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## Introduction

### *The Globalization and Regulation of Legal Services*

#### 1.1 Legal Services and the Modern Economy

The explosion of the Internet since the beginning of the twenty-first century has facilitated a new generation of legal services being provided across international borders. At the same time, the increasing globalization of the economy means that legal issues are taking on an international dimension, necessitating professional advice across multiple jurisdictions and in international law. New business models, such as virtual law firms, conflict with traditional regulatory structures at the national and subnational levels. These forms of service delivery, including the controversial outsourcing of legal tasks to professionals in other countries, raise an urgent demand for an investigation into how laws on data protection and privacy, as well as ethical obligations of legal practitioners, fit into international frameworks governing trade in services. At the same time, there has been an expansion of other kinds of professional services to cover areas traditionally performed by lawyers, such as accountants, surveyors, and new varieties of legal professionals. These alternative business structures (ABSs) offer other services, which are bundled with legal advice, raising problems of categorization under public international law. Changes that are underway in the legal profession itself and the process of obtaining qualifications in countries such as the United Kingdom, generally in the direction of liberalization, underscore the need to reconsider barriers to international practice as well as often outdated or inadequate rules on mutual recognition.

Trade in legal services has grown in the manner alluded to above, in step with globalization itself. Globalization has influenced the legal sector by expanding the need for legal services that cover multiple jurisdictions and may be flexibly applied by the same provider or firm. Simultaneously, it would seem that there has been a growth in international law, specifically the range of commercial and noncommercial issues that are dealt with at the international rather than the domestic level. These include

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high-profile commercial fields such as foreign investment and international trade as well as e-commerce, tax, and arbitration. International commerce has led to an increase in the number and size of economic actors engaging in transactions, often ending up in disputes that require resolution in international tribunals. Just as companies operate across many countries, so highly mobile consumers and workers find themselves interacting with legal regimes beyond that of their home country. This so-called legal pluralism means that a single individual may potentially be subjected to multiple legal or even quasi-legal regimes imposed variously by the state, substate, transnational, and international communities.<sup>1</sup> Tied to this, the emergence of transnational business governance regimes is shaping the expectations of transparency and predictability on the part of parties engaged in international business transactions.<sup>2</sup> The demand for multijurisdictional advice has capitalized on the expansion of telecommunications as well as worldwide alliances of law firms with offices in many jurisdictions, which are better able to embed themselves in the legal cultures of a diverse range of legal systems.<sup>3</sup> The rise of the Foreign Legal Consultant as a category of legal professional is perhaps emblematic of this development. While such professionals have the competence to advise on criminal or family matters, their role would seem to have been designed to serve the commercial interests of multinational actors, including those of a contentious nature that end up in arbitration.<sup>4</sup>

Economic development through globalization has led to the emergence of what commentators have described as a new model of legal services oriented towards providing legal advice to businesses rather than the traditional one in which lawyers, often sole practitioners, represent clients at local courts. There is now a pressing need for legal services in jurisdictions that lack expertise in business law, notably the emerging markets of Asia. This has generated considerable export activities for US and European law firms.<sup>5</sup> Legal professionals serving these international business clients across a range of jurisdictions have a vital role in constructing governance regimes with a view towards facilitating greater movement

<sup>1</sup> P. Schiff Berman, *Global Legal Pluralism* (Cambridge University Press, 2012).

<sup>2</sup> M. C. Regan Jr, "Lawyers, Globalization and Transnational Governance Regimes", 12 *Annual Review of Law and Social Science* 133 (2012).

<sup>3</sup> G. Muller, *Liberalization of Trade in Legal Services* (Wolters Kluwer, 2013) at 6.

<sup>4</sup> S. Moritsch, "Research Paper: International Trade in Legal Services – FTAs and Beyond GATS Commitments", International Bar Association Trade in Legal Services Committee at 1.

