹¹² *Ibid*.

¹¹³ Laurel S Terry, "Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions" (2005) 22 Penn St L Rev 695 at 743 [Terry, "Lawyers, GATS, and the WTO Accountancy Disciplines"].

¹¹⁴ IBA, *A Handbook for International Bar Association Member Bars*, *supra* note 30 at 48.

TABLE 3: MODES OF SUPPLY			
Mode of Supply	Description	Where a consumer is from Country A and a service provider is from Country B	Example in legal services
1. Cross Border Supply	The supply of a service from one territory into another territory without physical movement by the consumer or the service supplier	The consumer is at home in Country A; the service provider is at home in Country B	A lawyer in one country provides a legal product or advice to a client in another country, either by mail (physical or electronic) or telephone
2. Consumption Abroad	The supply of a service to a consumer from one state in another state	The consumer is abroad in Country B; the service provider is at home in Country B	A citizen of one country uses the services of a foreign lawyer abroad
3. Commercial Presence	The supply of a service through the establishment or presence of commercial facilities in another country	The consumer is at home in Country A; the service provider is at home in Country B, but the business has been exported into Country A	Foreign lawyers establish a permanent commercial presence in another country, for instance through a branch office
4. Presence of Natural Persons	Persons temporarily travelling to another country to provide services	The consumer is at home in Country A; the service provider is abroad working in Country A	An individual lawyer working abroad

B. Why Liberalize Legal Services and Expand Recognition of Foreign Credentials?

Affording foreign-trained legal professionals a greater opportunity to work within their chosen occupation benefits foreign visitors, and continued liberalization of trade in legal services also benefits the Canadian public, Canadian consumers and the Canadian legal profession.

Economically-speaking, opening the Canadian legal services market to qualified foreign-trained workers makes sense. Services generally are a dynamic division of international trade and their growth has exceeded that of trade in merchandise since the 1980s.¹¹⁵ Likewise, growth in the legal profession has taken on a similarly important economic role and continues to do so.¹¹⁶ There is an increasing worldwide demand for legal services, especially in the realms of business law, international trade and investment.¹¹⁷ Factors such as larger law firms, higher revenues, more outsourcing, increased travel, internationalization of the economy and a desire for “one-stop shopping” have all influenced this growth.¹¹⁸ In 2009, Datamo nitor, an independent data collector, estimated that global legal services accounted for \$581 billion of profits in the 2008 fiscal year, with a predicted annual growth rate of 5%.¹¹⁹ Canada alone experienced 30% growth in exports of legal services from 2001 to 2005.¹²⁰ Predicting the exact size of the Canadian legal services market or declaring the most profitable division of law (host, home, third country or international) or mode of supply in order to facilitate trade exclusively in those areas is nearly impossible: in practice, legal services are not divided by practice areas or modes and instead they may regularly be aggregated in general business costs.¹²¹ The efficiency and ease of arranging international transactions would encourage more international trade deals within Canada, thus encouraging more exportation of Canadian legal services.¹²² Nevertheless, legal services already play an important role in the international and Canadian economies. Any increased access to Canada’s legal services sector would allow Canada to share in those hefty profits through domestic use, increased exports and expanding international transactions.

¹¹⁵ WTO, *A Handbook on the GATS*, *supra* note 5 at 3.

¹¹⁶ Hook, *supra* note 107 at 3.

¹¹⁷ WTO, Council for Trade in Services, *Legal Services Background Note*, WTO Doc WT/S/C/W/318 (2010) at 2, online: WTO <<http://docsonline.wto.org>> [WTO, *Legal Services Background Note*, 2010].

¹¹⁸ Hopkins, *supra* note 73 at 427.

¹¹⁹ WTO, *Legal Services Background Note*, 2010, *supra* note 117 at 4.

¹²⁰ Hook, *supra* note 107 at 9.

¹²¹ WTO, *Legal Services Background Note*, 2010, *supra* note 117 at 11; Williams & Nersessian, *supra* note 103 at 1.

¹²² Michael J Chapman & Paul I Tauber, “Liberalizing International Trade in Legal Services: A proposal for an Annex on Legal Services under the GATS” (1994) 16 Mich J Int’l L 941 at 955-6 [Chapman & Tauber].

Foreign lawyers wishing to work in Canada may be impeded from doing so by recognition difficulties and closed practice areas or restricted modes of supply. The consequences of non-recognition and delayed or prohibited access are surely less drastic for temporary visitors regulated under the GATS than for permanent residents or new immigrants. Some of the hardships will not be so different, however: possible financial hardships, emotional distress and robust roadblocks to practise may discourage and ultimately prevent skilled foreigners from venturing to Canada. Removing these barriers and facilitating recognition encourages more movement while providing viable opportunities for skilled workers wishing to work temporarily within Canada.

One side-effect of open services markets is increased competition between local providers. This results in significant benefits accruing to different stakeholders as it “can help boost growth prospects and enhance welfare.”¹²³ Consumers have the benefit of a larger, more diverse and more competitive market.¹²⁴ Clients are finally provided with alternatives¹²⁵ and benefit from the increased “breadth, depth and quality of legal services” that become available.¹²⁶ Foreign nationals may be able to address market needs and niches that the current Canadian legal landscape does not provide for by offering services that were otherwise unattainable or not readily available. The availability of cost-effective, quality legal advice, be it on domestic, foreign or international law, impacts the potential success of business transactions.

There is also an incentive for domestic lawyers to improve their services¹²⁷ and for domestic law firms to rise to their full potential. Competition between foreign and local lawyers in France, for example, has “encouraged excellence at the French bar”.¹²⁸ National legal institutions and law societies are strengthened and infused by more dynamic practitioners. This encourages Canadian legal practitioners to meet constantly rising standards in the market place, making them more apt and ready to compete on a worldwide scale. A further benefit of liberalization is that foreign professionals who practise in Canada, even short-term, can facilitate transfers of knowledge, sharing innovative techniques and unique perspectives with local practitioners. Even foreign-trained workers who are only in Canada temporarily can make long-lasting and meaningful

¹²³ Bernard Hoekman, “The General Agreement on Trade in Services: Doomed to Fail? Does it Matter?” (2008) 8 *Journal of Industry, Competition and Trade: From Theory to Policy* 295 at 2 [Hoekman, “Doomed to Fail?”].

¹²⁴ Chapman & Tauber, *supra* note 122 at 954.

¹²⁵ *Ibid.*

¹²⁶ Organization for Economic Co-operation and Development, Trade Committee, *Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services*, OECD Working Paper No 2, by Massimo Geloso Grosso, TD/TC/WP(2003)40/FINAL (14 June 2004) at 19, online: OECD <<http://www.oecd.org>> [OECD, *Managing Request-Offer Negotiations*].

¹²⁷ Chapman & Tauber, *supra* note 122 at 956.

¹²⁸ Orlando Flores, “Prospects for Liberalizing the Regulation of Foreign Lawyers under GATT and NAFTA” (1996) 5 *Minn J Global Trade* 159 at 173-74 [Flores].

contributions to Canada's legal profession. Furthermore, the high degree of transparency that is required of a domestic system in order for foreign professionals to have their qualifications duly recognised helps invigorate the values of the legal profession, strengthen the profession itself, and maintain independent legal systems.¹²⁹

C. Special Considerations

Potential benefits of opening Canadian legal service markets to foreign professionals are countered by significant challenges posed by some of the unique aspects of the legal profession. Four attributes of the legal profession in particular complicate liberalization: the national or regional character of law, the vulnerability of the public, protectionist tendencies and the self-regulatory nature of professions.

1. *Localized Character of the Law*

The national, or even regional character of law and legal education is largely responsible for inconsistent requirements for admission to the practice of law between jurisdictions. This is the main obstacle to trade in legal services.¹³⁰ Unlike fields such as medicine or engineering, there is no single fixed body of material making up the study and practice of law. In some cases, variations in laws and legal systems can be seen as extensions of social norms or business customs, driven in part by interests and priorities defined by individual cultures.¹³¹ The heterogeneity across legal systems and families of law reduces the transferability of legal qualifications since knowledge of the local law is one of the main aspects of a lawyer's education and skill-set. Understanding how a legal system adapts, as well as how law is interpreted and rights are held, often requires that lawyers possess specific knowledge of the local laws as well as the governing legal structures before they can properly practise.¹³²

The inherent uniqueness of each legal system means that every jurisdiction requires its own standards and procedures to ensure that legal practitioners within its borders are sufficiently qualified. The fact that foreigners might be less familiar with the local law and legal system is a multifaceted concern which primarily speaks to an individual's competency and capacity to practise. The different legal families and traditions within each jurisdiction mean that a foreign

¹²⁹ Chapman & Tauber, *supra* note 122 at 956.

¹³⁰ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 5.

¹³¹ Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 *Mich L Rev* 338 at 345-6 [McAdams]; Roy Boyne, "Culture and the World-System" in *Global Culture: Nationalism, Globalization and Modernity*, ed Mike Featherstone, (London: SAGE Publications Ltd, 1990) at 57-58 [Boyne].

¹³² McAdams, *supra* note 131 at 348; Thorsten Beck, Asli Demiguc-Kunt & Ross Levine, "Law and Finance: Why Does Legal Origin Matter?" (2003) 31 *Journal of Comparative Economics* 653 at 654-661 [Beck].

lawyer's education and experience may not provide the necessary competence to practise law within a different state, especially host country law. This at least partially explains why there are greater degrees of recognition between countries sharing the same legal origins than between countries with varying systems.¹³³

Some critics also warn against granting access to individuals who do not have a sense of national loyalty to the host country arguing they do not share the same values as other members of the local legal profession.¹³⁴ This argument, however, overlooks the fact that members of the legal profession globally do adhere to common overarching principles.¹³⁵ Furthermore, it ignores the diverse viewpoints present in any local regime.

Generally competence concerns due to the localized character of law can be met by well-crafted screening techniques, such as examining the extent and relevance of foreign training and experience as well as supplementary educational or testing requirements, if necessary. . Market-based arguments might also apply: clients would seek qualified, competent and skilled legal advice. If the foreign-trained workers were not found to be qualified, competent or skilled in local law, one would expect clients to obtain advice elsewhere.

2. *A Vulnerable Public*

The variability of law implies a need for great care and attention when determining if a professional meets the requirements to practise in the host country. Legal practice places lawyers in a trump position “as officers of the courts, defenders of citizen rights and guardians of the Rule of law.”¹³⁶ This relationship speaks to clients' vulnerability and the position of authority legal professionals assume. This, along with the important function lawyers perform within the legal system, explains in part why they are, and must be, subject to a great deal of scrutiny. Maintaining confidence in the justice system requires enforcing full compliance with codes of ethics and professional conduct, as well as ensuring quality legal work. In their duties, lawyers and the quality of service they offer must command the confidence and respect of the public.¹³⁷ Clients ought to be assured of the “integrity, competence and loyalty” of their legal professionals.¹³⁸

The public must be protected from professionals who are unfit or incompetent to practise law. Legal professionals are held to high standards of practice and the public ought to be able to anticipate and expect the same basic

¹³³ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 41.

¹³⁴ Chapman & Tauber, *supra* note 122 at 952.

¹³⁵ See International Bar Association, *International Principles on Conduct for the Legal Profession*, entered into force 28 May 2011, online: IBA <<http://www.ibanet.org>>.

¹³⁶ *Ibid* at 5.

¹³⁷ The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011, Preface at 5 [*CPC* Manitoba].

¹³⁸ *Ibid*.

level of competency from anyone holding him or herself out to be a lawyer.¹³⁹ One side of this is the need for substantive knowledge of the law and procedures, relevant experience and skills, without which a legal professional cannot accurately practise law. Another angle, however, involves adherence to core values of the respective Member country's legal profession, which determines how legal services are provided and how they are regulated. These values may include such elements as refraining from taking on cases where one does not have the relevant competency required and instead referring the client to another practitioner.¹⁴⁰

It may be that these competency requirements could be met without specific regulations regarding recognition of foreign credentials. After all, many of the codes of conduct governing local professions place members offering legal services under legal and ethical obligations to meet an appropriate level of competency.¹⁴¹ In principle, foreign lawyers could be subject to the same standards as local practitioners and merely held to account if they are found to be lacking. However, there may be legitimate concerns about the proper way to police for competency and how to redress a wrong if one were to arise.¹⁴² If foreign practitioners were permitted to practise law within Canada during a temporary stay, they very well might not have significant ties to the local community or the country at large. This may be an obstacle if a client needs to enforce a judgment.¹⁴³ At the same time, liability insurance is frequently a requirement of practice which would remedy this problem.

Nevertheless, it is, after all, the public and clients who are injured if legal professionals are permitted to practise without sufficient training or skills.¹⁴⁴ The entire profession would be negatively affected if unfit professionals were permitted to practise. Establishing competency and ensuring practitioners carry professional liability insurance are essential.

3. *Status Quo*

Despite the adaptability of the law and the benefits of liberalizing the legal profession, status quo arguments and policies abound when it comes to the self-

¹³⁹ The Law Society of Newfoundland & Labrador, *Code of Professional Conduct*, St Johns: Law Society of Newfoundland & Labrador, 1998, ch II, commentary 2 [CPCNewfoundland].

¹⁴⁰ *CPC* Manitoba, *supra* note 137, s 2.01(1).

¹⁴¹ *Ibid*, ch II; *CPC* Newfoundland, *supra* note 139, ch II; The Law Society of Alberta, *Code of Professional Conduct*, Calgary: Law Society of Alberta, 2009, ch II; The Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton: Law Society of New Brunswick, 2003, ch II.

¹⁴² Chapman & Tauber, *supra* note 122 at 953.

¹⁴³ *Ibid*.

¹⁴⁴ Canadian Bar Association, *Submission on the General Agreement on Trade in Services and the Legal Profession: the Accountancy Disciplines as a Model for the Legal Profession* (2000) at 6, online: CBA <<http://www.cba.org/cba/submissions/pdf/00-30-eng.pdf>> [CBA, *Submission*].

regulated legal services sector. Various concerns, conscious and unconscious, may be behind the slow pace of change. Concerns about meeting knowledge and competency requirements can be addressed in a sound manner that still permits much wider access for foreign trained professionals. Current members of the profession may fear being forced to reinvent themselves in order to meet the needs of a leaner, tougher marketplace; they may be in part motivated by an intention to maintain their income levels through restricting competition. For those individuals, the status quo is working just fine. Public policy, however, should generally favour open entry and competition; it should not work to prop up the incomes of one sector of society at the expense of the rest. Any concern that “too much competition” would lower lawyers’ ethical standards likely represents an unduly jaundiced view of the ethical character of lawyers and the effectiveness of its self-regulatory bodies. It should also be noted that there is an extensive problem in Canada of consumers lacking access to legal assistance;¹⁴⁵ concerns about glutting the market, should therefore not be exaggerated. Another concern may be that an influx of foreign trained professionals would result in changes to professional norms and cultures. The addition of professionals with skills and perspectives developed in other countries, however, may positively enrich the base of ideas and techniques used in the profession. At the same time, the best values and practices of the Canadian legal profession should be able to remain in place based on their intrinsic merit.

4. *Self-Regulation*

Integrating skilled legal professionals into the workforce is a “complex and multi-faceted process involving a number of different stakeholders,”¹⁴⁶ not least of which includes varying levels of government, law societies, bar associations, law firms, practitioners and the public. Regulating legal services is complicated by the fact that in many jurisdictions, including everywhere in Canada, the profession is self-governing. The importance of an independent judiciary and legal profession is linked to protecting and maintaining the rule of law, and both

¹⁴⁵ His Right Excellency the Right Honourable David Johnson, Canada’s Governor-General, and Madam Chief Justice McLachlin both spoke about the need for an increase in access to justice at the Canadian Bar Associations’ conference in August 2011; the Governor General’s speech has been archived at The Governor General of Canada, “The Legal Profession in a Smart and Caring Nation: a Vision for 2017” (Delivered at the Canadian Bar Association’s Canadian Legal Conference, Halifax, 14 August 2011), online: The Governor General of Canada <<http://www.gg.ca>>; a transcript of the Chief Justice’s speech may be found at Beverley McLachlin, “A busy court, access to justice, and public confidence” (Delivered at the Canadian Bar Association’s Canadian Legal Conference, Halifax, 13 August 2011), online: iPolitics <<http://www.ipolitics.ca>>.

