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## Corrections to Laurel S. Terry, GATS' Applicability to Transnational Lawyering

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**Corrections to Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 Vand. J. Transnat'l L. 989 (2001)**

*Laurel S. Terry*

In October 2001, the Vanderbilt Journal of Transnational Law published an article I wrote entitled *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 Vand. J. Transnat'l L. 989 (2001). (This article was part of an April 2001 Symposium on Lawyer Ethics in the 21st Century: Global Legal Practice.) After my article was published, I came to discover several mistakes in it. The pages that follow are my corrections to that October 2001 article. I am very grateful to the editors of the Vanderbilt Journal of Transnational Law for the opportunity to publish these corrections. Since my Vanderbilt article was first published, significant events have occurred with respect to the GATS and legal services. I would like my article to serve as a resource during this important time period.

In November 2001, after my article was published, the WTO held its Fourth Ministerial Meeting in Doha, Qatar. During this meeting, WTO Members agreed to a new comprehensive round of negotiations. WTO Member States agreed to submit their initial "requests" by June 30, 2002 and their initial "offers" by March 31, 2003. Negotiations should be completed by January 1, 2005. The impact of the Doha Ministerial Meeting on legal services is discussed in an International Bar Association June 2002 publication entitled *GATS: A Handbook for International Bar Association Members*, which is available on the Internet at <http://www.ibanet.org/pdf/gats.pdf>. I was the principal drafter of the IBA GATS Handbook, which is based in large part on my Vanderbilt article. I would like to thank the editors of the Vanderbilt Journal of Transnational Law Journal for granting permission to include large excerpts from my Vanderbilt article in the IBA GATS Handbook.



A third important provision to which all WTO Member States are subject is the domestic regulation provision in Article VI, 12.<sup>35</sup>

reciprocity requirements, with no mention made of the GATS): Roger J. Goebel, *Legal Practice Rights of Domestic and Foreign Lawyers in the United States*, 49 INT'L & COMP. L. Q. 413, 434 (2000) (describing reciprocity rules in ABA Model FLC Rule and New York Rule and the GATS separately, without mentioning the effect of the GATS on the U.S. rules.).

35. Article VI states, in its entirety:

#### Article VI

##### Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that [the procedures] in fact provide for an objective and impartial review.

(b) The provisions of sub-paragraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in sub-paragraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

Domestic regulation is also potentially significant to legal services regulators because of its requirement that, for those including legal services on their Schedules, regulatory measures, such as admission, licensing, and discipline measures, be administered in a reasonable, objective, and impartial manner and that qualification requirements be not more burdensome than necessary to ensure the quality of the service.

A fourth important generally-applicable provision involves "Recognition."<sup>36</sup> Recognition requirements will be relevant to regulators who must decide whether to recognize lawyers licensed in other jurisdictions—the admission by motion situation. The GATS envisions that recognition issues may also be handled through "Mutual Recognition Agreements" negotiated between GATS Member States.

Finally, one of the most important aspects of the GATS that applies to all signatories is the progressive liberalization provision in Article XIX.<sup>37</sup> This article requires all WTO Member States to engage in "progressive liberalization" and requires additional negotiations within five years. This provision is the basis for the GATS 2000 ongoing negotiations, which are explained in greater detail in Section III.G.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a) above, account shall be taken of international standards of relevant international organizations applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

GATS, *supra* note 4, art. VI.

36. This article provides in part:

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3 below, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

\* \* \*

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in co-operation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

GATS, *supra* note 4, art. VII (1, 5).

37. GATS, *supra* note 4, art. XIX.

Thus, when evaluating the GATS's applicability to legal services, one must ask whether the country is exempt from MFN requirements.