<sup>5</sup> Muller, *Liberalization of Trade* at 5.

of goods, services, and capital across international borders. Their work has in turn instigated a greater need for law firms in an ever-intensifying process. In that sense, lawyers are both the agents and the beneficiaries of globalization.<sup>6</sup>

International legal services make up a sizable sector of the economy in many advanced countries. The United States was the largest legal services market in 2016, accounting for about US \$290 billion, or 45 per cent of the global market. The United Kingdom was the second largest, accounting for about \$45 billion, or 7 per cent of the global total and approximately 20 per cent of the European market. Germany was in third place, accounting for about \$25 billion, or 4 per cent of the global market. These countries are followed by France, which represented about 3.5 per cent of the global market, or \$20 billion, and Japan, which accounted for 0.5 per cent.<sup>7</sup> Data from emerging markets such as China and India are harder to verify, but the growth rates of these countries coupled with their increasing integration into the global economy and global legal architecture suggest that the legal services markets in these countries will expand considerably in the coming years. The legal services market could grow faster than the global economy itself. This is because of the explosion of the international risk culture, that is, the increasing legalization of society, in which more and more regulations cover more aspects of life, particularly in a commercial context, as well as the expansion of judicial extraterritoriality, seen, for example, in the number of transnational courts.<sup>8</sup>

Consumers using legal services are changing their patterns of consumption, with a clear trend towards the purchase of legal services from nontraditional suppliers. This applies to clients who are individuals as well as firms. A study conducted in 2017 revealed that approximately 52 per cent of in-house legal departments are considering acquiring legal services from nontraditional law firms. Clients are increasingly seeking firms that offer a range of professional services, such as accounting, finance, and even marketing. Expertise in digital commerce, data protection, privacy, and internet security are also frequently sought from legal services providers.<sup>9</sup> Many commercial clients, particularly newer firms, now have the

<sup>6</sup> Regan Jr, “Lawyers, Globalization and Transnational” and Y. Dezalay and B. G. Garth, eds. *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011).

<sup>7</sup> “The EU and the Legal Sector Report”, The Law Society of England and Wales, 2015.

<sup>8</sup> A. Hook, “Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services”, OECD and World Bank (undated) at 11.

<sup>9</sup> Legal Services Market Global Report 2017 (12 Jan 2017) [www.prnewswire.com/news-releases/legal-services-market-global-market-report-2017-300390461.html](http://www.prnewswire.com/news-releases/legal-services-market-global-market-report-2017-300390461.html).

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expectation that their lawyers will be able to offer business-oriented advice in addition to conventional legal advice.<sup>10</sup>

Commentators have begun to draw attention to how the legal profession is changing through the application of technology and how law firms have often been slow to accommodate these changes, insisting on delivering their services in an obsolete manner that is not cost effective and will ultimately lead to their own demise.<sup>11</sup> Rapidly changing product, market, and network configurations reduce the period in which static legal solutions are effective. Legal services are thus required that can be developed and deployed quickly and in a global manner.<sup>12</sup> Although global supply chains and online delivery of services have led to an economy that has become increasingly complex, some observers believe that the legal infrastructure has lagged behind.<sup>13</sup> Globalization appears to have driven much change in the sector; as open markets have created greater demand for legal services, technology and liberalization have unlocked the capacity of a range of legal professionals to serve foreign clients.<sup>14</sup> The resistance to the changing nature of the legal services market from within the highly conservative legal profession, particularly among its older members, including senior partners, judges, and law professors, has been criticized by some commentators.<sup>15</sup>

### 1.2 Definition of Legal Services

At a fundamental level, legal services suppliers provide advice to clients, who may be individuals or corporations, about their legal rights and obligations. Legal services suppliers also represent clients in civil or criminal cases as defendants or claimants, in commercial transactions, and in various other noncommercial matters such as family law and estates. These issues are not always easy to categorize formally for the purposes of integrating global markets.

<sup>10</sup> A. Weinberg and J. Heine, “Counseling the Startup: How Attorneys Can Add Value to Startup Clients’ Businesses,” 15 *Journal of Business and Securities Law* 39 (2014).

<sup>11</sup> R. Susskind, *Tomorrow’s Lawyers* (Oxford University Press, 2017) at 3–6 and M. Kowalski, *Avoiding Extinction: Reimagining Legal Services for the 21st Century* (American Bar Association, 2012). Kowalski’s book is curiously framed as a novel.

<sup>12</sup> G. Hadfield, *Rules for a Flat World* (Oxford University Press, 2017) at 151.

<sup>13</sup> *Ibid.* at 130.

<sup>14</sup> Susskind, *Tomorrow’s Lawyers* at 3–6.

<sup>15</sup> B. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015) at 174.