¹⁴⁶ *Pan-Canadian Quality Standards in International Evaluation*, supra note 54 at 4.

components are often considered essential for democracy to flourish.¹⁴⁷ The 'wide-berth' demanded by an autonomous, self-governing and self-regulating legal profession, however, may complicate instituting a trade agreement such as the GATS.¹⁴⁸ Governments are unable to act unilaterally: they need regulating bodies on their side for any agenda they wish to put forth... this creates a serious negotiating weakness.¹⁴⁹

Canada has multiple sub-national, self-governing legal bodies; in fact, each province and territory has its own law society. Each law society aims to protect the public interest of Canadians by establishing and enforcing standards of conduct. Reaching consensus on a controversial topic such as liberalization is severely hampered by the multitude of organizations present during Canada-wide negotiations. The Federation of Law Societies of Canada (FLSC) seeks to simplify this and facilitates negotiations by acting as a united voice for the fourteen legal professions across Canada. The government continues to be at a disadvantage when it comes to enforcement, however, as it cannot dictate orders to the legal profession.

D. Finding the Middle Path

The benefits of liberalizing trade in legal services are tempered by legitimate concerns for maintaining the integrity of a Member's domestic legal system. Recognition and access to legal services markets are important, but so is ensuring public safety. Members have largely dealt with this matter through employing the five-part legal services definition described above. Through this, countries can make precise determinations of what they commit to liberalize or, conversely, what they restrict. One by-product of this definition is a growing trend for foreign-trained legal professionals to practise home country law, third country law or international law within a host state.¹⁵⁰ These service providers are known as 'foreign legal consultants' (FLCs).

Foreign legal consultants face fewer barriers to entry because they merely seek to do in one country what they are already qualified to do in their home country.¹⁵¹ Note that domestic law is excluded from their scope of practice. Thus, a lawyer from Mexico authorized as an FLC in Canada would be permitted to practise Mexican law and would be restricted from practising Canadian law, either provincially or federally. In Canada, FLCs have latitude to practise their home country law and nothing else; in some jurisdictions they may also practise

¹⁴⁷ The Law Society of British Columbia, *Report of the Independence and Self-Governance Committee For The Benchers*, (Vancouver: The Law Society of British Columbia, 2008) at 3, online: Law Society of British Columbia <http://www.lawsociety.bc.ca/docs/publications/reports/SelfGovernance_2008.pdf>.

¹⁴⁸ CBA, *Submission*, *supra* note 144 at 17.

¹⁴⁹ Paton, *supra* note 32 at 394.

¹⁵⁰ *Ibid* at 375.

¹⁵¹ *Ibid* at 375-6; WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 47.

international law. Typically, FLCs do not require much more than a permit and a promise to submit to a local code of ethics in order to begin practising within a host jurisdiction.¹⁵² In some cases, FLCs may be required to pass an examination, usually in the local language, and they must not hold themselves out to be members of the legal profession *per se*.¹⁵³ Overall, this trend towards FLCs allows foreign legal professionals to work within a host country while still managing to reach a balance in protecting the domestic market against undesirable practices.

IV. CURRENT STATUS OF TRADE IN LEGAL SERVICES

A. Generally

1. *Obligations*

During the initial years following the Uruguay Round, 47 Members made commitments regarding legal services.¹⁵⁴ Of those, most chose to liberalize international law and home country law, and there was more emphasis on advisory services than representation.¹⁵⁵ The majority of Members who scheduled legal services allow for FLCs in some capacity. It is less likely for domestic law to be listed in a country's Schedule though, and even rarer for commercial presence to be other than "unbound," which means a country has made no commitment in that respect.¹⁵⁶

2. *Common Limitations*

As discussed previously, there are possible limitations on any service listed in a Member's Schedule. The most common restrictions for legal services fall in market access and national treatment, which Members must specifically list in their respective Schedules. MFN exemptions also come into play, though they are relatively rare. Only four Members included exemptions specifically for legal services¹⁵⁷ while four others exempted "professional services" during the initial negotiations.¹⁵⁸ Those Members were exempt from any market access or national treatment obligations so long as legal services remained off their Schedules of Commitments.

¹⁵² See e.g. The Law Society of Upper Canada, *By-Law 14: Foreign Legal Consultants* (28 October 2008) online: Law Society of Upper Canada <<http://www.lsuc.on.ca>> [LSUC, *By-Law 14: Foreign Legal Consultants*].

¹⁵³ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 48.

¹⁵⁴ *Ibid* at 57.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ Brunei Darussalam, Bulgaria, Dominican Republic and Singapore.

¹⁵⁸ Costa Rica, Honduras, Panama and Turkey.

i. Market Access

There are various limitations affecting trade in legal services that fall under market access. Restrictions on movement, on legal form, or nationality requirements are all examples of market access limitations.¹⁵⁹ Nationality requirements, especially, remain quite common in legal services.¹⁶⁰ These requirements can be justified and perhaps overlooked where they apply to public positions that fulfill a ‘public function.’¹⁶¹ Nationality criteria are often justified by pointing to the need to ensure a foreign lawyer’s competence in a new jurisdiction, under the host country’s law and culture.¹⁶² However, the relationship between nationality and consumer protection is tenuous and public safety could be virtually guaranteed by other means. For example, if a non-national lawyer were willing to obtain and demonstrate the requisite knowledge for practice in the domestic market and take out appropriate liability insurance, public safety concerns could be addressed. This could be demonstrated through completing a full legal education in the host country, passing examinations and fulfilling any other additional requirements imposed on national lawyers.¹⁶³ In many cases, nationality requirements are unjustifiably burdensome domestic regulations. This idea was supported by the Supreme Court of Canada in its decision, *Andrews v Law Society of British Columbia* [*Andrews*],¹⁶⁴ which looked at equal protection and treatment of non-nationals under the *Canadian Charter*.¹⁶⁵ The Supreme Court decided in a split decision that the Law Society of British Columbia’s citizenship requirement for admission to the bar was a form of unequal treatment that could not be justified under the government’s Section 1 limitations clause.¹⁶⁶ In her court of appeal decision, Wilson J, as she then was, wrote that the citizenship requirement is not “carefully tailored” to its goals.¹⁶⁷ Citizenship alone does not achieve or ensure familiarity with Canadian institutions and customs, nor does it demonstrate a real connection to Canada.¹⁶⁸ Furthermore, the argument that lawyers fulfill a public function is over-broad and could be dealt with in a less restrictive manner.¹⁶⁹

¹⁵⁹ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 30-32.

¹⁶⁰ *Ibid* at 30.

¹⁶¹ *Ibid*.

¹⁶² OECD, *Managing Request-Offer Negotiations*, *supra* note 126 at 21.

¹⁶³ *Ibid*.

¹⁶⁴ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

¹⁶⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁶⁶ *Andrews*, *supra* note 164 at para 17.

¹⁶⁷ *Andrews v Law Society of British Columbia* (1986), 27 DLR (4th) 600, [1986] 4 WWR 242 (BCCA) at paras 58-9 (BCCA).

¹⁶⁸ *Andrews*, *supra* note 164 at para 13.

¹⁶⁹ *Ibid* at para 16.

ii. National Treatment

Any treatment that discriminates against a foreign service provider is prohibited by national treatment, unless it is expressly provided for in the Schedules. Members have tended to schedule these limits as residency and language requirements that allow recognition of foreign degrees for nationals who studied abroad but not for foreigners, and as requirements that foreign endeavourers be competitive or successful in their home countries before being granted entry.¹⁷⁰

Residency requirements take multiple forms and can manifest as requirements for prior or permanent residency, and domicile.¹⁷¹ Prior residency is the most restrictive, as it provides an advantage to service suppliers who have already been resident in the country for a period of time. This potentially places all foreign legal service providers at a disadvantage and it definitely disadvantages temporary foreign skilled workers. However, although residency requirements can amount to discrimination, it is worth noting that they are eventually surmountable and relatively minimal for foreign lawyers who are living in the country.¹⁷² This concession does very little to encourage temporary workers or to ease the transition and arrival of foreign-trained workers planning to stay in Canada on a long-term basis.

Education requirements, another national treatment limitation which may either oblige legal service suppliers to be graduates of a national university or only grant recognition for foreign degrees earned by nationals, may not be so easy to overcome. The former is an example of formally identical treatment that causes *de facto* discrimination since foreign lawyers are unlikely to have attended a university in the host country.¹⁷³ These requirements could result in the necessity of full requalification without the opportunity to have qualifications obtained in the home country taken into account.¹⁷⁴

Aside from explicit limits Members may list in their Schedules, for legal services commitments, the non-discrimination burden Members must meet is further limited by the qualification in the national treatment provision: non-discrimination is required only in the case of “like services and service suppliers.”¹⁷⁵ What is a “like service supplier”? Is a foreign-trained civil lawyer “like” a common law Canadian lawyer? Is a foreign-trained common law lawyer in an English-speaking country “like” a common law Canadian lawyer? The meaning may not always be clear. Because a lawyer’s training is so jurisdiction-specific, foreign lawyers are arguably not *like* domestic ones; under that

¹⁷⁰ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 63.

¹⁷¹ *Ibid* at 38.

¹⁷² *Ibid* at 39.

¹⁷³ *Ibid* at 62.

¹⁷⁴ *Ibid*.

¹⁷⁵ *GATS*, *supra* note 3, art XVII: 1.

approach, the national treatment clause loses much of its practical value for legal services.

National treatment might be more valuable in achieving increased liberalization if it prevented Members from imposing *excessive* measures in pursuing their legitimate policy objectives or enacting measures that clearly discriminate against foreign professionals without a bona fide purpose. For example, if the knowledge required to practise domestic law could be obtained other than by complete requalification, then requiring legal service suppliers to be graduates of a national university would arguably be inconsistent with national treatment. This is also true where consumer protection could be achieved in a less burdensome way than through residency requirements.

In theory, the concept of qualification requirements being as unburdensome as possible is already enshrined within the domestic regulation provision, but the primacy accorded to national treatment exemptions makes this less significant. If a Member preserves the right to discriminate through national treatment limitations, any positive changes to domestic regulation become meaningless since a foreign lawyer may not be permitted to take advantage of them.¹⁷⁶ National treatment is an important safeguard against regulatory protectionism.¹⁷⁷ Therefore, removing national treatment limitations in the legal services sector is a worthy goal. This would take place under track one of the liberalization regime, to be discussed below.

3. *Progressive Liberalization*

When it comes to services, there are two distinct methods, or “tracks,” mandated by the GATS to liberalize services, an overview of which may be found in Table 4: Progressive Liberalization, below. The first involves increasing scheduled commitments while the second consists of creating a common rubric to guide and regulate Members’ domestic regulations for specific professions by creating ‘disciplines.’ Together, these tracks are meant to assist in further opening services markets. Track two aims to develop disciplines and thereby establish qualitative formulas for Members to meet across specific service sectors or modes of supply. The disciplines complement the request-offer negotiations occurring under track one by providing guidance and ensuring that commitments are upheld.¹⁷⁸ As such, the disciplines “can play a significant role in promoting and consolidating domestic regulatory reform.”¹⁷⁹ Furthermore, it

¹⁷⁶ *Ibid.*

¹⁷⁷ Mattoo & Mishra, *supra* note 93 at 451.

¹⁷⁸ Delimatsis, *supra* note 10 at 11; Panagiotis Delimatsis, “Article XIX GATS: Negotiation of Specific Commitments” in Rudiger Wolfrum, Peter-Tobias Stoll & Clemen Feinaugle, eds, *Max Planck Commentaries on World Trade Law*, vol 6: WTO – Trade in Services (Leiden/Boston: Maritimes Nijhoff, 2008) 427 at 435.

¹⁷⁹ Legal Vice Presidency of the World Bank, *Legal Aspects of International Trade: Proceedings of a World Bank Seminar* (Washington, DC: The International Bank for Reconstruction, 2001)

has been posited that without disciplines regulating domestic regulations and recognition procedures, “market access commitments on mode 4 will have only notional value.”¹⁸⁰ Liberalization in respect of the first track has taken place primarily outside the Doha Development Round (DDR), though success under either track is largely dependent on a deal being reached under the DDR. Without building momentum and reinvigorating the DDR negotiations, progressive liberalization obligations and the successful conclusion of the negotiations will continue to stagnate under either track. Failure to reach a settlement would likely lead to reversals under both tracks, the possibility of increased protectionism and an amplified threat of trade wars.¹⁸¹

at 305, online: <<http://siteresources.worldbank.org>> [Legal Vice Presidency of the World Bank].

¹⁸⁰ *Ibid.*

¹⁸¹ International Food Policy Research Institute, *The Potential Cost of a Failed Doha Round*, IFPRI Issue Brief 56 by Antoine Bouet and David Laborde (Washington, DC: International Food Policy Research Institute, 2008) at 3, online: IFPRI <<http://www.ifpri.org>>.

TABLE 4: PROGRESSIVE LIBERALIZATION	
GOAL: Strive for all WTO Members to continue liberalizing trade in services to establish an open services market	
How?	Track Two
Article	Track One XIX: 1
What does progressive liberalization look like?	VI:4 The Council on Trade in Services is working to develop and implement multilateral disciplines on domestic regulations for various sectors
Current Status	A commitment to participate at successive rounds of negotiations between other WTO Members Negotiations are on-going; the Doha Development Round (DDR) began in 2001 and continues to the present, with no foreseeable end date The Accountancy Disciplines are established and negotiations are under-way to extend these disciplines horizontally, on a sector-specific basis or not at all
Progress Made	Negotiations under the DDR have become frustrated and little to no progress has been made towards continuing to liberalize trade in services through expanding the scope of Members' commitments The Accountancy Disciplines were developed in 1998; the Council on Trade in Services has since been working to find ways to extend these disciplines horizontally to other service sectors
Future Recommendations	<ul style="list-style-type: none"> • encourage revising the multilateral negotiating structure of the DDR • create a short-term negotiating agenda of less controversial topics • encourage bilateral negotiations such as mutual recognition agreements or economic integration agreements <ul style="list-style-type: none"> • move toward implementing a single horizontal discipline that is both adequately broad and flexible to cover multiple service sectors

i. Track One Negotiations

Track one comes from Article XIX (1) and it involves a commitment to participate at successive rounds of trade negotiations.¹⁸² The first negotiating round was to begin not more than five years after the GATS was enacted in 1995.¹⁸³ A new round of trade talks, the Doha Development Round (DDR) or the Doha Development Agenda (DDA), was launched in November 2001 in Qatar in order to address development of less developed nations and fulfil the progressive liberalization obligation within the GATS.¹⁸⁴ The aim of the DDR was to increase the scope and security of market access¹⁸⁵ by filling sectoral gaps and strengthening levels of commitments through removing exemptions.¹⁸⁶ Therefore, the negotiating round deals with negotiating specific commitments, encouraging commitments in new sectors, and extending existing market access commitments.¹⁸⁷ This is to be achieved by employing a multilateral negotiating framework and making collective requests.

However, the DDR did not exclusively include negotiations on trade in services. As mentioned briefly, it included broad and controversial topics as well, such as agricultural and non-agricultural market access. Despite the original deadline set for January 2005, negotiations became frustrated and the round was necessarily extended. Delays to progress in trade in services arose for various reasons, but certainly the multilateral nature of the discussions was a factor.¹⁸⁸ Also, some countries chose to make their willingness to negotiate on trade in services dependent on levels of reciprocity or advancements made in other areas. Indeed, already plagued by political, economic, bureaucratic and methodological concerns, Members informally agreed to set aside negotiations on services until a conclusion could be reached on both agricultural and non-agricultural market access, which included controversial issues regarding government agricultural

¹⁸² American Bar Association, Center for Professional Responsibility, *Track 1 of the GATS: The Ongoing GATS (Doha) Negotiations*, online: ABA <<http://www.americanbar.org>>.

¹⁸³ *GATS*, *supra* note 3, art XIX: 1.

¹⁸⁴ Anup Shah, "WTO Doha "Development" Trade Round Collapse, 2006", *Global Issues* (28 July 2006), online: Global Issues <<http://www.globalissues.org>>; see *GATS*, *supra* note 3, art XIX: 1.

¹⁸⁵ Bernard Hoekman, "The Doha Round impasse and the trading system", *Vox EU* (19 June 2010), online: Vox EU <<http://www.voxeu.org>> [Hoekman, "The Doha Round impasse"]; J Robert Vastine, "Services Negotiations in the Doha Round: Promise and Reality" (2005) 5:4 *Global Economy Journal* 3 [Vastine].