### C. Commitments Derived from One's Schedule of Specific Commitments

In addition to the general requirements that apply to all WTO Members, there are certain provisions in the GATS that apply only if a country listed the particular service on its *Schedule of Specific Commitments*. For the non-trade law specialists, it may be useful to explain briefly how the *Schedules of Specific Commitments* were developed. Because the GATS negotiation process was based on a request-offer system, countries exchanged information about their proposed *Schedules of Specific Commitments* during the Uruguay Round negotiations before the GATS was signed. This permitted a country to know before it finalized its own *Schedule of Specific Commitments*, what it could expect from other countries. These *Schedules* were subject to fierce negotiations, with some countries saying—in essence—“I’ll include this service on my *Schedule* with these conditions if you will include that service on your *Schedule*.”<sup>41</sup> At a certain specified deadline, each country had to submit its final proposal, including its *Schedule of Specific Commitments*.<sup>42</sup>

Many countries, including the United States,<sup>43</sup> listed legal services on their *Schedules* as a covered service, thus making them subject to many of the GATS' provisions. On the other hand, most countries listed their current regulations in their *Schedules*. The consequence of listing a current law is that the current law need not comply with the market access and national treatment provisions of the GATS that apply to “scheduled” services.<sup>44</sup> In other words, this

41. A country's schedule provides examples of the types of items subject to negotiation. See, e.g., *WTO Guide to Reading Schedules*, *supra* note 40.

42. The negotiations concluded on December 15, 1993. See, e.g., GATS, *supra* note 4, at 1125; Dillon, *supra* note 27, at 54.

43. See, e.g., *U.S. Schedule of Commitments Under the General Agreement on Trade in Services*, at <http://www.ustr.gov/sectors/services/docsvcs.shtml> (visited July 16, 2001). This link ultimately connects one to <ftp://ftp.usitc.gov/pub/reports/studies/GATS97.pdf> (visited July 16, 2001). See *infra* notes 303-09 and accompanying text for a discussion of the ABA's opposition to inclusion of legal services on the U.S. Schedule of Specific Commitments. See *Legal Services, infra* note 93, ¶ 57 (providing a list of countries scheduling legal services).

44. See Cone, *supra* note 16, 2:20-24 (listing in tables I-IV GATS members that submitted schedules of specific commitments for legal services; Table I also summarizes the nature of the commitments.). The WTO website now contains the Schedules of WTO Member States. *WTO, Schedules of Specific Commitments*, at [http://www.wto.org/wto/english/tratop\\_e/serv\\_e/22-specm\\_e.htm](http://www.wto.org/wto/english/tratop_e/serv_e/22-specm_e.htm) (Oct. 13, 2001). The Schedules are also available in other places. For example, the U.S. Schedule is available as a link from the U.S. Trade Representative's website to the U.S. International Trade Commission's website. See <ftp://ftp.usitc.gov/pub/reports/studies/GATS97.pdf> (visited July 16, 2001).

structure has the effect of requiring a country's future regulation of legal services to comply with the market access and national treatment provisions in the GATS, but "grandfathers in" the existing set of regulations.<sup>45</sup> Thus, commentators often describe the GATS as creating standstill provisions.<sup>46</sup>

If a country lists a category of services on its *Schedule*, then future laws—and current laws not included in the *Schedule*—governing that service must comply with additional provisions in the GATS. The market access provision in Article XVI<sup>47</sup> is one of the most important provisions in the GATS that is triggered if a country lists a service on its *Schedule of Specific Commitments*. The market access provision prohibits limitations on the number of service providers, for example by quotas, numerical limitations, or monopolies; it also requires that access to the legal services market not be provided in a manner less favorable than is set forth in the country's *Schedule of Specific Commitments*. To state it differently, the market access provision focuses on what a member country may not do, employing a negative approach.

Another important provision that applies once a service is "scheduled" is the national treatment provision in Article XVII.<sup>48</sup> The

45. Cone, *supra* note 16, 2:32.

46. *Id.* 2:31-32; Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 964, 967-68 (1995) (describing standstill provisions without using that term); Flores, *supra* note 27, at 178.

47. This article provides in part:

With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule.

GATS, *supra* note 4, art. XVI(1). It also prohibits quotas, monopolies, and similar restrictions. *Id.* art. XVI(2)(a).

48. This article provides:

#### Article XVII

##### *National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of

national treatment provision is important because it acts as an equal protection clause for foreigners as compared to domestic service providers; this section prohibits regulators from providing foreigners with treatment that is less favorable than the treatment it accords to its own services and service suppliers.

Finally, if legal services are listed on a country's Schedule, then the domestic regulation of legal services in that country must comply with the remaining provisions of GATS article VI.<sup>48A</sup>

In sum, in my view, there are seven key GATS provisions that ultimately will be of the most significance to regulators of U.S. legal services. These seven provisions include: (1) the requirements of transparency; (2) most favored-nation (MFN) treatment; (3) domestic regulation; (4) recognition; (5) progressive liberalization; ~~and (6) the market access; and (7) national treatment provisions, which apply only to "scheduled" services.~~ Although this terminology probably is not familiar to those trained in the law of lawyering, I believe that we must now become familiar with the type of terminology and analysis summarized below.