The World Trade Organization (WTO) specified the classifications for legal services used in the original General Agreement on Trade in Services (GATS) negotiations, which we will discuss in more detail later. These specifications were based on the UN Central Product Classification (CPC) Group 181 for legal services, which is divided into four classes:

- 8611 – Legal advisory and representation services in the different fields of law
- 8612 – Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
- 8613 – Legal documentation and certification services
- 8619 – Other legal advisory and information services.<sup>16</sup>

The CPC definition is problematic because it is geared toward domestic law and consequently does not capture the reality of trade in legal services. This is one reason why it has not been possible for states negotiating for liberalization of legal services even to agree on a common format and terminology. Indeed, WTO members scheduling commitments for legal services have done so in a range of ways. This incoherence weakens the value of international treaty commitments on legal services and may offer at least one explanation of why progress in this area has been unsatisfactory. Several WTO members have submitted proposals to the Council for Trade in Services for alternative definitions. It has further been questioned whether the language of barriers to trade is appropriate in the context of legal services regulation, in which, at least in the United States, discussions about the validity of regulation of lawyers have not used this vocabulary,<sup>17</sup> possibly because it is a sector that has traditionally been highly circumscribed. The language of barriers appears – perhaps unsurprisingly for the WTO – to be imbued with reflexive liberalism.

Furthermore, the fragmented nature of the legal services industry in countries such as the United Kingdom, where there are multiple licensing regimes for solicitors, barristers, conveyancers, and others (in contrast to the United States, where there is one regime for lawyers), poses additional problems in terms of GATS classification in that different degrees of liberalization may be permitted within “legal services”, which tend to be viewed more holistically elsewhere. The United States proposed a definition for

<sup>16</sup> World Trade Organization, Document W/120, Services Sectoral Classification List (July 1991).

<sup>17</sup> L. Terry, “From GATS to APEC: The Impact of Trade Agreements on Legal Services”, 43 *Akron Law Review* 875 at 974–976 (2010).

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legal services that included the provision of legal advice or legal representation in areas such as counsel on business transactions, participation in the governance of businesses, mediation, arbitration, and other nonjudicial dispute resolution services as well as, very expansively, public advocacy and lobbying.<sup>18</sup> Canada recommended that there should be common definitions for foreign legal consultancy services and for the practice of international law.<sup>19</sup> Australia made similar suggestions.<sup>20</sup> Interestingly, India put forth the idea of dividing legal services into subsectors that concentrate on individual professions, such as lawyers and judges.<sup>21</sup> A group of WTO member states issued a joint statement on services to the Council for Trade in Services that was based on the International Bar Association (IBA)'s resolution for a more appropriate definitional framework. This statement was based on the idea that there should be common definitions for all forms of legal services, taking into consideration the varied approach adopted by WTO members in submitting their GATS schedules and capturing the fundamental distinction between advisory and representation services.<sup>22</sup>

The term "service supplier" is defined in GATS, rather unhelpfully, to mean any person that supplies a service.<sup>23</sup> Article XXVIII (b) goes on to state that "supply of a service" includes the production, distribution, marketing, sale, and delivery of a service. A "person" means either a natural person or a juridical person. Footnote 12 to Article XVIII (g) explains that service suppliers also include forms of commercial presence without the legal status of a juridical person, such as branches or representative offices that are not organized as legal entities, an elaboration that is particularly relevant for law offices. This latter provision clarifies that members do not have the power to exclude certain entities from the scope of GATS by virtue of their national laws, which may not grant legal personality to certain businesses or may not recognize certain foreign juridical persons, such as associations.

<sup>18</sup> Legal Services, Communication from the United States, Council for Trade in Services Special Session, S/CSS/W/28 (18 December 2000).

<sup>19</sup> Initial Negotiating Proposal on Professional Services, Communication from Canada, Council for Trade in Services Special Session, S/CSS/W/52 (14 March 2001).

<sup>20</sup> Negotiating Proposal for Legal Services, Revision, Communication from Australia, Council for Trade in Services Special Session, S/CSS/W/67/Supp.1/Rev (10 July 2001).

<sup>21</sup> Proposed Liberalization of Movement of Professionals under the GATS, Communication from India, Council for Trade in Services Special Session, S/CSS/W/12 (24 November 2000).

<sup>22</sup> IBA Resolution in Support of a System of Terminology for Legal Services for the Purpose of International Trade Negotiations, IBA Council Meeting, San Francisco, September 2003.

<sup>23</sup> Article XXVIII (g).