¹⁸⁶ WTO, *Negotiations on Trade in Services: Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee for the purpose of the TNC stocktaking exercise*, WTO Doc WT/TN/S/35, online: WTO <<http://docsonline.wto.org>> [WTO, *Report by the Chairman*].

¹⁸⁷ Hoekman, "The Doha Round Impasse", *supra* note 185.

¹⁸⁸ WTO, *Report by the Chairman*, *supra* note 186.

subsidies.¹⁸⁹ Some have since called this a “huge mistake, indeed counterproductive” to the DDA’s mandate.¹⁹⁰ It certainly did not help to advance liberalization in services.

That was not the end of frustrated negotiations: discussions persisted after the original deadline came and went though negotiating roadblocks have abounded. Members have found new areas of conflict and continue to struggle with the many perspectives and positions within the WTO. Initially, Members debated agricultural subsidies; more recent discussions have moved onto removing import tariffs, with some Members advocating for parity-based duties while others remain adamant that this was never a goal of the GATS.¹⁹¹ The multilateral nature of the DDR mixed with the sophisticated set of issues Members are attempting to address makes consensus and the potential of the DDR reaching a satisfactory conclusion understandably more complicated. While the DDR has not yet concluded or been declared futile, it very well may be “the first outright failure ... in the postwar era.”¹⁹² After more than a decade, the DDR is now considered the “longest-running negotiation” in modern times, with no end in sight.¹⁹³

It has been said that insanity is doing the same thing time and time again while expecting different results. This is not unlike the current DDR.¹⁹⁴ One approach to revitalizing the round would allow some countries or group of countries to assume a greater leadership role. Canada, for example, could clean its own hands by eliminating supply management and push for major reform in areas such as trade in agriculture. It could make the powerful case that protectionism in developed countries is having a devastating effect on the economic growth potential of many undeveloped countries. The parameters for negotiations might also be adjusted to achieve some concrete outcome. One possible solution is to establish a more limited agenda of less contentious trade areas and set a reasonable yet timely target conclusion date. Doing this would at least have the advantage of achieving some kind of progress and it might also

¹⁸⁹ Matthew Adler et al, “What’s on the Table? The Doha Round as of August 2009”, *Working Paper 09-6* (Washington, DC: Peterson Institute for International Economics, 2009) at 19, online: Peterson Institute for International Economics <<http://www.iie.com/publications/wp/wp09-6.pdf>> [Adler]; Vastine, *supra* note 185 at 5.

¹⁹⁰ Adler, *ibid* at 19.

¹⁹¹ “The Doha round: Dead man talking: Ten years of trade talks have sharpened divisions, not smoothed them”, *The Economist* (28 April 2011), online: The Economist <<http://www.economist.com>> [“The Doha round: Dead man talking”].

¹⁹² Gary Clyde Hufbauer, Jeffery J Schott & Woan Foong Wong, “Figuring Out the Doha Round”, *Vox EU* (22 February 2010), online: Vox EU <<http://www.voxeu.org>> [Hufbauer, Schott & Foong Wong].

¹⁹³ *Ibid.*

¹⁹⁴ Richard Baldwin & Simon Evenett, eds, *Next Steps: Getting Past the Doha Round Crisis* (London: Centre for Economic Policy Research, 2011), online: CEPR <<http://www.cepr.org>> at 15 [Baldwin & Evenett].

encourage collaborations on more controversial topics at a later time.¹⁹⁵ Failing to take steps that reinvigorate and restore faith in the DDR and the GATS could be fatal to both. The WTO seems to have recognized the dire position of the DDR and, by extension, the GATS: it has started a recent push to revitalize negotiations and encourage a settlement. Pursuant to this, a revised set of negotiating documents was released by the WTO in April 2011, including additional information and reports to assist Members in establishing their positions.¹⁹⁶ However, even with this assistance, Pascal Lamy, the current Chair of the WTO's Trade Negotiation Committee, considers the differing political views to be "effectively blocking progress and putting into serious doubt the conclusion of the Round this year."¹⁹⁷ Even if the ambition of the Doha round has to be scaled back somewhat, very significant steps towards liberalization talks, however, do seem feasible.

When it comes to discussing how legal services specifically have been affected under track one, it warrants beginning with scheduled commitments before turning to liberalization trends and determining where there is room for further liberalization. Compared to commitments listed in other sectors, relatively few commitments have been listed in legal services.¹⁹⁸ To date, roughly 78 countries have made commitments to liberalize legal services, either through the Uruguay Round or through accession to the WTO.¹⁹⁹ To put this in context, there are more than one hundred and fifty WTO member states. A little over twenty of the Members that scheduled legal services also made commitments with respect to host country law (both for advice and representation) across all four modes. Commitments in the area of home country law were much more common, with closer to seventy Members scheduling commitments.²⁰⁰

There are two main areas for liberalization of trade in legal services. The first involves encouraging roughly half the WTO Members to make initial commitments. The second, which we shall look at more closely because this is where progress will be made within Canada, involves expanding the scope of already-listed obligations by removing permissible restrictions to market access and national treatment. For legal services especially this means paying particular attention to establishing commitments with regards to host country law and mode 4 (commercial presence).

Requests for talks on legal services have been tabled in the DDR and little progress has been made. Some discussion relating to services did occur initially,

¹⁹⁵ *Ibid* at 12-13.

¹⁹⁶ "The Doha Round: Dead man talking", *supra* note 191.

¹⁹⁷ WTO, Trade Negotiation Committee, *Cover Note by TNC Chair*, WTO Doc WT/TN/C/13 (21 April 2011), online: WTO <<http://docsonline.wto.org>> [WTO, *Cover Note*].

¹⁹⁸ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 64.

¹⁹⁹ WTO, *Legal Services Background Note*, 2010, *supra* note 117 at 48.

²⁰⁰ *Ibid* at 49-51.

but progress has been especially limited since July 2008. There has been almost no change for legal services since 2007.²⁰¹ When legal services were discussed, Members appeared to stay within “the relatively narrow confines of liberalizing rules relating to foreign legal consultants”.²⁰² With other issues taking precedence, there has been low priority given to individual lawyers’ access to domestic markets in this round. Economically, international trade in legal services tends to affect business and international law—where foreign-trained legal professionals are more likely to work—more so than traditional areas of domestic law.²⁰³ However, politically, mode 4 is also the most controversial of the modes of supply, affecting not only the global economy but also many national and regional issues. These national policies range from positions on immigration law, stances on how or if competition should be regulated, what would constitute permissible effects on the local economy, to whether it is good international policy to potentially inflict brain-drain on other Members and ideas about how to address national security concerns.²⁰⁴ Furthermore, even in the few cases where Members made full commitments to practicing of host-country law foreign lawyers still face high domestic regulatory barriers.²⁰⁵ Qualification requirements and variations in legal practice as well as education mean that host country law continues to play only a marginal role in international trade of legal services.²⁰⁶ This does not appear likely to change in the near future.

Mode 4 has largely been underrepresented in trade in legal services. This is not entirely unusual: in spite of its increasing importance, there are far fewer and more limited commitments with respect to global mobility than for other modes of supply across all service sectors.²⁰⁷ When it comes to legal services, even

²⁰¹ WTO, Council for Trade in Services, *Negotiations on Trade in Services* (Special Session 2011), WTO Doc WT/TN/S/36 at 2 & 33 (2011), online: WTO <<http://docsonline.wto.org>> [WTO, *Negotiations on Trade in Services*].

²⁰² Paton, *supra* note 32 at 415; Hill, *supra* note 66 at 373 (which explains that the Council of the Bars & Law Societies of the European Union (CCBE), which represents all the bars and law societies in the EU, is focused on the establishment of lawyers from non-EU Members as foreign legal practitioners).

²⁰³ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 23.

²⁰⁴ Oonagh Sands, “Temporary Movement of Labor Fuels GATS Debate”, *Migration Information Source* (June 2004) online: Migration Information <<http://www.migrationinformation.org>>.

²⁰⁵ WTO *Legal Services Background Note*, 1998, *supra* note 97 at 65.

²⁰⁶ Indian Council for Research on International Economic Relations, *Barriers to Movement of Natural Persons: A Study of Federal, State, and Sector-Specific Restrictions to Mode 4 in the United States of America*, by Debjani Ganguly, WP No 169 (New Delhi: Indian Council for Research on International Economic Relations, 2005) at 33, online: ICRIER <<http://www.icrier.org>> [ICRIER, *Barriers to Movement of Natural Persons*].

²⁰⁷ National Foreign Trade Council, *The Doha Development Agenda and GATS Mode 4: Recommendations for Improved Rules on Temporary Global Mobility* (Washington, DC: National Foreign Trade Council, 2005) at 3, online: NFTC <<http://www.nftc.org>> [NFTC, *The Doha Development Agenda*].

Canada, the US, the EU and Japan did not make mode 4 commitments guaranteeing national treatment in the legal services sector.²⁰⁸

Current negotiations have been called a “non-starter” when it comes to making headway regarding legal services and mode 4.²⁰⁹ This is due, partially to the complex issues associated with the movement of people.²¹⁰ Furthermore, legal services have lacked the “economic magnitude and political heft” to feature primarily under GATS.²¹¹ Just the same, facilitating the supply of legal services under mode 4 is not completely off the global radar: it was identified by at least some participants at a 2005 meeting as one of the objectives for the current round of negotiations.²¹² In addition, most of the 32 WTO Members that participated in the Services “Signalling” Conference in July 2008 indicated a readiness to improve access conditions for mode four generally.²¹³

Australia has also presented a collective request in legal services on behalf of itself, Canada, the EU, Japan, New Zealand, Norway and the USA.²¹⁴ It does not address barriers to full local licensing, though, among other things, it requests Members make new or improved mode 4 commitments with a special emphasis on independent professionals. The request seeks permission for foreign lawyers to practise in multiple jurisdictions (a combination of the practice of foreign, domestic and international law but not full authorization to practise domestic law). It goes on to say that where Members are able to comply with the request, “they should also consider permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in domestic law.”²¹⁵ In other words, even where members do undertake further mode 4 liberalization, conferring the right to provide legal services in domestic law remains optional and conditional on compliance with domestic regulation, though the request does encourage it. There is no mention of making non-discriminatory domestic regulations less restrictive since, as noted by the request, it is not within the scope of schedules of specific commitments.²¹⁶ Ongoing

²⁰⁸ See each country’s schedules online at: WTO <<http://docsonline.wto.org>>.

²⁰⁹ Hoekman, “Doomed to Fail,” *supra* note 123 at 12.

²¹⁰ *Ibid* at 24.

²¹¹ Sydney M Cone III, “Legal Services in the Doha Round” (2003) 37 J World Trade 29 at 29 [Cone].

²¹² WTO, Council for Trade in Services, *Report by the Chairman to the Trade Negotiations Committee* (Special Session 2005), WTO Doc WT/TN/S/23 at 16, online: WTO <<http://www.docsonline.wto.org>> [WTO, *Report by the Chairman to the TNC*],

²¹³ *Ibid*.

²¹⁴ Mission of Australia, “Collective Request – Legal Services” (Request for plurilateral discussion in Geneva, 7 April 2006) at 3, online: European Services Forum <<http://www.esf.be/pdfs/Collective%20Requests/legal%20Services%20C%20R.pdf>> [Mission of Australia, “Collective Request”].

²¹⁵ *Ibid*.

²¹⁶ *Ibid* at 4 (the request states, “we would encourage Members to remove any limitations such as qualifications requirements and procedures which have been incorrectly schedules under either the market access or national treatment columns”).

obligations related to domestic regulations are being dealt with under the second track of negotiations with the formation of disciplines.

Nonetheless, despite some small progress and efforts made by Members, to date few tangible results have been achieved in liberalizing legal services in either host country law or mode four. Even with the eventual benefits of liberalizing mode 4 and expanding the scope of legal practice, liberalizing trade in either area is a controversial topic. For those seeking results and real progress towards opening the legal services market, this might not be the best time to depend on the effectiveness of the already-weak DDR. However, there might be another, less controversial, means of achieving this without entering full-blown multilateral negotiations. Many Members chose to schedule legal services commitments that were more restrictive than practices already in place on the ground, meaning that Members would be able to enforce more restrictive policies if they so desired.²¹⁷ In doing this, much of the initial value of the national treatment and market access provisions to reduce protectionism was lost,²¹⁸ though the inherent implication is that now there is room for further liberalization of existing commitments to meet practices already in place.²¹⁹ Furthermore, persuading Members to increase their scheduled commitments, even if the commitments themselves are already being met, will help maintain transparency and stability of market access.²²⁰ In terms of actually moving ahead to liberalize legal services, especially under the fourth mode of supply, there may be a greater likelihood of success if negotiations and agreements were to take place bilaterally or regionally through agreements. This will be addressed shortly.

ii. Track Two Negotiations

a. History

The second track of progressive liberalization is mandated by the domestic regulation provision of the GATS and is specifically in the control of the Council for Trade in Services.²²¹ As international services have become more sought after and more easily traded, there is a growing need for multilateral disciplines to form a common, world-wide harmonization of consistent criteria and to ensure domestic regulations “do not constitute unnecessary barriers to trade in services.”²²² Members and international bodies representing diverse sectors have been able to make significant contributions and suggestions to this process.

²¹⁷ WTO, *Presence of Natural Persons (Mode 4): Background Note by the Secretariat*, WTO Doc WT/S/C/W/75 (1998) at 11, online: WTO <<http://www.wto.org>> [WTO, *Mode 4 Background Note*].

²¹⁸ Hopkins, *supra* note 73 at 435.

²¹⁹ Hoekman, “The Doha Round impasse”, *supra* note 185.

²²⁰ WTO, *Mode 4 Background Note*, *supra* note 217 at 11.

²²¹ GATS, *supra* note 3, art VI: 4.

²²² *Ibid*; American Bar Association, Centre for Professional Responsibility, *Track 3 of the GATS: The Ongoing GATS (Doha) Negotiations*, online: ABA <<http://www.americanbar.org>>.

Creating strong disciplines to monitor commitments may nevertheless be a challenge: despite the fact that the framework used to create the disciplines was largely elucidated in the GATS, WTO Members would likely hesitate to agree to measures that appear to restrict national sovereignty and limit regulatory freedom.²²³

The mandate to create multilateral disciplines fell initially to the WTO entity the Working Party on Professional Services (WPPS). In 1998, the WPPS developed multilateral disciplines on domestic regulation for the accountancy sector: the *Accountancy Disciplines*.²²⁴ These disciplines address five areas: licensing and qualification requirements and procedures, and technical standards. Please see Table 2: Highlights from the Accountancy Disciplines, above, for a more detailed overview. The disciplines were adopted in 1998 by the WTO: however, they do not have any legal effect until “all the disciplines developed by the WPPS are ... integrated into the GATS [before the DDR ends] and will then become legally binding.”²²⁵ Members did agree not to take steps that would be inconsistent with the disciplines unless such legislation was already in place at the time.

Soon after the development of these disciplines, the WPPS was replaced by the Working Party on Domestic Regulation (WPDR) because it was widely believed within the WPPS that work on disciplines for domestic regulation should proceed on a horizontal, rather than sectoral, basis.²²⁶ The decision that created the WPDR, however, expressly recognized the possibility of developing disciplines specific to individual sectors, such as legal services, instead of merely one discipline for all.²²⁷ The authority to determine the appropriate way forward was left with the WPDR which, for the last decade, has examined the feasibility of applying the *Accountancy Disciplines* horizontally across all sectors, including of course the legal services sector. With input from Members, the WPDR continues in its attempts to create a single, horizontally applicable discipline and is currently in the midst of another intensive drafting process.²²⁸ Despite the suspension of many negotiations under the first track, Members have continued to negotiate this issue, which is at the centre of track two.²²⁹ With respect to

²²³ Legal Vice Presidency of the World Bank, *supra* note 179 at 305.

²²⁴ WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, *supra* note 92.

²²⁵ WTO News, Press/118, *supra* note 92.

²²⁶ WTO, Working Party on Professional Services, *Minutes of Meeting* (9 February 1999), WTO Doc WT/S/WPPS/M/25 [WTO, *Minutes of Meeting* (9 February 1999)].

²²⁷ WTO, Trade in Services, *Decision on Domestic Regulation: Adopted by the Council for Trade in Services on 26 April 1999*, WTO Doc WT/S/L/70 (99-1717), art 3, online: WTO <<http://www.wto.org>>.