Step 1:	Step 2:	Step 3:
Analyze the general commitments that a country assumes by virtue of joining the WTO and signing onto the GATS.	Has the country exempted itself from the MFN requirement that is part of the GATS' general commitments?	What does the country's Schedule of Specific Commitments promise with respect to legal services?
<ul style="list-style-type: none"> <li>• Transparency (art. III)</li> <li>• Most Favored Nation (MFN) treatment (art. II)</li> <li>• Domestic Regulation (art. VI, ¶ 2)</li> <li>• Recognition (art. VII)</li> <li>• Progressive Liberalization (art. XIX)</li> </ul>	<ul style="list-style-type: none"> <li>• Is the country one of the few that exempted legal services from its MFN obligations?</li> </ul>	<ul style="list-style-type: none"> <li>• Are legal services "scheduled"?</li> <li>• If so, apply Domestic Regulation provisions (art. VI, ¶¶ 1, 3-6)</li> <li>• Any additional commitments? (art. XVIII)</li> <li>• If so, what limitations or "standstill" provisions are included with respect to:                         <ul style="list-style-type: none"> <li>• Market Access (art. XVI)</li> <li>• National Treatment (art. XVII)</li> </ul> </li> </ul>

services or service suppliers of the Member compared to like services or service suppliers of any other Member.

GATS, *supra* note 4, art. XVII.

48A. See GATS, *supra* note 4, art. VI, ¶¶ 1, 3, 4-6.



- as an Annex to the GATS;
- as a reference paper to be incorporated by Members into their *Schedules of Specific Commitments* as "additional commitments" under Article VIII of the GATS; or
- as a decision by the Council for Trade in services, adopting the text of the disciplines (but not requiring immediate entry into force) and containing a political standstill not to take measures inconsistent with the disciplines, until entry into force takes place.<sup>131</sup>

The WPPS and Council ultimately chose the third legal form.<sup>132</sup> The *Decision* issued by the Council for Trade in Services memorializes this *Decision* by stating that the Disciplines only apply to Member States who listed accountancy on their Schedules of Specific Commitments and that even for those states, the Disciplines did not become effective immediately, although they did create an immediate standstill effect:

No later than the conclusion of the forthcoming round of services negotiations, the disciplines developed by the WPPS are intended to be integrated into the General Agreement on Trade in Services (GATS). Commencing immediately and continuing until the formal integration of these disciplines into the GATS, Members shall, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines. <sup>133</sup>

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draft Council Decision (Job No. 6481/Rev.1), which the WPPS now recommends for adoption." Working Party on Professional Services, *Working Party on Professional Services Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector*, S/WPPS/4, at ¶ 6 (Dec. 10, 1998).

131. WTO ANNUAL REPORT 101 (1998), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anre98\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anre98_e.pdf) (last visited June 23, 2001).

132. See *Disciplines for the Accountancy Sector*, *supra* note 116. Accord WTO ANNUAL REPORT 1999, *supra* note 118, at 71.

The disciplines are to be applicable to all WTO Members who have scheduled specific commitments for accountancy. They do not have immediate legal effect, but instead are to be integrated into the GATS, together with any other new or revised disciplines which have been developed, before the end of the upcoming round of services negotiations. A standstill provisions (i.e. a promise not to adopt new measures in violation of the accountancy disciplines) does, however, have immediate effect, and is applicable to all WTO Members.

*Id.*

133. *Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 Dec. 1998*, S/L/63 (Dec. 15, 1998). Accord Press Release, *supra* note 117.