With attention drawn to the above definitional issues, some preliminary comments need to be made about the terminology used in this book. The term “legal services provider” is the dominant phrase that will be used to describe any individual or firm that is providing legal services, which itself can encompass legal advice and representation in court as well as assistance in matters that have a legal dimension, such as document review and other routine tasks. In the past, some lawyers associations, notably the American Bar Association (ABA), has resisted the use of the phrase “legal services” because of the concern that it somehow diminished the legal profession, which comprises lawyers and only lawyers. The extraordinary position of lawyers as distinct from other kinds of legal services providers is grounded in legal professional privilege, which prevents communications between lawyer and client on legal matters from being disclosed without the client’s permission. The UK Supreme Court recently established that this privilege may be exercised only by qualified lawyers (solicitors and barristers), not by other kinds of legal professionals, such as paralegals.<sup>24</sup> The unique character of lawyers is also seen in the prohibition, in some US states, against the unauthorized practice of law. For most people outside of the legal profession around the world, however, lawyers tend to be seen as simply another kind of service provider.<sup>25</sup> This perception may take hold as other types of legal professionals begin to undertake work that was traditionally the exclusive domain of the classic lawyer.

The term “legal services” should also be contrasted with “the practice of law” or the “profession of law” because these terms unfairly underpin questionable claims of distinctiveness on the part of legal services. In the domain of international trade, which is the focus of this book, legal services tend to be thought of as merely another category of services, such as health care or engineering, both of which could equally lay claim to a special status as professions. This view is rooted in the theory that the concept of profession is a fluid one that is premised fundamentally on the notion of asymmetrical knowledge between the provider and the consumer as well as, somewhat more ambiguously, the fulfilling of a social role beyond simply that of self-interest or personal profit.<sup>26</sup> In this book, the term “lawyer” is used for convenience to refer to someone possessing a legal qualification authorized by a regulating body in the individual’s home state or

<sup>24</sup> *Prudential PLC and Prudential (Gibraltar) Ltd v. Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)*, [2013] UKSC 1 (23 January 2013).

<sup>25</sup> Terry, “From GATS to APEC” at 970.

<sup>26</sup> R. Susskind, *The Future of the Professions* (Oxford University Press, 2015) at 24–25.



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host state. Thus, the term “lawyer” includes both barristers and solicitors as well as attorneys and practitioners with similar titles as used in other jurisdictions.

### 1.3 The Regulation of Trade in Legal Services

It is important to draw attention in this introductory chapter to the main kinds of regulatory barriers that are imposed on the supply of legal services because these are the focus of many of the liberalizing efforts with respect to trade in legal services. Equally important is a consideration of the justification behind these measures, which often impede the modernization and globalization of the legal profession in terms of who is entitled to provide legal services and, by extension, what qualifications such individuals must possess and, in some cases, where they originate.

#### 1.3.1 *The Nature of the Regulatory Barriers to Trade Legal Services*

The legal services industry is among the most restricted of all sectors of the economy. The Organisation for Economic Co-operation and Development’s Services Trade Restrictiveness Indices (STRIs) for legal services range from 0.11 to 0.73 on a scale from 0 to 1, with an average of 0.31.<sup>27</sup> The regulation of the legal profession, as with most industries, has historically been the purview of national and in many cases subnational governments. The provision of an enabling legal framework is the responsibility of the state, just as it is implemented and enforced through legal institutions, including properly functioning courts, effective legal counsel (prosecution and defence), an independent and competent judiciary, and diligent investigating authorities.<sup>28</sup> Such laws traditionally create a monopoly for individuals who are qualified under the jurisdiction’s rules,

<sup>27</sup> M. G. Grosso, H. Nordås, F. Gonzales, I. Lejárraga, S. Miroudot, “Services Trade Restrictiveness Index (STRI): Legal and Accounting Services”, *OECD Trade Policy Papers* 171 (4 November 2014). The STRIs are composite indices that take values between 0 and 1, where 0 represents an open market and 1 represents a market that is completely closed to foreign services providers. The indices are calculated for forty countries – the thirty-four OECD members and Brazil, China, India, Indonesia, Russia, and South Africa – and are based on regulations that are mentioned explicitly in the GATS, regulations that are mentioned explicitly in regional trade agreements, and other regulations that the OECD has identified as relevant.

<sup>28</sup> N. Katangaza and C. Thurston Smith, “Lawyers without Borders: The Case for Legal Services Liberalisation”, 20:3 *International Trade Law and Regulation* 45 at 46 (2014).



prohibiting unqualified suppliers from offering legal services and controlling the extent to which individuals from outside the jurisdiction can enter the domestic market. Domestic competition authorities focus on regulating legal services markets, whereas professional regulatory bodies such as bar associations and law societies devote their attention to regulating the individual services suppliers themselves.