²²⁸ WTO, Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4: Chairman's Progress Report*, (14 April 2011), WTO Doc WT/S/WPDR/W/45 at 1-2, online: WTO <<http://www.wto.org>> [WTO, *Article VI: 4: Chairman's Progress Report* (2011)].

²²⁹ *Ibid* at 4.

legal services, determining whether there even ought to be a discipline, a sector-specific discipline or a horizontal discipline, has become a hot topic.²³⁰

b. No Discipline

The International Bar Association (IBA) objects to a global discipline for legal services on the basis of “heterogeneity of substantive knowledge”.²³¹ Legal education and training are so individualized by jurisdiction that even creating a single international standard for legal practice would be difficult or quite possibly entirely inappropriate.²³² Although many legal principles are similar across jurisdictions, they may be applied differently according to local law and traditions.

c. Sector-Specific Discipline

Many legal regulators and members of various bars, including the Canadian Bar Association (CBA), insist that the legal services sector requires its own discipline. Members and the WPDR have taken pains to receive input from professional international bodies though, the professional legal bodies have strongly opposed extending the *Accountancy Disciplines* to legal services. This means that governments are unlikely to agree to extend the disciplines horizontally unless they are willing to ignore these strong objections.²³³ Recalling the impossibility of enforcing obligations on self-regulating bodies, however, means that progress seems more than a little unlikely without the profession coming on side. The power wielded by law societies and the legal profession globally may be the strongest argument against creating a horizontal discipline so long as these bodies oppose it. This represents a significant roadblock for establishing a universal horizontal discipline.

There are also multiple reasons why a sector-specific discipline would be well-suited to the legal profession. A horizontal discipline would likely be easier to implement than developing a new, sector-specific discipline, but enforcement and application of such a generalized discipline would be both costly and difficult if the sector itself were to have detailed regulations.²³⁴ Contrarily, compliance with a sector-specific discipline would be less costly, less ambiguous and easier to apply if the sector were already highly regulated.²³⁵ Legal services represent such a sector. Furthermore, establishing a sector-specific discipline would take more time to create than a horizontal program, but there would also be a higher rate of

²³⁰ IBA, *A Handbook for IBA Member Bars*, *supra* note 30 at 35.

²³¹ *Ibid.*

²³² Paton, *supra* note 32 at 404.

²³³ *Ibid.*

²³⁴ Delmatsis, *supra* note 10 at 290.

²³⁵ *Ibid.* at 183.

predictability as to how the discipline would work before it came into effect,²³⁶ and issues specific to the nature of the legal sector could be better addressed.

d. Horizontal Discipline

The starting point for considering a horizontal discipline which would apply across all sectors is the *Accountancy Disciplines*.²³⁷ Commencing with a sector-specific discipline was in no way meant to be an indication that disciplines would henceforth be on a sector-to-sector basis; in fact, the *Accountancy Disciplines* provide helpful context for a discussion about disciplines.²³⁸ Main themes that can be drawn from it that would be used to launch a set of horizontal disciplines are necessity, transparency, equivalence and international standards.²³⁹

Proponents of a single horizontal discipline contend that legal services are not so unique that relevant domestic regulations could not fit within this overarching framework. The same economic and social factors, including regional and cultural variations, exist across all sectors, including legal services.²⁴⁰ Implementing a single comprehensive discipline that has broad impact on many sectors would also be a more efficient and less time-consuming process than creating multiple sector-specific disciplines. Creating a single discipline would prevent over-regulation of any given individual sector²⁴¹ and would provide impetus for further and future liberalization by holding most Members and all sectors to the same level of responsibility.²⁴²

While there are clear benefits to installing a horizontal discipline, the legal profession has legitimately unique qualities that may not be adequately addressed in a general program. Overall, extending the *Accountancy Discipline* horizontally calls for applying objective, transparent and fair criteria in a Member's domestic regulations: in principle, the legal profession would generally comply with these requirements,²⁴³ and these criteria should be almost universally applicable. The burden should be on those resisting the horizontal extension to provide specific explanations on what is supposedly different about their profession, and to put forward refinements that go no further than

²³⁶ *Ibid.*

²³⁷ Hopkins, *supra* note 73 at 439.

²³⁸ WTO, Council for Trade in Services, *Article VI: 4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services – Note by the Secretariat, S/C/W/96*, 1 March 1999 at 5-6, online: WTO <<http://docsonline.wto.org>> [WTO, *Article VI:4*].

²³⁹ *Ibid.* at 16.

²⁴⁰ Delimatsis, *supra* note 10 at 182.

²⁴¹ *Ibid.* at 182-3.

²⁴² *Ibid.* at 290.

²⁴³ Federation of Law Societies of Canada, *Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization* (2001) at 11-12, online: FLSC <<http://www.flsc.ca/en/pdf/2001wtoreport.pdf>> [FLSC, *Meeting Canada's Current Obligations*].

necessary to address those differences. Defining “law” and laying out what a “legal service” would be a good first step toward alleviating misunderstandings.²⁴⁴

The CBA made a submission regarding the applicability of the *Accountancy Disciplines* to the legal profession in which it discussed five main concerns.²⁴⁵ In particular, the CBA highlighted important values such as the independent and self-governing nature of the legal profession and lawyers, the significant role of client confidentiality and the importance of avoiding conflicts of interest.²⁴⁶ Many other professions, including accountancy, have their own confidentiality and conflict of interest rules, and must also coordinate duties to the client with overriding legal requirements designed to protect the public interest. While lawyer-client privilege might be stricter than confidentiality requirements in some other professions, it is not at all clear why foreign-trained professionals would find it difficult to appreciate and abide by Canada’s requirements in this respect. With respect to “third party” oversight of professions, lawyers are not granted absolute autonomy; governments and legislatures routinely play a role, even in Canada, in helping to define professional standards, and subjecting them to overriding legal regimes such as human rights legislation or (we hope eventually) fair access legislation.

The necessity test in the *Accountancy Disciplines* is the CBA’s second main concern. The disciplines require that measures not be “more trade-restrictive than necessary to fulfil a legitimate objective”.²⁴⁷ What this means exactly is unclear: neither “necessary” nor “legitimate objective” are defined. Adding a specific definition would help ensure certainty and reduce fears held by some stakeholders that a necessity test could threaten legitimate regulatory autonomy. The definition of “legitimate objectives” for lawyers could specifically include such values as ensuring lawyers respect legal and ethical requirements of privilege and confidentiality, that they do not abuse powers over third parties and fulfill their duties to the court as well as to their client. The issue of necessity could be addressed by setting out that both expert evidence and empirical studies may be used in defending restrictions. Concerns by the profession can also be addressed by pointing out that legislatures can put enact suitable means for determining necessity. Self-regulating bodies in the legal profession would have a continuing role in establishing requirements, and would have standing to defend their requirements if and when they are challenged before independent oversight bodies.

²⁴⁴ *Ibid* at 12.

²⁴⁵ CBA, *Submission*, *supra* note 144.

²⁴⁶ FLSC, *Meeting Canada’s Current Obligations*, *supra* note 243 at 6-7; Canadian Bar Association, *World Trade Organization – General Agreements on Trade in Services (GATS)* (2009), online: CBA <<http://www.cba.org/CBA/epigram/pdf/world.pdf>>.

²⁴⁷ *Disciplines on Domestic Regulation in the Accountancy Sector*, *supra* note 92 at 2.

Answering this question may prove unnecessary: both the necessity test and the ‘legitimate objective wording’ were excluded from the equivalent provision in the 2009 Draft Disciplines.²⁴⁸ Rather, the draft required measures relating to licensing and qualification procedures and requirements and technical standards to be “pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.”²⁴⁹ The draft further specified that “nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service”, although this must be done “in a manner consistent with their obligations and commitments under the GATS.”²⁵⁰ More recently, following an April 2011 drafting session, the necessity test was again included in the most up-to-date copy of the draft disciplines. Significant debates have continued though and in principle nothing is final until the whole document is finalized and agreed to in full.²⁵¹

A third concern held by the CBA, and occasionally advanced by the IBA deals with technical standards. The legal profession, after all, does not share a global set of standards or common practices.²⁵² Without internationally recognized standards to form the basis for multilateral ethical rules, it would be futile to subject the legal profession to an even broader horizontal discipline.²⁵³ But there are commonalities in ethical standards between most Members that allow for common international codes of conduct, such as the International Bar Association’s *International Code of Ethics*, which was first adopted in 1956, and the Council of Bars and Law Societies of Europe (CCBE)’s *Code of Conduct*, that governs cross-border transactions in Europe.²⁵⁴ These international documents could help legal regulators reach common ground to establish a legal discipline.²⁵⁵ Indeed, the legal profession has ethical rules such as loyalty, confidentiality and avoidance of conflicts of interest that appear to have a universal element. There are no easily measurable technical standards in the

²⁴⁸ WTO, Working Party on Domestic Regulation, *Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4*, Room Document 2160 (2009) at 27, online: Institute for Agriculture and Trade Policy <<http://www.tradeobservatory.org>> [WTO, *Draft Disciplines*, 2009].

²⁴⁹ *Ibid* at 11.

²⁵⁰ *Ibid* at 12.

²⁵¹ WTO, *Article VI: 4: Chairman’s Progress Report*, (2011), *supra* note 228 at 14.

²⁵² FLSC, *Meeting Canada’s Current Obligations*, *supra* note 243 at 12.

²⁵³ CBA, *Submission*, *supra* note 144 at 15.

²⁵⁴ WTO, Council on Trade in Service, *International Regulatory Initiatives in Services: Background Note by the Secretary*, GATT Doc S/C/W/97 (1999) at 17, online: WTO <<http://www.docsonline.wto.org>>; see also International Bar Association, *International Code of Ethics*, London: 1988, online: IBA <<http://www.ibanet.org>> & Council of the Bars & Law Societies of the European Union, *CCBE Response to the WTO Concerning the Applicability of the Accountancy Disciplines to the Legal Profession*, (2003), online: CCBE <http://www.ccbe.org/doc/En/ccbe_response_080503_en.pdf> [*CCBE Response*].

²⁵⁵ Hopkins, *supra* note 73 at 453.

legal profession and finding ways to measure ethical adherence would not be straightforward, nor would it be impossible. The current draft attempts to define technical standards and spells out that technical standards provisions are only those standards that are “applicable” to the relevant service sector.²⁵⁶ This problem is largely a definitional issue that does not seem so significant as to prevent extending the disciplines horizontally.

The fourth and fifth concerns held by the CBA involve recognizing qualifications. The *Accountancy Discipline* originally stated “[a] Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.” As the CBA explained, “[i]t is unlikely that foreign qualifications will be of great relevance to the practice of law in Canada.”²⁵⁷ While in some cases this may be true, foreign qualifications are often of great relevance. A lawyer with training and experience in a common law system, like that of the United Kingdom, Australia or the United States, may have many transferable competencies when coming to Canada. The European Union experience shows that even the free movement of lawyers from civil law to common law systems can operate effectively. In any event, the disciplines do not in fact demand recognition, only that qualifications are to be taken into account on a fair and transparent basis. Canada already does this, presumably along with other countries. If these qualifications are found not to establish the necessary competence to practise host-country law, there is no obligation to award recognition. Thus, taking a stance that this provision is generally acceptable, such as the European Union’s CCBE did, seems reasonable.²⁵⁸

In an effort to make a universal discipline more amenable to all sectors, the WPDR responded to many concerns initially posited by its opponents by amending the 2009 draft and then again allowing alternative provisions in the most recent 2011 draft.²⁵⁹ The evolution of the disciplines is a testament to the complex process of multilateral negotiations and the importance placed on creating a functional horizontal discipline. The 2009 draft spoke to ensuring that adequate procedures exist to verify and assess qualifications and, where relevant, giving due consideration to professional experience as well as membership in a “relevant professional association”.²⁶⁰ This remains one of three possible alternatives;²⁶¹ all the provisions of the 2011 draft disciplines are divided into three categories based on their progress and how much agreement has been

²⁵⁶ WTO, *Article VI: 4: Chairman’s Progress Report*, (2011), *supra* note 228, s 13.

²⁵⁷ CBA, *Submission*, *supra* note 144 at XX.

²⁵⁸ CCBE *Response*, *supra* note 254.

²⁵⁹ WTO, *Draft Disciplines*, 2009, *supra* note 248 at 27; WTO, *Article VI: 4: Chairman’s Progress Report*, (2011), *supra* note 228.

²⁶⁰ WTO, *Draft Disciplines*, 2009, *supra* note 248 at 27.

²⁶¹ WTO, *Article VI: 4: Chairman’s Progress Report*, (2011), *supra* note 228, s 27.

reached. Little consensus has been achieved so far on this aspect of the qualification requirements.²⁶²

The second concerning provision states “[t]he scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought.”²⁶³ The unease in the legal profession lies in the fact that lawyers are not always licensed to practise in specific areas of law. In this case, the ‘activity for which authorization is sought’ means becoming a full member of the bar.²⁶⁴ In some jurisdictions, however, the legal profession *is* divided into areas of practice and it may be possible to seek more specific authorization.²⁶⁵ The reality of an undivided Canadian legal practice hardly seems to make the provision so inappropriate that it should thwart the entire effort to extend the disciplines, though it would seem that if practice is undivided and unrestricted, an individual must seek access to the *entire* profession. This provision was also replaced with a less controversial version in the 2009 draft. So long as an applicant presents all required supporting evidence of his or her qualifications, the Member state must identify any deficiencies and explain what is needed to compensate for that deficit. The Member state may suggest or prescribe course work, examinations, training or work experience.²⁶⁶ This continues to be an alternative and a possible provision in the 2011 draft disciplines.²⁶⁷

Efforts to extend disciplines to cover the legal services sector, either horizontally or specifically, have achieved “few practical results.”²⁶⁸ Disciplines on domestic regulation could play an important role in the reduction of unnecessary barriers to entry to the domestic legal market; hopefully, progress will be made more quickly in the future. In future discussions, representatives of the legal profession should take into account the amount of time it takes to draft sector-specific disciplines and remember that many other professions also claim to be unique; these considerations have led to scepticism about the “‘unique nature’ of the legal profession and the need for specificity”.²⁶⁹ Achieving a legal services market that is open to foreign professionals may require law societies and regulating bodies to take a broader view of the profession and how competency may be established, this may include “accepting non-[domestic]

²⁶² *Ibid* at 14.

²⁶³ WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, *supra* note 92 at 20.

²⁶⁴ CBA, *Submission*, *supra* note 144 at 14.

²⁶⁵ The distinction between solicitors and barristers in the UK, each of which is governed by its own professional body (The Bar Council and the Law Society of England and Wales), is an example of limited practice areas which could be extended to foreign trained professionals.

²⁶⁶ WTO, *Draft Disciplines*, 2009, *supra* note 248, s 28.

²⁶⁷ WTO, *Article VI: 4: Chairman’s Progress Report*, (2011), *supra* note 228, s 28.

²⁶⁸ Hill, *supra* note 66 at 355.

²⁶⁹ IBA, *A Handbook for IBA Member Bars*, *supra* note 30 at 43.

educational qualifications as complete or partial fulfillment of the necessary standards” and eliminating citizenship and residency requirements.²⁷⁰

Pending the adoption of domestic disciplines, Article VI: 5 subjects all new domestic regulations to transparency, objectivity and necessity criteria. However, existing requirements and those which could be foreseen at the time the GATS came into force are expressly excluded. If changes are to be made to overly restrictive domestic measures and further liberalization is to be achieved, it is crucial that disciplines are developed: the progressive liberalization negotiations under track one do not delve into domestic regulations. Success in both tracks is needed to allow for market openness through the GATS.

Horizontal and sector-specific disciplines would both assist in opening the legal profession to foreign workers, though a single horizontal discipline appears to be the ideal choice. It would allow for almost immediate implementation of a new liberalizing regime without developing an individualized program for each service sector. Although the unique features of the legal profession would need to be accounted for, it appears that the *Accountancy Disciplines* could be generally applicable to legal services,²⁷¹ not to mention that the 2009 draft also resulted in positive changes to the disciplines, making them increasingly appropriate for the legal services sector. On-going debates and the new 2011 draft, which still is very much a work in progress, suggest that a horizontal discipline may yet be feasible. Despite objections, there seems to be room to compromise on how the accountancy disciplines would form the basis of a horizontal discipline applying to the legal services sector.²⁷²

iii. Reality about Further Liberalization under the GATS Negotiations

Exploring steps taken under both tracks of the current progressive liberalization negotiations shows that little progress has been made. Few scheduled commitments have been expanded under track one. Modest strides have been taken regarding track two, though the current status of the 2011 draft does seem to point the WPDR closer to forming a horizontal discipline. Despite these hiccups, there remains great potential for expansion in trade in services. It is estimated that services compose 70% of the global economy, though only 20% of world trade is in services.²⁷³ Not only would further liberalization allow Members to seize opportunities under this neglected market area, using the GATS structure would provide a secure framework for regulating trade in services.²⁷⁴ In the interest of expediency and achieving lasting results, it is suggested that Members temporarily move away from the GATS and create

²⁷⁰ FLSC, *Meeting Canada's Current Obligations*, *supra* note 243 at 4 & 11.