The disciplines will not have immediate legal effect. WTO Members, as stated in today's *Decision on Disciplines Relating to the Accountancy Sector*, will continue their work on domestic regulation in the context of the Working Party on Professional Services (WPPS), aiming to develop general disciplines for professional services while retaining the possibility to develop additional sectoral disciplines. Before the end of the forthcoming round of services negotiations, which commence in January 2000, all the disciplines developed by

\* Discriminatory requirements and procedures relating to the licensing of foreign individuals and the establishment of natural persons and legal persons in the accountancy sector, including the use of foreign and international firm names. Discriminatory elements which set prior conditions unrelated to the ability of the supplier to provide the service when preparing, adopting or applying licensing requirements;

\* Discriminatory residency requirements or requirements for citizenship, including those required for sitting examinations related to obtaining a licence to practice. Discriminatory requirements for membership of a particular professional body as a prior condition for application;

\* Discriminatory treatment of applications from foreign service suppliers vis-à-vis domestic applications including: criteria relating to education, experience, examinations and ethics; the overall degree of difficulty when testing competence of applicants; the need for in-country experience before sitting examinations. 138

To recap, while I suspect many readers remain confused about the exact coverage of the *Disciplines*, there are a few key points to remember. First, one should understand that the *Disciplines* apply to, and have an immediate standstill effect in, those Member States that included accountancy services on their *Schedules of Specific Commitments*. Second, one should understand that the *Disciplines* only apply to the laws of those Member States that constitute "domestic regulation" provisions. Third, one should understand that it is often exceedingly complex, even for the WTO negotiators, to determine whether a Member State's law is a "domestic regulation" provision rather than a "market access" or "national treatment" provision. Finally, one should understand that if the Member State's law is considered to be a "market access" or a "national treatment" provision, then the *Disciplines* do not apply to that law.

In sum, the key documents related to the *Disciplines for the Accountancy Sector* include the following:

WTO ENTITY:	DOCUMENT ISSUED:
Working Party on Professional Services	<ol style="list-style-type: none"> <li>1. [Draft] Disciplines on Domestic Regulation in the Accountancy Sector. Draft S/WPPS/W21 (30 Nov, 1998) [contains the text of the disciplines approved at the meeting memorialized in S/WPPS/M/24];</li> <li>2. Note on the Meeting Held on 4 December 1998—Note by the Secretariat. S/WPPS/M/24 (18 Dec. 1998) [minutes of the WPPS meeting at which the Disciplines were approved];</li> <li>3. Report to the Council for Trade in Services on the Development of Disciplines on</li> </ol>

	<p>Domestic Regulation in the Accountancy Sector, S/WPPS/4 (10 Dec. 1998) [transmittal of the Disciplines by the WPPS to the Council for Trade in Services for its approval];</p> <p>4. Chairman's Note on discussion of Articles VI, XVI and XVII (Job No. 6496; attached to S/WPPS/4) [this document has no legal force but explains the method by which the Working Party on Professional Services (WPPS) pursued its work with respect to the question of the types of measures it would address in creating the disciplines in the accountancy sector and summarizes some of the discussion about differences between domestic regulation provisions covered by the Disciplines and market access and national treatment.]</p>
Council for Trade in Services	<p>5. DECISION ON DISCIPLINES RELATING TO THE ACCOUNTANCY SECTOR, Adopted by the Council for Trade in Services on 14 December 1998 (S/L/63) (15 Dec. 1998)[adopts the accountancy Disciplines]</p>

Thus, in December 1998, the WPPS completed the second of its assignments by issuing the *Disciplines for the Accountancy Sector*. As the name suggests, these *Disciplines* only applied to accounting. Thus, while the *Disciplines for the Accountancy Sector* will certainly be of interest to those who regulate lawyers, the *Disciplines* do not directly govern regulation of the legal profession.

There was a time period in which the world's bar leaders expected the WPPS to issue disciplines that did apply directly to the legal profession. For example, in 1996, bar leaders were briefed by the WTO Secretariat and told that the WPPS intended to turn to legal services as soon as it finished its work with the accountancy sector.<sup>139</sup> As late as November 1998, the CCBE *Paris Forum Discussion Paper* predicted that the WPPS would begin to develop disciplines for the legal profession in 1999.<sup>140</sup> As the next section explains, however, within four months of issuing the *Disciplines for the Accountancy Sector*, the WPPS was disbanded without ever having considered disciplines for legal profession.

139. See, e.g., Ward Bower, *Multidisciplinary Practices—The Future*, in GLOBAL LAW IN PRACTICE 155, 162 (J. Ross Harper, ed. 1997) ("An October 1996 WTO briefing of [International Bar Association] leaders, in Geneva, indicates that the legal profession will be next, 'in a few years' (1998 or after).").

140. *Id.*

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