Entry rules to the legal profession may be subdivided into three categories, the least onerous of which is registration, in which individuals who provide a certain service must identify themselves to a regulator. This is followed by certification, which is similar to registration except that it also permits the use of certain titles or designations, such as Queen's Counsel (QC) for experienced barristers. The most stringent entry rule (and the most market-distorting one) is full licensing, which prohibits anyone from providing legal services unless the individual is specifically granted the permission to do so, typically after demonstrating skill by passing examinations or undergoing training.

Conduct rules seek to prevent poor-quality service and often involve insurance to mitigate harm that may be done as a consequence. Conduct rules also involve ethical rules and guidelines. Many jurisdictions maintain laws designed to protect the public from unqualified foreign lawyers. These consist of rules that essentially compensate for differences in training and qualification procedures across various jurisdictions. They include educational and experience requirements as well as restrictions on the types of legal advice that a foreign lawyer may provide.

Business structure rules limit the nature of the business entity through which the individual may deliver legal services, such as partnerships with non-lawyers and corporations, often described as ABSs. These regimes are relatively liberal in the United Kingdom and Australia but remain tightly controlled in the United States and various Asian countries, including Japan.<sup>29</sup> Corporate law provisions regarding company structure that restrict the type of business form that law firms can adopt, for example, are another example of this kind of law. There are, of course, sector-specific measures, typically captured in primary legislation governing the legal profession, that may be imposed through codes of conduct, as well as measures concerning education and training. All of these can affect the extent to which foreign practitioners may access the market.<sup>30</sup> There are laws aimed at constraining the ability of otherwise qualified foreign

<sup>29</sup> N. Semple, *Legal Services Regulation at the Crossroads* (Edward Elgar, 2015) at 33–44.

<sup>30</sup> Hook, "Sectoral Study on the Impact of Domestic Regulation" at 3.

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lawyers from providing services in the domestic market. These measures include hiring restrictions, partnership and association restrictions, data protection and privacy rules, restrictions on naming of firms, residency requirements, and, in some cases, discriminatory taxes. There are regulations that effectively prohibit legal practice by foreign lawyers solely on the basis of their nationality. These measures include citizenship requirements for local bar membership, prohibitions on foreign ownership, and visa requirements.<sup>31</sup>

The closed community of legal specialists who are permitted to provide these services in most countries is regularly criticized for offering insufficient choice to consumers. Many believe that the legal profession is an unjustified monopoly and that its rules, in many countries, are restrictive and anticompetitive.<sup>32</sup> There are parallels between the liberalization of markets domestically (ABSs and delivery by non-lawyers) and the liberalization of markets internationally (enlarging spheres of legal services delivery for foreign providers). Reform initiatives for the former are often linked to the latter, and just as the areas of practice available to non-lawyers are expanded, so also are foreign providers' opportunities. Some jurisdictions regulate foreign lawyers in the same manner as they regulate local non-lawyers. Commentators have spoken of the global "ripple effect": When liberalization of the kinds of services that can be supplied by non-lawyers takes hold and better serves the needs of clients, global businesses that benefit from new forms of service delivery will expect similar services in their own countries.<sup>33</sup> Foreign lawyers may be the first to answer this call.

Most jurisdictions around the world allow legal services providers to offer services regarding the laws of the jurisdiction or jurisdictions in which they are qualified as well as in international laws. Such individuals are usually permitted to form partnerships with local legal practitioners and other foreign lawyers and to use their firm's name. Restrictions based on the nationality or residency of the service supplier are uncommon. In many jurisdictions, legal services suppliers are subject to local legal professional ethical and disciplinary rules.<sup>34</sup>

Domestic legislation on the provision of legal services tends to set out the objectives of the regulation, the scope of the market that is subject

<sup>31</sup> These categories were initially described by D. N. Menegas, "GATT as a Framework for Multilateral Negotiations on Trade in Legal Services", 7 *Michigan Yearbook of International Legal Studies* 277 at 280–282 (1985).

<sup>32</sup> Susskind, *Tomorrow's Lawyers* at 6.

<sup>33</sup> *Ibid.* at 9.

<sup>34</sup> Katangaza and Thurston Smith, "Lawyers without Borders" at 48.