²⁷¹ OECD, *Managing Request-Offer Negotiations*, *supra* note 126 at 25.

²⁷² Hopkins, *supra* note 73 at 471.

²⁷³ Vastine, *supra* note 185 at 15.

²⁷⁴ Delmatsis, *supra* note 10 at 19.

regional or bilateral agreements to liberalize trade in services. The advantages of the GATS are multi-fold, but such bilateral agreements could help kick start the GATS with a spirit of cooperation. Reconsidering the current DDR plurilateral negotiating structure to allow for meaningful and timely deals may also facilitate liberalization while seeking to maintain the multilateral nature of trade in services that the GATS aims to establish. Without overriding concerns from the legal profession, a horizontal discipline should also be applied to trade in legal services under the second liberalization track for the sake of expediency and pragmatism.

B. Canada

In 1994 Canada made a commitment during the Uruguay Round to schedule legal services.²⁷⁵ Canada's Schedule includes market access and national treatment limitations that strongly affect Canada's commitment to liberalize legal services. Gaining an accurate picture of Canada's true commitment under the GATS requires investigating permissible horizontal restrictions before moving to sector-specific ones.

1. *Legal Services Obligations*

i. Horizontal Commitments

There are only limited restrictions that apply horizontally to foreign legal professionals in Canada. There are no relevant market access or national treatment exceptions under the first or second modes, cross-border trade and consumption abroad, though there are allowances for certain tax measures.²⁷⁶ Under mode three, commercial presence, there is a market access limitation requiring foreigners to seek permission before acquiring control of Canadian businesses.²⁷⁷ There are also national treatment limitations permitting public sector subsidies and allowing for taxation variations, which would otherwise not be allowed.²⁷⁸

The fourth mode, the movement of natural persons, is the most pertinent to a discussion about foreign credential recognition. Officially, Canada is unbound, which means that Canada has no commitment to liberalize this mode, for both market access and national treatment, with only specific exceptions listed where Canada *has* made commitments.²⁷⁹ These exemptions include, amongst others,

²⁷⁵ WTO, *General Agreement on Trade in Services: Canada: Schedule of Specific Commitments*, WTO Doc WT/GATS/SC/16, (1994), online: WTO <<http://www.docsonline.wto.org>> [WTO, *Canada: Schedule of Specific Commitments*].

²⁷⁶ *Ibid* at 1.

²⁷⁷ *Ibid* at 2.

²⁷⁸ *Ibid* at 3.

²⁷⁹ *Ibid* at 10.

business visitors, intra-company transferees and professionals.²⁸⁰ There are rules relating to each of these categories.

For example, under the GATS, business visitors are permitted to enter Canada to participate in business meetings, to set up contracts or to conduct negotiations for a period of no more than 90 days. They may not, however, receive remuneration from within Canada or participate in sales or supply services directly to Canadians.²⁸¹ Legal professionals choosing to enter Canada as business visitors would not be permitted to practise law while in the country.

Professionals, in contrast, are natural persons who hold academic credentials and professional qualifications for a covered field. In Canada, foreign legal consultants (FLCs) qualify as professionals under the GATS (“lawyers” or other “legal professionals” do not qualify as professionals for the purpose of Canada’s GATS commitments). To be an FLC, an individual is generally required to hold a Canadian baccalaureate degree in law or its equivalent.²⁸² Where an individual seeks to enter a regulated profession with licensing requirements in Canada, such as law or working as a FLC, “a work permit [cannot be issued under the GATS] unless the applicant has obtained, prior to arrival in Canada, a temporary or permanent license from the appropriate province.”²⁸³ Once the professional applicant has obtained a licence from the regulatory body and a work permit is subsequently granted, the individual may enter Canada temporarily for a period of 90 days or less, or for the time it takes to complete the service contract they are coming to Canada to fulfill, whichever ends first.²⁸⁴

No extensions are permitted after the 90 days expire and secondary employment not covered in the working permit is not allowed under these working categories.²⁸⁵ These are important limits to bear in mind when looking to the sector-specific sections: business visitors, intra-company transferees and professionals have restricted, and rather short-term, access to the Canadian services market under the GATS. Note as well that licensing requirements fall outside of the agreement as primarily domestic regulations, though they nevertheless pose a significant barrier to accessing the Canadian legal services market.

²⁸⁰ *Ibid* at 10-13.

²⁸¹ *Ibid*.

²⁸² WTO, Trade in Services, *Canada: Schedule of Specific Commitments – Supplement 2*, 28 July 1995, GATS/SC/16/Suppl 2 at 2, online: WTO <<http://www.docsonline.wto.org>>.

²⁸³ Citizenship and Immigration Canada, “Appendix D: General Agreement on Trade in Services” in *FW 1, Foreign Worker Manual: Temporary Foreign Worker Guidelines* (Citizenship and Immigration Canada, 2011) at 132, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>.

²⁸⁴ *Ibid* at 13.

²⁸⁵ *Ibid* at 130.

ii. Sector-Specific Commitments

Canada did not schedule legal services *per se* in its Schedule. Indeed, Canada made commitments for “Foreign Legal Consultants,”²⁸⁶ which restricts a foreign legal professional’s practice area to foreign or international law and excludes domestic Canadian law. Canada made no exceptions for market access or national treatment under the first two modes and only one exemption under mode three, where commercial presence is restricted to either a sole proprietorship or a partnership under market access. Canada again remains unbound for mode four, apart from the applicable horizontal exceptions and specific market access exemptions (business visitors, professionals and intra-corporate transferees). Those market access provisions permit PEI, Alberta, Ontario and Newfoundland to retain permanent resident requirements and allow Quebec to maintain citizenship requirements.²⁸⁷ Citizenship or permanent residency requirements will almost entirely restrict foreign lawyers wishing to enter Canada temporarily and practise law, even foreign or international law, from doing so. In the additional commitments column, some provinces have scheduled commitments to grant temporary permission to practise without the same criteria as for full accreditation. In some respects, the requirements for temporary practice are the same as for long-term practice as a FLC. In Saskatchewan and British Columbia, for example, the foreign legal professional must be in good standing in the home country’s legal profession, and in Ontario the individual must have five years of experience practising law in the home country.²⁸⁸ This offers a gradation system which helps facilitate temporary market access without posing an unnecessary burden on visiting foreign professionals. Please see Table 5: Canada’s Sector-Specific Commitments for Foreign Legal Consultants on the following page to view this specific Schedule.

²⁸⁶ *Ibid* at 16.

²⁸⁷ *Ibid*.

²⁸⁸ Ontario, Saskatchewan and BC.

TABLE 5: Canada's Sector-Specific Commitments for Foreign Legal Consultants

Modes of supply: 1) Cross border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
Sector or subsector	Limitations on market	Limitations on national treatment	Additional commitments
II. SECTOR-SPECIFIC COMMITMENTS			
I. BUSINESS SERVICES A* Professional Services	1) None 2) None 3) None, other than Commercial presence must take the form of a sole proprietorship or partnership 4) Unbound except as indicated in the horizontal section, and: <u>Lawyers</u> (Prince Edward Island, Alberta, Ontario and Newfoundland); <u>Recruitment to be</u>	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	<u>Foreign Legal Consultants</u> The right to practice without meeting normal accreditation requirements is granted temporarily in the Provinces of British Columbia, Saskatchewan and Ontario on the following basis: 1. In British Columbia and Saskatchewan the FLC must be a "member in good standing" of the legal profession in his/her home country. 2. In Saskatchewan, the FLC must have practised the law of his/her country for at least three complete years and in Ontario for at least the five preceding years.
a*) <u>Foreign Legal Consultants</u> (advisory services on foreign and public international law only) (CPC 861*)			

2. *Other Limitations to Canada's Commitments*

i. Opt-Out Provision

Canada did not take advantage of the one-time opportunity to “opt out” of the MFN principle for legal services and chose not to list legal services, foreign legal consultants or professional services generally on its MFN exemption list in 1995.²⁸⁹

ii. Economic Integration Agreements

Canada has six economic integration agreements or preferential trade agreements (PTAs) currently in effect with ten countries and more in differing stages of negotiations.²⁹⁰ Two of these agreements have only recently reached the final stages of negotiations: during the Prime Minister's tour through South America this past August, a free trade agreement (FTA) with Columbia officially entered into force²⁹¹ and Prime Minister Stephen Harper also announced that bilateral negotiations for an FTA with Honduras have concluded.²⁹² These agreements all grant preferential market access to signatories and serve as a general exception to the GATS trade rules between Canada and the nations involved.

Not all of these agreements consider trade in services, however, and those that do encompass services vary in scope. Canada's FTA with Jordan, for

²⁸⁹ Canada does have an MFN exemption as well as supplements and revisions to that list, which exempt aspects of service sectors such as film/video/television programming, fishing, agriculture, banking, air and marine transport, insurance and finance from MFN. See Trade in Services, *Canada – Final List of Article II (MFN) Exemptions*, WTO Doc WT/GATS/EL/16, 15/04/1994, 94-1102, online: WTO <<http://www.docsonline.wto.org>> for more information, as well as Trade in Services, *Canada – List of Article II (MFN) Exemptions Supplement 1: Revision*, GATS/EL/16 Suppl 1/Rev 1, (4 October 1995), 95-2882 and Trade in Services, *Canada – List of Article II (MFN) Exemptions Supplement 2*, GATS/EL/16/Suppl 2, 26 Feb 1998, 98-0690 for more information regarding insurance and financial services exemptions.

²⁹⁰ Foreign Affairs and International Trade Canada, *Negotiations and Agreements*, online: Canada.gc.ca <<http://www.international.gc.ca>>; see *Free Trade Agreement Between Canada and the Hashemite Kingdom of Jordan*, signed 28 June 2009; *Free Trade Agreement Between the Government of Canada and the Government of the State of Israel*, signed 1 Jan 1997; *Canada – Chile Free Trade Agreement*, signed 5 July 2007; *Canada – Costa Rica Free Trade Agreement*, signed 23 April 2001, in force 1 Nov 2001; *Canada – Peru Free Trade Agreement*, signed 29 May 2008; *Free Trade Agreement Between Canada and the Republic of Panama*, signed 14 May 2010; *Free Trade Agreement Between Canada and the States of the European Free Trade Association*, in effect 1 July 2009; *NAFTA*, *supra* note 40.

²⁹¹ Foreign Affairs and International Trade Canada, Canada News Centre, *Canada – Columbia Free Trade Agreement Comes into Force*, No 230, 15 August 2011, online: Canada News Centre <<http://www.news.gc.ca>>; *Free Trade Agreement Between Canada and the Republic of Columbia*, signed 15 August 2011, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>.

²⁹² Prime Minister of Canada Stephen Harper, *Canada – Honduras free trade agreement*, 12 August 2011, San Pedro Sula, Honduras, online: Office of the Prime Minister of Canada <<http://www.pm.gc.ca>>.

example, covers only goods.²⁹³ Canada's agreements with Costa Rica and the European Free Trade Association (EFTA) both recognize the growing importance of trade in services and speak to providing parties with information on matters affecting trade in services as well as encouraging professional bodies to work together towards mutual recognition.²⁹⁴ The agreement with the EFTA goes a step further with a provision to facilitate temporary access for intra-corporate transferees and business visitors and their families.²⁹⁵ NAFTA is perhaps the best known of these agreements and, like the EFTA, addresses both services and temporary labour mobility.²⁹⁶

NAFTA covers almost all aspects of cross-border trade in services and mandates transparent, fair, non-discriminatory treatment of cross-border service providers between the signatories. The agreement does not permit permanent migration, though it does provide for temporary movement of individuals falling in one of four categories: business visitors, traders and investors, intra-company transferees and professionals.²⁹⁷ Business visitors who move between Mexico, the US and Canada without intending to establish permanent residency or receiving remuneration in the host country, are granted temporary entry under the agreement without requiring a working permit or certification.²⁹⁸ Business visitors may seek an unlimited number of visas or extensions. Foreigners applying as professionals and intra-corporate transferees still require working permits and must "meet licensing or certification requirements respecting the exercise of a profession," though applying through NAFTA expedites the application process.²⁹⁹ NAFTA creates a Trade NAFTA, or TN, visa that is issued once an applicant demonstrates that he or she has a Canadian job offer. Work permits may be issued for professionals, including lawyers who meet licensing criteria set

²⁹³ Foreign Affairs and International Trade Canada, *Fast Facts: Free Trade with Jordan*, 18 July 2011, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>.

²⁹⁴ *Free Trade Agreement Between the Government of Canada and the Government of the Republic of Costa Rica*, signed 23 April 2001, art VIII.1-3; *Free Trade Agreement Between Canada and the States of the European Free Trade Association*, signed 1 December 2008, art III:12 [*Canada-EFTA FTA*].

²⁹⁵ *Canada-EFTA FTA*, *ibid*, III: 13(1)

²⁹⁶ *NAFTA*, *supra* note 40, c V: 12, V: 14 & V: 16.

²⁹⁷ *Ibid*, c V: 16, art 1603, art 1404 & Annex 1210.5.

²⁹⁸ *Ibid*, c V: 1603.1 & 1603.4.

²⁹⁹ Citizenship and Immigration Canada, "Appendix G: North American Free Trade Agreement (NAFTA)" in *FW 1, Foreign Worker Manual: Temporary Foreign Worker Guidelines*, (2011-01-20) at 143-144, online: <<http://www.cic.gc.ca>>.

by the appropriate regulatory body and who hold a law degree,³⁰⁰ for a three year period, with no limit on the number of extensions an individual may seek.³⁰¹

While Canada's trade agreements change the legal landscape for trade in services and how the GATS applies, overwhelmingly these agreements are not being found to have much effect on labour mobility or, by extension, how or if foreign credentials are recognized. In the few cases, such as NAFTA, where these agreements attempt to facilitate labour mobility, "the movement of workers is constrained by national immigration and security frameworks ... [and] everyone who enters the country must abide by the requirements of the 2002 Immigration and Refugee Protection Act and other relevant immigration and security screening rules."³⁰² NAFTA alone does not seem to promote widespread labour mobility: while figures are lacking for inflows into Canada under the specialized working categories, in 2006 the Office of Immigration Statistics of the US Department of Homeland security reported that only 64,633 Canadians and 9,427 Mexicans took advantage of this device.³⁰³ The corresponding Canadian figures are likely much lower. On NAFTA's tenth anniversary, Demetrios Papademetriou, a co-founder of the US Migration Policy Institute, wrote that an important question was still relevant: "[a]re free-trade negotiations and agreements a valid forum for addressing migration per se?" He added: "[t]he NAFTA negotiators' answer was a very timid 'maybe.'"³⁰⁴ That FTAs and PTAs have so far not been able to expand labour mobility any more than the GATS may speak to the overall lack of political will pushing for greater labour mobility. Lant Pritchett draws attention to this dilemma in his work by referring to "Everything but Labor Globalization."³⁰⁵

³⁰⁰ This may be an LL B, a JD, an LL L, a BCL, a Licenciatura Degree or membership in a state or provincial bar; see *NAFTA*, *supra* note 40, c V: Appendix 1603.D.1.

³⁰¹ There are similarly no limits on the number of individuals permitted to enter Canada under these provisions or restrictions on the number of visa extensions individuals may seek under either the *Columbia – Canada FTA* or the *Peru – Canada FTA*.

³⁰² Barbara McLaren, "Labour Mobility and Trade in the Americas: Current Frameworks and Socio-Economic Implications", *Focal Canadian Foundation for the Americas* (June 2008) at 4, online: Focal <<http://www.focal.ca>>.

³⁰³ *Ibid* at 14 (provided to said author, unpublished).

³⁰⁴ John J Audley et al, *NAFTA's Promise and Reality: Lessons from Mexico for the Hemisphere* (Carnegie Endowment for International Peace, 2004) at 40, online: Carnegie Endowment <<http://carnegieendowment.org/files/nafta1.pdf>> [Audley].

³⁰⁵ Lant Pritchett, *Let Their People Come: Breaking the Gridlock on Global Labor Mobility*, (Washington, DC: Centre for Global Development, 2006) at 30 (interestingly, Pritchett considers this "Everything but Labor Globalization" to be a catalyst for increased migration: the costs of moving, financially and psychologically, are lessened and, with everything else liberalized, the question 'why not labor too' is bound to arise eventually).

iii. Recognition

Recognizing foreign credentials is an important component of liberalizing trade in legal services that affects how the GATS applies, especially for mode four.³⁰⁶ Recognition may be achieved one of two ways: through an agreement (either a mutual recognition agreement (MRA) or a PTA that touches on recognition), or unilaterally. Canada does not fully or automatically recognize legal professionals from particular countries, either unilaterally or by way of an agreement; instead, each applicant is examined on an individual basis.³⁰⁷ The particulars of this arrangement will be explored in relation to domestic regulations.

Canada is, however, party to PTAs that consider recognition, though these agreements have largely been ineffective in dealing with labour mobility or in establishing much beyond an encouraging atmosphere for developing mutual recognition criteria.³⁰⁸ International MRAs do not play a large role in Canada, least of all for legal services. There are presently no specific MRAs for legal services anywhere in common-law Canada. Quebec holds a Mutual Recognition of Occupational Qualifications Agreement with France, which allows for recognition of civil legal qualifications between Quebec and France.³⁰⁹ More broadly, Canada holds MRAs for certified management accountancy, general accountancy and engineering.³¹⁰ Having limited recognition agreements is not a particularly unique situation: MRAs have typically been difficult and slow to develop.³¹¹ Certainly for a field such as law, regional differences in practice and in education are strong impeding factors.³¹²

³⁰⁶ ICRIER, *Barriers to Movement of Natural Persons*, *supra* note 206 at 36.

³⁰⁷ Federation of Law Societies of Canada, National Committee on Accreditation, Policies and Guidelines, in effect 15 August 2011, at 1.1 Assessment: Introduction, at 2, online: FLSC <<http://www.flsc.ca>>.

³⁰⁸ See e.g. *Canada-EFTA FTA*, *supra* note 294, art III:12(1)-(3) (the parties “recognize the increasing importance of trade in services” and that they “will work together with the aim of achieving further liberalization and additional mutual opening of markets for trade in services, taking into account on-going work under the auspices of the WTO.” The agreement also says parties will encourage professional bodies to develop and cooperate on mutual recognition of licensing and certification. Note, however, that nothing concrete is mentioned, nor are any steps provided and little is in principle added to the Members’ pre-existing GATS obligations).

³⁰⁹ See *Québec-France Agreement on the Mutual Recognition of Professional Qualifications*, 17 October 2008, online (in French): Ministère des Relations internationales <<http://www.mri.gouv.qc.ca/fr/informer/ententes/pdf/2008-12.pdf>> [*Québec-France Agreement*].

³¹⁰ *Mutual Recognition Agreements (MRA)*, Canadian Information Centre for International Credentials, 1990-2011, online: CICIC <<http://www.cicic.ca>>.

³¹¹ Zarrilli, *supra* note 49 at 8.

³¹² *Ibid* at 10.

3. *Practising Law in Canada: Domestic Regulations and On the Ground Roadblocks*

i. Full Members of the Canadian Bar

There are two stages for gaining access to practise domestic law as a full member of the Canadian legal profession. The first involves applying for national accreditation and the second requires applying to the respective provincial bar once a Certificate of Qualification has been issued.³¹³ The process is considered “lengthy at best” even in the scenario of virtual equivalency.³¹⁴

The legitimacy of some form of domestic regulation in the market is not in question—recall that the GATS recognizes a Member’s right to regulate. In fact, such regulation is needed to guarantee the protection of the public, the integrity of the legal profession, and public confidence in the administration of justice, which are all valid policy concerns. The issue, however, is ensuring that these measures are the least restrictive possible in achieving a valid purpose. They ought not amount to protectionism. As such, this means that education and experience obtained in the home jurisdiction should be given due consideration in evaluating competence and ability within the host country.³¹⁵ In principle, this already occurs within the Canadian framework, though it may be possible to do so in a less restrictive and costly manner.

Foreign lawyers with overseas legal education must apply to the National Committee on Accreditation (NCA). This standing committee of the Federation of Law Societies of Canada (FLSC) evaluates an applicant’s legal training and professional experience to determine what additional education and/or training he or she must complete in order to gain entry into a bar admission program.³¹⁶ Individuals are assessed on a uniform standard, regardless of where in Canada they plan to practise. They must all pay the same initial reviewing fee, which is non-refundable, of \$450 CAD.³¹⁷ The NCA seeks to establish the degree of equivalency between an applicant’s previous education and experience and that of a Canadian LLB program. To be most effective, the NCA has attempted to individualize this process and awards recognition on a per-applicant basis. Comprehensive evaluation guidelines allow the NCA to develop a keen sense of what particular applicants may be lacking. In particular, the NCA looks at such factors as the degree conferred on the individual, the individual’s standing in his or her courses, the subjects she or he followed and the content of those courses,

³¹³ Alice Toal, “Tips for lawyers re-qualifying in Canada,” *The Lawyers Weekly* (4 Feb 2011), online: The Lawyers Weekly <<http://www.lawyersweekly.ca>>.

³¹⁴ *Ibid.*

³¹⁵ WTO, *Legal Services Background Note*, 1998, *supra* note 97 at 73.

³¹⁶ Federation of Law Societies of Canada, *About the NCA*, online: Federation of Law Societies of Canada <<http://www.flsc.ca>>.

³¹⁷ Federation of Law Societies of Canada, *How to Apply for an Assessment*, online: Federation of Law Societies of Canada <<http://www.flsc.ca>>.

the quality of education received, the length of the program, and whether the individual took a pre-law post-secondary degree.³¹⁸ This assessment, however, is weighted heavily towards an applicant's educational background, to the detriment of individuals with more experience.³¹⁹

After the review is completed, the NCA issues the results of the assessment by way of a list of required subjects that, when completed, would make the applicant's legal training comparable to that of a Canadian common law degree program. There is a general focus on Canadian content, which implies that even foreign professionals with very similar legal backgrounds to Canadians can expect some re-training requirements.³²⁰ There is also a concern to address core common law topics. Complete requalification without any credit for existing qualifications may be required where the differences between legal systems are large enough.³²¹ It is not abnormal for there to be a wide spectrum of rules governing how, as well as the extent to which, foreign lawyers may apply to re-qualify across divergent jurisdictions.³²² In cases where the legal system from which an applicant originates is considered too divergent from the Canadian system, however, such as where an applicant entirely lacks any common law experience, the applicant can expect to receive notice that she must complete a full Canadian common law degree program. This is the most onerous potential outcome of the NCA assessment. Otherwise, the NCA may require that equivalency be achieved through a minimum of four challenge exams, each one with a financial cost to writers as well as a self-study component, or, as mentioned, a requirement to return to law school. Individuals may be recommended to return to law school for something less than a full degree.³²³ Once the foreign lawyer meets the requirements listed by the NCA, apart from finishing a Canadian law degree, the NCA then issues a Certificate of Qualification.

The NCA-issued certificate is accepted by most law societies in Canada as equivalent to a common law degree (LL.B. or J.D.) for bar admission, though not by those in any of the Canadian territories.³²⁴ Rules of admission to the various provincial and territorial Bars are not consistent. Generally, all foreign-trained lawyers are expected to participate in a provincial or territorial bar admission course once they have completed an LLB/JD or its equivalent, typically

³¹⁸ *Ibid*; Toal, *supra* note 313.

³¹⁹ Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Consultation Paper* (2008), Appendix 1, online: FLSC <http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf> [FLSC, *Consultation Paper*].

³²⁰ *Ibid*.

³²¹ *Ibid*.

³²² Hook, *supra* note 107 at 25.

³²³ Toal, *supra* note 313; Federation of Law Societies of Canada, *Taking Canadian law school courses*, online: <<http://www.flsc.ca>>.

³²⁴ FLSC, *Consultation Paper*, *supra* note 319.

demonstrated through the NCA's certificate. Foreign professionals enter the Canadian legal workforce the same way Canadian law graduates do, despite their possible practical knowledge or experience: they take the bar admission course and must act as interns.³²⁵ The rationale behind this is that the bar course as well as the student-at-law internship period known as articles both focus on practical skills and procedures that may be unique to the jurisdiction in which the applicant is seeking authorization to work in.³²⁶

Completing this process takes time and the cost of compliance and requalification for foreign professionals is often high. Financial and time constraints can limit applicants from studying for challenge exams or returning to law school.³²⁷ Compliance with entry requirements often results in reduced earnings for foreign professionals as they are forced to remain under-employed or even unemployed.³²⁸ Following articles, lawyers may be fully licensed to practise and begin their respective practices, but, in many ways, these individuals are put on a track that requires re-starting their careers, often as junior-level associates despite their previous levels of achievement.³²⁹

The NCA strives to acknowledge receipt of an application within ten days of receiving it and aims to send applicants a completed assessment within three months. However, the NCA functions on a first-come, first-served basis and backlogs occur. Upon receiving an assessment, individuals may be required to apply to a Canadian law school and complete a degree plus a year of articles. Individuals ought to reasonably expect this process to take between four and five years if they are able to complete their studies as full-time students. Individuals assessed at the other end of the spectrum, requiring only the four minimum courses or challenge examinations (Principles of Canadian Administrative Law, Canadian Constitutional Law, Canadian Criminal Law and Procedure, and Foundations of Canadian Law), may complete their studies within a single semester or at the speed they are able to self-study and write the exams, likely not much less than four months. These individuals must then also complete roughly a year of articles and the provincial bar course. It follows that applying to be a full legal practitioner in Canada as a foreign legal professional can take somewhere between two and five years.

ii. Foreign legal consultants

Becoming an FLC can be a complicated process, though it is undoubtedly less complex and less time consuming than applying for full status under the Canadian Bar. In this case, foreign legal professionals are not usually required to

³²⁵ Toal, *supra* note 313.

³²⁶ *Ibid.*

³²⁷ FLSC, *Consultation Paper*, *supra* note 319, Appendix 1.

³²⁸ Mattoo & Mishra, *supra* note 93 at 445.

³²⁹ Toal, *supra* note 313.

complete more course work or take challenge exams. Still, they must apply for assessment, though in this case it is the provincial or territorial law society in the common law province they hope to practise in that conducts the assessment: the NCA is not involved. Individuals must meet the criteria set out by the provincial body they apply to and each province has a somewhat different system for awarding permits. The overarching criteria, however, are similar to those summarized in model legislation created by the Federation of Law Societies of Canada (FLSC): applicants must be in good standing in their domestic legal profession, they must be of good character and repute, they must have practised law for at least three years or be prepared to work under the direct supervision of a person who is.³³⁰ Applicants must promise to follow local codes of ethics, carry liability insurance as well as a fidelity bond or other form of security, and not to handle trust funds, amongst other requirements.³³¹ Individuals must also submit a non-refundable permit/application fee, which in some cases may be fairly expensive: applying to the Law Society of Upper Canada (Ontario) or the Law Society of Manitoba costs \$500 CAD. Hopeful FLCs may also be required to submit their curriculum vitae, reference letters, proof of liability insurance and other pertinent documentation.³³² After assessment by the provincial law society, successful applicants are granted permits to practise their home country law within that province.

This procedure, which mainly involves verification of submitted documents, is relatively simple and far less complex than being admitted as a full lawyer within Canada. There is little direct assessment and more assessment by the law societies. The time to complete the assessment process once a complete application is submitted likely varies based on the province and the volume of applications, though there is no legislated time limit for law societies to make a decision and inform applicants. Law societies are generally mandated to consider each application and inform each applicant whether his or her request is to be granted or rejected however.³³³ Permits to work as FLCs typically last for a full calendar year and, with the proper forms and fee, later extensions are permitted. This is one way for foreign professionals to temporarily enter the Canadian service market, though their FLC applications must be accepted by a provincial

³³⁰ Federation of Law Societies of Canada, *Foreign Legal Consultants* (2000), online: FLSC <<http://www.flsc.ca/en/pdf/flc.pdf>> at 32, 3(a), (b), (c); see also: LSUC, *By-Law 14: Foreign Legal Consultants*, *supra* note 152, art 4(2); Law Society of Manitoba, *Queen's Bench Rules*, R3-32: Foreign Legal Consultants, online: Law Society of Manitoba <<http://www.lawsociety.mb.ca>>; The Law Society of British Columbia, *Law Society Rules*, Rules 1-19: Foreign legal consultants, online: The Law Society of British Columbia <<http://lawsociety.bc.ca>>.

³³¹ *Ibid*, FLSC, 3(d),(e), (f).

³³² Law Society of Upper Canada, *Foreign Legal Consultants*, online: LSUC <<http://rc.lsuc.on.ca>>.

³³³ LSUC, *By-Law 14: Foreign Legal Consultants*, *supra* note 152, art 5(4).

law society before arrival and they will be restricted to a maximum 90-day stay as a professional under the GATS.

4. *Moving Ahead: Liberalization Techniques*

i. Internationally

a. Bilateral or Regional Agreements or the GATS?

To date, Members have begun taking advantage of the MFN exemption allowing for trade agreements between Members.³³⁴ In fact, since the establishment of the GATS and the WTO in 1995, more than 300 additional trade agreements have been notified to the WTO, compared to 123 agreements from 1948 to 1994.³³⁵ The average number of PTAs a WTO Member is party to has now risen to 13.³³⁶ Foreign policy reasons and economic plans, including Members' desires to foster ambitious trade regimes that are transparent, stable and liberalized, may in part explain this new trend.³³⁷ Certainly the recent stagnation of trade negotiations under the DDA and growing concerns over the slow rate of liberalization under the WTO are factors pushing Members to seek other alternatives, including other trade instruments.³³⁸ The DDR and the GATS are simply taking too long.

These various trade agreements fluctuate in terms of content, scope and signatories.³³⁹ Yet, they all help open markets by initiating reciprocal bargaining between parties, providing forums for regulatory matters and often encouraging greater transparency of domestic regimes.³⁴⁰ Some of the agreements achieve greater transparency by mandating clearer schedules with complete annexes that provide a full and accurate idea about the extent of existing domestic regulations.³⁴¹ The costs and skills involved in forming bilateral or regional trade agreements are also significantly less than under the multilateral GATS framework: negotiations are far less complex, bargaining is more effective and

³³⁴ *GATS*, *supra* note 3, art V: 4 & 1.

³³⁵ WTO, *Regional Trade Agreements: Facts and Figures*, online: WTO <<http://www.wto.org>>.

³³⁶ WTO, *World Trade Report 2011: The WTO and preferential trade agreements: From coexistence to coherence*, (Geneva: WTO, 2011) at 47, online: WTO <http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> [WTO, *World Trade Report 2011*].

³³⁷ Sherry M Stephenson, "Can Regional Liberalization of Services go further than Multilateral Liberalization under the GATS?" (2002) *World Trade Review* 187 at 189 [Stephenson, "Regional Liberalization of Services"].

³³⁸ Confidence Letsoalo, *Services Liberalisation and Regional Trade Agreements: Issues for Developing Countries*, Trade Law Centre for Southern Africa, 2011, at 21 online: [tralac](http://www.tralac.org) <<http://www.tralac.org>> [Letsoalo].

³³⁹ Note that *NAFTA*, *supra* note 40 discusses recognition of qualifications while other agreements may not provide for this.

³⁴⁰ The World Bank, "Roaring Tigers or Timid Pandas", *supra* note 39 at 7-8.

³⁴¹ Stephenson, "Regional Liberalization of Services", *supra* note 337 at 194.

results come more swiftly.³⁴² Fewer signatories mean the costs to adjust agreements are lower if the need arises. Furthermore, achieving higher integration of recognition requirements and greater regulatory harmonization is more straightforward and more feasible between fewer countries.³⁴³

Regional trade agreements and PTAs are relatively easy to create, they help build momentum for trade reform and encourage incremental global change while also strengthening political alliances. Parties can also seek the best alternative instead of the lowest common denominator, as occurs in multilateral talks. More dialogue between signatories creates an atmosphere of trust that is nurtured by transparent, open policies and less competition. Not only might this help develop PTAs, this might also encourage functional recognition agreements as the parties will be better versed in each other's domestic regulations and internal policies.

While the speed and potential outcomes of trade agreements outside the GATS are enticing, and they certainly can be interpreted as having a positive impact on trade, there is tension: the choice "is between a first-best multilateral approach, which may be stalled because of lack of agreement among countries worldwide, and a second-best regional or bilateral approach that achieves liberalization between the partners but creates discrimination against the rest of the world."³⁴⁴ Furthermore, despite the possibilities of expanding market access through PTAs, these agreements have been unable to do much towards liberalizing trade in professional services generally³⁴⁵ and the potential for trade agreements to advance labour mobility and liberalization of trade in services has not yet been met.³⁴⁶

It may be best, where possible, to treat these agreements as an interim solution to current delays and setbacks: there are good reasons to strive for an eventual multilateral agreement or at least a wider regional agreement. Real long term progress might be made if PTAs were used to complement the multilateral process.³⁴⁷ Some have argued that PTAs or RTAs "are a mechanism to enhance the pressure to move on the multilateral front, and they act as laboratories for

³⁴² The World Bank, "Roaring Tigers or Timid Pandas", *supra* note 39 at iv.

³⁴³ Stephenson, "Regional Liberalization of Services", *supra* note 337 at 196.

³⁴⁴ Sherry Stephenson & Gary Hufbauer, "Labor Mobility" in Jean-Pierre Chauffour & Jean-Christophe Maure, eds, *Preferential Trade Agreement Policies for Development: A Handbook* (Washington, DC: The International Bank for Reconciliation and Development & The World Bank, 2011) 275 at 290, online: World Bank <<http://web.worldbank.org>>.

³⁴⁵ Hufbauer & Stephenson, "Services Trade", *supra* note 69 at 620.

³⁴⁶ *Global Economic Prospects: Trade, Regionalism, and Development* (Washington, DC: The International Bank for Reconstruction and Development & The World Bank, 2005) at 97, online: World Bank <<http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf>> [*Global Economic Prospects*].

³⁴⁷ *Ibid* at 135.

international cooperation on behind-the-border policy issues.³⁴⁸ At a conference in 2007, the Director-General of the WTO, Pascal Lamy, plainly stated that “it would be fair to say proliferation [of regional trade agreements] is breeding concern — concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations.”³⁴⁹ These concerns have not evaporated or been adequately addressed since they were raised. Bilateral or regional trade agreements continue to promote trade diversion: the most competitive services and service suppliers may not necessarily be given market access while potentially less competitive services (national or otherwise) are protected.³⁵⁰ Pursuant to this, regional trade agreements usually accord developing nations less bargaining power and give those nations less say on the scope of rules covered under the agreements or in determining whether reciprocity is a pre-condition to bargaining.³⁵¹ Reluctant developing nations may choose not to take part in the agreements, perhaps to their disadvantage but also to that of more developed nations wishing to trade. The multiplicity of agreements, as Lamy noted, also has the potential of wreaking havoc on the international trading system. The complicated maze of different regional trade deals effectively stifles international trade on a large scale as governments, businesses and individuals alike require technical expertise of a multitude of agreements in order to participate.³⁵²

A multilateral trade agreement allows the market to rule and provides a single unified trading framework. Creating such an agreement will require more time and more negotiating than a regional agreement. However, expecting nations to stop bargaining for bilateral agreements and to start serious talks at the DDR is unrealistic. The DDR remains active but ineffective while Members ‘vote with their feet’ and in practice emphasize the importance of bilateral and regional agreements.³⁵³ Regional and multilateral trade arrangements do not necessarily “serve the same purpose or satisfy the same needs.”³⁵⁴ they can be used to promote specific types of trade and build political alliances; there are a wide range of economic and political motives behind PTAs.³⁵⁵ Just the same, the proliferation of PTAs means that a growing number of countries are receiving

³⁴⁸ *Ibid.*

³⁴⁹ WTO, News Release, Speeches—DG Pascal Lamy, “Proliferation of regional trade agreements “breeding concern”—Lamy” (10 September 2007), online: WTO News <<http://www.wto.org>>.

³⁵⁰ Khor, *supra* note 42.

³⁵¹ *Ibid* at 3.

³⁵² *Ibid* at 4.

³⁵³ Stephenson & Hufbauer, “Labor Mobility”, *supra* note 345 at 290.

³⁵⁴ WTO, *World Trade Report 2011*, *supra* note 336.

³⁵⁵ *Ibid* at 95.

similar trade preferences under different agreements. In turn that means the importance of PTAs is dwindling as Members reach roughly the same footing.³⁵⁶

There are examples of preferential trade agreements beginning regionally before circulating more broadly and other countries are invited to join.³⁵⁷ Perhaps, then, continuing to seek regional and bilateral trade agreements has promise. Certainly these agreements have positive impacts on their own, but eventual amalgamation regionally or even globally, conceivably within the GATS structure, could offer even greater advantages. Theoretically the question becomes “whether preferential tariff opening would eventually lead to multilateral opening.”³⁵⁸ Practically one must ask how PTAs can be made coherent within the WTO system. The WTO, in its 2011 World Trade Report, explored four proposals: 1) accelerate opening multilateral trade by extending these agreements non-discriminatorily to other Members, 2) address and fix the WTO’s legal deficiencies that do not expressly cover or regulate PTAs, 3) use PTAs to complement the already-existing WTO legal framework by adding more transparency, and 4) multi-lateralize regionalism.³⁵⁹ Determining the outcome of this complex issue and how it ought to be resolved is well beyond the scope of this paper, though it seems logical that if PTAs are to fit within the WTO’s multilateral system, the WTO will need to become more involved with these agreements. Establishing a legally binding and effective discipline that covers various service sectors could also assist in this integration process.

b. Recognition

Recognition, either unilaterally or through a negotiated agreement, is yet another way countries such as Canada can achieve greater levels of liberalization of trade in services. Any progress made in improving access to domestic legal markets through recognition agreements cannot be attributed to the GATS in more than an ancillary way; the GATS merely permits these agreements and other preferential arrangements notwithstanding MFN obligations. MRAs are not likely to eventually evolve into a multilateral framework, however. As one GATT Counsellor has noted, the GATS will likely not be able to multi-lateralize such individualized arrangements or force countries to treat all foreign qualifications equally.³⁶⁰ Just the same, if these agreements prove to be effective in reducing trade barriers and promoting labour mobility, their importance should not be overlooked or discredited merely because they do not fit within the GATS framework.

³⁵⁶ Jean-Pierre Chauffour & Jean-Christophe Maur, “Preferential Trade Agreements: The Swiss knife of trade policy?”, *Vox EU* (28 July 2011), online: [Vox EU <http://www.voxeu.org>](http://www.voxeu.org).

³⁵⁷ Letsoalo, *supra* note 338 at 9.

³⁵⁸ Nadia Rocha & Robert Teh, “Preferential trade agreements and the WTO”, *Vox EU* (21 July 2011), online: [Vox EU <http://voxeu.org>](http://voxeu.org).

³⁵⁹ WTO, *World Trade Report 2011*, *supra* note 336 at 15.

³⁶⁰ Flores, “Prospects for Liberalizing”, *supra* note 128, n 179.

Despite impediments to recognizing foreign legal credentials, there are nevertheless examples of recognition agreements, even for legal services specifically, that show such agreements are in fact feasible and quite possibly worth the initial effort. One interprovincial example is the *National Mobility Agreement* made by the Federation of Law Societies of Canada (FLSC).³⁶¹ While this is not an international agreement, with a mandate to “facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions,” it does serve as a model for overcoming regionalized variations and it could provide the foundation for a more extensive international agreement.³⁶² Subject to a few limitations, this agreement permits Canadian lawyers authorized in one jurisdiction to practise in another jurisdiction without a permit, provided the duration of an out-of-province lawyer’s stay does not exceed 100 days.³⁶³ Labour mobility to and from Quebec, however, continues to be restricted. This limit on labour mobility is influenced by language differences and its distinct legal system.

The European Union has exemplary functioning mutual recognition agreements that apply generally and that are specific to law. One such example is the *Lisbon Recognition Convention*³⁶⁴ which was signed by all member States of the Council of Europe in 1997 and other States that were parties to the UNESCO *Convention on the Recognition of Studies, Diplomas and Degrees Concerning Higher Education*,³⁶⁵ including Canada.³⁶⁶ The goal of the agreement was to address developments in higher education, including growth of private institutions and increased academic mobility³⁶⁷ by establishing that states recognize educational qualifications for the purpose of academia—including degrees and periods of study—unless the State could show there are “substantial differences in qualifications”.³⁶⁸ Recognition allows an individual either to continue with further studies in a different country or to make use of an academic title. The benefits of such an MRA are multi-fold in attracting top research candidates, encouraging further studies and fostering a diverse

³⁶¹ Federation of Law Societies of Canada, *National Mobility Agreement*, 16 August 2002, online: <http://www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf>.

³⁶² *Ibid* at 2.

³⁶³ *Ibid*, art 7.

³⁶⁴ *Convention on Recognition of Qualifications concerning Higher Education in the European Region*, Council of Europe – UNESCO, 11 April 1997, CETS No 165 (entered into force 1 February 1999), online: Council of Europe <<http://conventions.coe.int>> [*Convention on Recognition of Qualifications*].

³⁶⁵ UNESCO & Council of Europe, *Explanatory Report to the Convention on recognition of qualifications concerning higher education in the European region*, (UNESCO, 2003) at 8 & 23 online: UNESCO <<http://unesdoc.unesco.org/images/0011/001112/111236mb.pdf>> [*UNESCO, Explanatory Report*].

³⁶⁶ *Convention on Recognition of Qualifications*, *supra* note 364.

³⁶⁷ UNESCO, *Explanatory Report*, *supra* note 365 at 4-6.

³⁶⁸ *Convention on Recognition of Qualifications*, *supra* note 364, art VI: 1.

academic setting. Canada was one of the initial signatories to the agreement, signalling its desire to facilitate recognition of foreign education and provide better access to information about Canada's higher education system.³⁶⁹ Unfortunately this recognition agreement is not part of Canada's recognition landscape. Canada—alongside four other signatory members—has so far failed to ratify this convention and it remains ineffective for foreign professionals visiting Canada.³⁷⁰

The European Union is very much a leader when it comes to recognizing legal qualifications. In an attempt to develop a single internal services market, the EU instituted two directives that deal with legal qualification requirements.³⁷¹ The first, from 1977, gave authorized legal service providers permission to provide services in their home country law in all other EU countries without needing to register with the host state.³⁷² The most recent directive from 1998 was somewhat more comprehensive.³⁷³ While registration is now required in a host EU state, legal service markets have been substantially opened. This directive permits a lawyer registered in one EU Member State to practise domestic law in another EU Member State with no limits on scope of practise and no requirements to be supervised by a domestic lawyer.³⁷⁴ Practice must be under a foreign lawyer's home title, however, for the first three years, but after that time a foreign lawyer is free to practise host country law without any qualification exams.³⁷⁵ Thereafter, the lawyer maintains the same status as domestically qualified lawyers.

The EU does not extend this liberal regime to lawyers from non-EU Member States; qualification requirements still pose significant trade barriers for non-EU practitioners. Nonetheless, the EU experience at least shows that mutual and nearly full recognition is possible in the legal profession at the multilateral level, despite different legal systems and regionally distinct laws. The local law societies worked together and encouraged this step.³⁷⁶ It could be that convincing the Canadian legal profession of the importance of opening its market is essential.

³⁶⁹ "The Council of Europe/UNESCO Convention on the Recognition of Qualifications Concerning Higher Education in the European Region: Fact Sheet No. 3" Canadian Information Centre for International Credentials, online: CICIC <<http://www.cicic.ca>>.

³⁷⁰ *Convention on Recognition of Qualifications*, *supra* note 364.

³⁷¹ *Managing Request-Offér Negotiations*, *supra* note 126 at 24.

³⁷² EC, *Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services*, EEC 77/249, OJ L 78, 26 March 1977, at 17.

³⁷³ EC, *Council Directive 98/5/EC to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, [1998] OJ L 77; EC, *Directive 98/5/EC of the European Parliament and of the Council of 16 Feb 1998*, OJ L 77, 14 March 1998.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid* at 36.

³⁷⁶ Zarrilli, *supra* note 49 at 10.

This is a significant achievement that Canada and other countries should look to as a prototype for guidance on establishing recognition requirements.

There are cases of PTAs containing commitments for the recognition of foreign qualifications, though few are actually binding.³⁷⁷ For example, the Annex on Professional Services in the *Australia-United States Free Trade Agreement (AUSTFA)* only goes so far as to encourage developing mutually acceptable standards for the licensing of professionals.³⁷⁸ NAFTA states that qualification requirements ought to be based on objective criteria; they ought not be more burdensome than necessary and must not constitute a disguised barrier on cross-border trade.³⁷⁹ It also includes an article stipulating that residency requirements be removed as prerequisites to providing cross-border services.³⁸⁰ While in principle these provisions go beyond the GATS and ought to guide participating countries towards levels of increasing liberalization, the language used is nonetheless more suggestive than obligatory. Nonetheless, some advancements have been made through NAFTA, especially related to growth in trade and increased temporary labour mobility, and more could be encouraged.³⁸¹ Some agreements do foster higher levels of integration, however. For example, “[t]he Central America and Caribbean Community (CARICOM) allows university graduates to move among member countries without passport requirements and allows university graduates, professionals, skilled persons, and workers from some selected occupations to work without a permit.”³⁸²

Not unlike the lack of progress under PTAs, there has not been significant advancement in developing harmonized standards with specific countries in order to facilitate recognition. Under this method of encouraging recognition, Canada could begin by developing harmonized national standards as a starting base for recognition agreements. Not only could such a step simplify the application process for foreign professionals wishing to practise in Canada, it could eventually have a reciprocal effect for Canadian professionals wishing to practise abroad. From this harmonization, common curricula and training obligations that meet equivalent criteria across the participating nations would be developed.³⁸³ Professional associations representing each nation, or possibly each region, could come together to generate these harmonized standards.³⁸⁴

³⁷⁷ Carsten Fink & Martin Molinuevo, “East Asian Free Trade Agreements in Services: Key Architectural Elements” (2008) 11 *J Int’l Econ L* 263 at 305.

³⁷⁸ *Australia-United States Free Trade Agreement*, 18 May 2004, (entered into force 1 January 2005), online: Australian Government Department of Foreign Affairs and Trade <<http://www.dfat.gov.au>> [*AUSTFA*].

³⁷⁹ *Ibid*, art 1210: 1.

³⁸⁰ *Ibid*, art 1205.

³⁸¹ Audley, *supra* note 304 for more information.

³⁸² *Global Economic Prospects*, *supra* note 346 at 115.

³⁸³ *Ibid* at 13.

³⁸⁴ *Ibid* at 48-50.

While theoretically possible, heterogeneity in law severely complicates this method of recognition.

It is also possible to conduct an in-depth evaluation of educational, training, and licensing criteria in other jurisdictions, compare those findings to Canada's domestic requirements and determine, possibly unilaterally, for which countries recognition should be awarded. This comparison and evaluation, however, is not only difficult, complex and costly, it is also very time-consuming.³⁸⁵ The intricate nature of law, as well as its fundamental local character, significantly impedes evaluating equivalency. Furthermore, it becomes increasingly difficult to determine full or partial equivalency where cultural and societal factors impact the profession, such as in the case of legal practice.³⁸⁶

ii. Domestically

Having said that, the recognition method just described is essentially the scheme Canada has adopted, though on a more individualized level. Such a complex system is even more time-consuming and more expensive than determining a 'one-size fits all' decision for all legal professionals from a particular country. The lack of a national standard for domestic common law degrees, the absence of a rubric for qualification assessment, and the inconsistent requirements between provinces do nothing to facilitate recognition. A recent study revealed a need to harmonize credential assessment in Canada in order to improve consistency and access.³⁸⁷ While there have been improvements to interprovincial mobility protocols which allow lawyers to practise in other jurisdictions without first passing qualifying examinations, this does not assist with the initial recognition process and thus does not assist foreign legal professionals hoping to work temporarily in Canada.

Most importantly, the current assessment system within Canada may not be adequately transparent. There can be wide discrepancies between the courses or examinations the NCA determines individual candidates must complete before certification is issued, without sufficiently detailed explanations.³⁸⁸ Two individuals coming from similar legal backgrounds may be assessed differently due to variations in individual performance or the specific courses each individual studied. However, as the current system stands now, there is no set guide that allows applicants to accurately anticipate what their requalification requirements might look like. There are documented cases that appear to show overarching shared experiences where individual candidates are nevertheless assessed differently and required to complete a different number of challenge

³⁸⁵ *Ibid* at 17 & 62.

³⁸⁶ *Ibid* at 18.

³⁸⁷ CICIC, *Pan-Canadian Quality Standards in International Evaluation*, *supra* note 54 at 4-5.

³⁸⁸ Michael Rappaport, "Foreign-trained lawyers face hurdles", *The Lawyer's Weekly* (11 December 2009) online: The Lawyer's Weekly <<http://www.lawyersweekly.ca>>.

exams.³⁸⁹ One would think that in order to maintain consistency and fair assessments, the NCA would use some type of formula for evaluation. The National Committee on Accreditation has recently posted on its website broad estimated assessments for the number of courses or examinations applicants may expect to be required to take based on their legal system of origin.³⁹⁰ Such a move will help to encourage consistency and transparency while still allowing for individual consideration; it ought to be commended. A more in-depth evaluative prescription presumably exists, however. There does not appear to be any reason not to publish it; indeed, this would only serve to encourage predictability within the Canadian accreditation system. It would also provide applicants with a better idea of how their applications may fare and what re-qualifications might be necessary before they would be allowed to practise in Canada.

Furthermore, recent statistics suggest there has been a 34% increase in applications to the NCA from applicants seeking recognition within Canada.³⁹¹ This shows there is interest in working in the Canadian legal system, and that there is possibly also a growing skill set that Canada can use to the mutual benefit of applicants and Canadian society at large. It may be worth moving beyond establishing merely a more transparent system in order to also seek effective and safe alternative methods to establish equivalency. This would encourage growth in this area.

Despite interest in the Canadian legal system, very few NCA applicants have gained access to the Canadian legal market through NCA-issued certificates. From 1999 to 2009, some 4,515 foreign-trained lawyers applied for NCA assessment, of whom, merely 1,708 applicants eventually received a Certification of Qualification.³⁹² Such a low success rate suggests a need to take steps to overhaul the Canadian recognition system. There must be a way to make use of these skills and afford other mechanisms for determining equivalency.

Legislation enacted in Manitoba, Ontario and Nova Scotia requires self-regulating professions to develop and maintain entry requirements that are

³⁸⁹ *Ibid.*

³⁹⁰ For example, the NCA directly refers to Graduate Entry or Senior Status programs from the UK, as well as Graduate Diplomas in Law. The jurisdiction where an applicant was trained is significant: individuals who studied in mixed or hybrid legal systems containing at least some common law elements can expect to be asked to demonstrate competence in at least eight topics. Without relevant professional experience, the NCA also specifies that individuals trained in legal systems different from common law will be assessed on a case-by-case basis. Similarly, applicants with particularly low academic standing may not receive any recognition for their degree, no matter the jurisdiction.

³⁹¹ NCA Statistics, "Summary of Evaluations & Certificates 1999-2009", online: Federation of Law Societies of Canada <<http://www.flsc.ca>>.

³⁹² *Ibid.*

objective, fair and transparent.³⁹³ This legislation is meant to reduce barriers for skilled newcomers. However, the effectiveness of this legislation is in question and transparency continues to be an issue.³⁹⁴ Moreover, legislative intent is related to internal concerns over labour shortages as well as fairness and transparency in registration practices.³⁹⁵ There is no suggestion of a motivation connected to international trade and the GATS, though if this legislation furthers either purpose it may nevertheless be relevant.

One positive step taken by the Ontario government in conjunction with the University of Toronto is dubbed the 'Internationally Trained Lawyer' (ITL) program. It is a recent effort that began in September 2010 to help foreign-trained lawyers prepare for challenge examinations and for entering the Canadian legal profession. Individuals are only allowed a one-time re-write of challenge exams and, in part due to the self-study nature of the material, failure rates are considered high. The ITL program also focuses on addressing language and cultural fluency in order to assist foreign professionals to better integrate into Canadian society, which is somewhat considered in the NCA evaluation. Currently set up as a one-year long course, the ITL program also includes legal work placements to assist foreign-lawyers enter the job market and make local connections. This program has yet to be evaluated for its success rate, but it appears to fulfill an important role in bridging a gap for foreign lawyers.

Apart from seeking significant steps towards progressive liberalization of trade in legal services through opening Canada's assessment of equivalency doctrines, perhaps to mirror the EU model for example, other potentially less drastic steps would also improve the system as it currently stands. Increasing transparency by publishing a basic rubric of assessment criteria would be a first step. Likewise, the NCA could work to publish more specific statistics relating to foreign applicants' credentials matched with their level of required re-assessment. The individual law societies and provincial and territorial governments should also seek to promote transparency and fairness through their respective criteria for bar admission. Finally, developing programs such as the ITL course implemented by the Government of Ontario will hopefully help facilitate entry of foreign lawyers into Canada and ensure a higher success rate for challenge examinations.

5. Roadblocks

While an increase in human capital may be advantageous to Canada, various concerns might be raised. One such concern is that facilitating access

³⁹³ FLSC, *Consultation Paper*, *supra* note 319 at 13; *The Fair Registration Practices in Regulated Professions Act*, SM 2007 c 21, CCSM c F12; *Fair Registration Practices Act*, SNS 2008, c 38.

³⁹⁴ See Bryan Schwartz & Natasha Dhillon-Penner, "Effective Foreign Credential Recognition Legislation: Give It Some Teeth" (2009) 6 *Underneath the Golden Boy* 81.

³⁹⁵ *Ibid* at 82.

will unfairly drain talent from other countries, including those that are economically undeveloped. However, Canadian public policy makers can legitimately take this into account, and emigration of talented individuals has positive as well as negative effects on source countries. Many foreign nationals send financial remittances to their hard-pressed families back home. While some will stay long term, many eventually return to their source countries and take with them enhanced knowledge, skill and experience. Commentators often speak of “brain circulation” rather than simply “brain drain”.³⁹⁶ Those who stay abroad are often able, by virtue of their continuing knowledge and connections with their original home, to assist in enhancing their original home’s trade and intellectual connections with their new home. The availability of an “exit” option for skilled workers may also encourage their home countries to adopt policies that encourage talented individuals to stay, and in so doing, improve the quality of life for the population generally.³⁹⁷

As a practical matter, any attempt to assist other countries by restricting intake of their skilled workers is futile. Potential immigrants who cannot come to Canada are likely to find other developed countries that will host them. If Canada finds that its welcoming policies are actually damaging to foreign countries, the appropriate response should not be to restrict the free movement of people; rather, it should be to create positive measures such as facilitating the movement of its own skilled workers to developed countries, whether on a temporary or longer term basis, and providing support in other countries for local education and training.

Concern might also be expressed about Canada taking measures such as negotiating MRAs with other states that will facilitate the emigration of skilled Canadians. If the view is adopted that outflows are, on balance, damaging to Canada, then a utilitarian calculus might suggest adopting a strategy of facilitating immigration, and only negotiating reciprocal agreements to facilitate movement when the likely result is that more human capital will arrive here than will exit. But there is no clear evidence that Canada loses more than it gains when its residents are able to go abroad to practise their professions or vocations. As is the case in less developed countries, many Canadians who practise their skills and trades abroad eventually return, and do so with enhanced knowledge, skills and perspectives. Furthermore, competitive pressure

³⁹⁶ Skills Research Initiative, *International Mobility of Highly Skilled Workers: A Synthesis of Key Findings and Policy Implications* (Ottawa: Micro-Economic Policy Analysis Branch, Industry Canada and Policy Research Directorate & Human Resources and Social Development Canada, 2008) at 8-9, online: Industry Canada <[http://www.ic.gc.ca/eic/site/eas-aes.nsf/vwapj/SRIr04.pdf/\\$FILE/SRIr04.pdf](http://www.ic.gc.ca/eic/site/eas-aes.nsf/vwapj/SRIr04.pdf/$FILE/SRIr04.pdf)>.

³⁹⁷ For a review of the potential positive and negative effects of the migration of skilled workers, including an extensive bibliography of the literature, see Frederic Docquier, “Brain Drain and Inequality Across Nations”, *Discussion Paper No 2440 – Institute for the Study of Labour* (Bonn, Germany: IZA, 2006), online: IZA <<http://ftp.iza.org/dp2440.pdf>>.

for talent can have a positive effect on Canadian governmental policy. If professionals are leaving Canada because they find regulations unduly restrict their ability to make use of the latest and best practices and techniques, governments have an incentive to adopt positive measures to retain and attract talented individuals. For example, concerns about the outflow of top minds encouraged Canada to take the positive step of establishing its Canada Research Chair program at Canadian universities.³⁹⁸

The lack of political will mentioned earlier is also a significant concern. While developed nations continue to experience high level of unemployment, “political resistance to all forms of labour mobility is extremely high.”³⁹⁹ Recognizing the public’s impact and the inevitable politics involved in moving ahead to a further liberalized service market and increased temporary labour mobility, it might be more productive and realistic to achieve this when unemployment rates reach more normal levels.

6. *Recommendations*

Overall, there is much room for expansion of Canada’s obligations in order to truly reach a state of liberalized legal services. First, Canada could work to expand the scope of its commitments, both by opening its obligations to the practice of domestic law and by committing to liberalize mode 4 beyond the business visitors, professionals and intra-corporate transferees exceptions. One aspect of this that could promote increased labour mobility would be removing the 90-day limit and restriction on renewal permits for these visitors, such as NAFTA already allows. In a current revised offer affecting Canada’s horizontal obligations, some strict residency requirements have been replaced with more liberal ones.⁴⁰⁰ However, complete removal of residency and citizenship requirements would be best. Similarly, encouraging provinces to offer special and expedited accreditation procedures for foreign legal professionals wishing to work as FLCs on a temporary basis would also be helpful.

Along the same lines, encouraging the provinces and territories to create harmonized standards for bar admission would increase accessibility to the Canadian market for foreign professions while also potentially facilitating recognition agreements in the future. The Canadian government could commence negotiations with the provincial and territorial governments while also encouraging legal professional associations, such as the CBA and the FLSC,

³⁹⁸ See John Zhao, “Brain Drain and Gain: The Migration of Knowledge Workers from and to Canada” (2000) 6 *Educational Quarterly Review* 8 (in the 1990s, concerns were expressed that Canada was losing skilled workers to the United States, although those losses were less than the inflow of skilled workers to Canada from other countries).

³⁹⁹ Pritchett, *supra* note 305 at 276.

⁴⁰⁰ “Trade in Services: WTO GATS Negotiations – Highlights of Canada’s Revised Conditional GATS Offer” (5 July 2011) online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>.

to work with their international counterparts to develop large-scale harmonized requirements and practices. Furthermore, Canada could enter into negotiations with other Members, on a bilateral or multilateral basis, in order to adequately evaluate equivalency of each legal system, licensing program and educational requirements. Looking to the European model as well, Canada could aim to be more lenient on labour mobility between Quebec and common-law Canada as well as on foreign legal professionals originating from non-common law countries, whether they are from civil, mixed or religious legal traditions.

Lastly, mixing labour mobility with immigration federally may be damaging to the viability of foreign workers working in Canada on a temporary basis. “In nearly all countries, the agency that deals with the influx of foreign labor is the immigration authority, whose concern is to regulate and restrict, not to promote.”⁴⁰¹ Beyond that, immigration authorities are normally more concerned with permanent migration than temporary movement.⁴⁰² As such, labour mobility becomes subject to many of the same concerns as immigration, though they do not necessarily go hand in hand: one deals with market access, the other with citizenship and political rights.⁴⁰³ Keeping the two separate would help to eliminate some of the complex roadblocks to working temporarily in Canada.

V. CONCLUSION: TO LIBERALIZE OR NOT TO LIBERALIZE?

Numerous strategies to encourage labour mobility in legal services in Canada have been suggested throughout this paper. The advantages of opening the Canadian legal services market through the various methods looked at would accrue not only to foreign practitioners wishing to practise in Canada temporarily or on a long-term basis but also to members of the local profession and the Canadian public. As we have seen, internal protectionist tendencies can form real barriers to opening markets, however the benefits of liberalization tend to overcome these restrictive policies overall.

Absent any demonstration of significant harm to society as a whole, Canada should act on the basis that the free mobility of individuals—including the movement of skilled individuals from Canada—is warranted by the rights and interests of those individuals themselves. A free society respects and values individuals as ends in themselves. If a Canadian resident believes that he can best realize his ends in life by deploying his talent and training in another part of the world, Canada should be supportive of that choice, rather than attempt to retain its human capital by relying on unreasonable barriers to entry maintained by other countries. Federal and provincial governments, and the professional bodies they establish or regulate, should therefore work individually and in

⁴⁰¹ Stephenson & Hufbauer, “Labor Mobility”, *supra* note 344 at 275.

⁴⁰² *Ibid.*

⁴⁰³ Pritchett, *supra* note 305 at 3.

cooperation in the international arena to promote the movement of professionals and skilled workers. These measures can include working within the GATS or outside the GATS framework. The overarching concern is fostering greater labour mobility, however that may be achieved. The GATS, after all, is not necessarily at the forefront of rule-making, and is not entirely living up to its initial aspirations or desired functions.⁴⁰⁴ Possible steps to assist in achieving increased labour mobility to Canada include:

- *Increasing the scope of professions, trades and other service activities that are listed on Canada's schedule under the GATS, with a particular emphasis on facilitating mode four—the supply of services in Canada by foreign nationals—by expanding listed exemptions and visiting periods;*
- *Working with the GATS Council for Trade in Services to continue its efforts to establish the Accountancy Disciplines, and to extend these liberalizing principles horizontally, with appropriate refinements, to many other professions and services;*
- *Working much more vigorously, in the context of government-to-government agreements (including agreements involving provinces, as well as Canada's federal government), for provisions on the mutual recognition of credentials;⁴⁰⁵*
- *Encouraging professional and trade bodies to work with their counterparts in other jurisdictions, both in Canada and abroad, to develop harmonized standards of recognition;⁴⁰⁶*
- *Increasing transparency for recognition assessment criteria.*

The failure of the Uruguay Round to lead to significant liberalization in the practice of host country law is understandable considering the difficulty of obtaining meaningful commitments for legal services in multilateral negotiations.⁴⁰⁷ However, the lack of progress suggests that the current structure of GATS might not be the most effective vehicle for bringing about the desired change.⁴⁰⁸ This suggestion is further supported by the lack of progress achieved under both tracks of negotiations in the current round. While the GATS may have assisted in putting the issue of regulation of legal services on the world

⁴⁰⁴ Hufbauer & Stephenson, "Services Trade", *supra* note 69 at 622.

⁴⁰⁵ A model worth emulating in this respect is the *Québec-France Agreement*, *supra* note 309.

⁴⁰⁶ See e.g. the mutual recognition agreements that the Canada Certified General Accountants Association has reached with its counterpart associations in the United States, Australia, Ireland and France; Canada Certified General Accountants Association, *ACCA and CGA-Canada Mutual Recognition Agreement (MRA): Strategic Alliances*, online: CGA-Canada <<http://www.cga-canada.org>>.

⁴⁰⁷ Chapman & Tauber, *supra* note 122 at 968.

⁴⁰⁸ *Ibid.*

stage, this is the extent of its contribution to the issue under consideration; it has managed to bring about few actual achievements.⁴⁰⁹ Despite the importance of a multilateral negotiation framework, if it is entirely ineffective, as the GATS has been, less desirable bilateral and unilateral arrangements become relatively more desirable and important; at the very least, they are effective. An increase in regional agreements and agreements allowing for the mutual recognition of credentials could fill the gap that the GATS was intended to fill for temporary labour mobility. As these peripheral arrangements are more tailored to participants and regional conditions, they could also more directly lead to labour mobility on a long-term or semi-permanent basis. As international agreements go, the aims of the GATS are ambitious and valuable, though the current negotiating strategy is undoubtedly flawed; however, WTO member states should avoid inaction where “the best is the enemy of the good”. A more refined approach to multilateral negotiations could assist in revitalizing the GATS and mutual recognition agreements permitted under the GATS could fill in during the interim. When it comes to progress in labour mobility and recognition of credentials in the legal profession to date, the contribution of GATS has been limited to discussion rather than concrete results; it has been all talk and no action.

⁴⁰⁹ Laurel S Terry, “The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”” (2008) *Prof Law* 189 at 192.