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

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GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers

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ABSTRACT

This Article examines the impact of the General Agreement on Trade in Services, or GATS, on legal services, and more specifically on the legal ethics rules in the United States. The Article begins by explaining background information about the global nature of legal services. Then, the Author details the structure and operation of the GATS, including its relevant exemptions, and its applicability to legal services. Next, the Article explores developments that have occurred since the signing of the GATS, including the possible significance to U.S. regulation of the legal profession. Subsequently, the Author identifies remaining questions about the effects of the GATS on U.S. legal ethics in the twenty-first century and identifies possible scenarios to which the GATS might be applied. Lastly, the Author calls for an increase in monitoring of, and participation in, the ongoing GATS 2000 *negotiations by U.S. lawyers who may be affected by its results.*

TABLE OF CONTENTS

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Last year I was asked by the Reporter of a state MDP[1] committee what impact, if any, the GATS had or should have on the state ethics rule that prohibits MDPs.[2] Although I have written extensively about MDPs and have briefly explored[3] the topic of the treatment of legal services in the General Agreement on Trade in Services or GATS,[4] I found that I had difficulty directly answering this question. As a result, during the past twelve months, I have worked to develop an answer to this question of the effect of the GATS on U.S. state ethics rules.

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1. The term "MDPs" recently has been used to refer to multidisciplinary practice between lawyers and nonlawyers and multidisciplinary partnerships between lawyers and nonlawyers. For purposes of this Article, these distinctions are not important and these terms can be used interchangeably.

For a discussion of MDPs, see generally *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000). My works on MDPs include the following: Laurel S. Terry & Clasina B. Houtman Mahoney, *What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans, in* PRIVATE INVESTMENTS ABROAD-PROBLEMS & SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998, Ch. 7 (Matthew Bender ed., 1999) (exploring U.S. ethics issues that might be implicated if MDPs were permitted in the United States and containing a translation and discussion of *Wouters v. Nova*, the MDP case currently pending before the European Court of Justice); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMPLE L. REV. 869 (1999) (analyzing the issues that an MDP regulator must face); Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000) (analyzing German MDPs); Laurel S. Terry, Symposium, *Multidisciplinary Practice: Examining the Issues*, Symposium Issue of THE PROFESSIONAL LAWYER 1 (1999) (introduction to conference materials that included summaries of the testimony of witnesses before the ABA MDP Commission).

2. E-mail Letter from D. Christopher Wells, Professor, Mercer University Law School and Reporter for the Georgia State Bar MDP Committee, to Laurel S. Terry, Professor, Dickinson School of Law (Oct. 24, 2000) (on file with author) ("One [of the] questions that came up at our last meeting has me a little stumped. Maybe you have some insight. Is there anything in NAFTA or GATT that would seem to control or constrain what state bar associations do with respect to MDP? For example, if the Canadian bar associations were to take a general pro-MDP stance and then existing Canadian MDPs decided to move into an American state that prohibited MDP, could the treaty be invoked to limit application of the state rule? (Assume that the Canadian lawyers and other professionals all could otherwise qualify to practice in the state.").

3. *See, e.g.*, Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. OF INT'L L. 1 (1999) [hereinafter Terry, *Paris Forum Introduction*] (summarizing GATS' regulation of lawyers); Laurel S. Terry, *A Case Study of the Hybrid Model For Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L. J. 1382 (1998) [hereafter Terry, *Cross Border Legal Practice*] (providing a brief overview of GATS' regulation of lawyers).

4. *General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services*, 33 I.L.M. 1125, 1168 (1994) [hereinafter *GATS*], *available at* http://www.wto.org/english/docs_e/legal_e/final_e.htm.

The "short version" of my answer is found in a two-page answer I gave in an e-interview with the "Crossing the Bar" website.[5] This Article represents a much longer, much more detailed answer, which I hope will provide interested lawyers with the resource material they need.

Obviously, there are a significant number of normative issues connected with the issue of the GATS' effect on legal services. One might ask what is the purpose of the GATS and the effect and the desirability of including legal services within the ambit of the GATS. In my view, however, before one can address these normative questions, one must understand what is happening. And, as this Article shows, understanding the GATS' effect on legal services is not necessarily a simple task.

Accordingly, my goals for this Article are rather modest. My first goal is to explain the structure and operation of the GATS, especially with respect to legal services. In doing so, I hope to correct some of the misinformation that has been circulated about the GATS and to raise the awareness level of U.S. lawyers with respect to the GATS and its potential effect on U.S. lawyer regulation. Second, this Article explores the important developments that have occurred since the signing of the GATS. If I accomplish the first two goals, then I hope that lawyers will be in a better position to address the normative questions about the effect of the GATS and GATS 2000 on legal ethics in the twenty-first century. Finally, I hope that this Article, together with an article I wrote during the Spring 2001,[6] might inspire more U.S. lawyers to monitor and participate in the ongoing GATS 2000 negotiations.[7]

Section I of this Article provides background information on the global nature of legal services, which helps explain why the GATS

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5. Interview with Laurel S. Terry, Professor, Dickinson School of Law, question 2 (May 17, 2001), *at* http://www.crossingthebar.com/Terry.htm (visited June 18, 2001) [hereinafter Terry, *E-Interview*]. This e-interview was based in significant part on the research I conducted when preparing to write this paper for the Vanderbilt Symposium.

6. *See* Laurel S. Terry, *A Challenge to the ABA and the U.S. Legal Profession to Monitor the GATS 2000 Negotiations: Why You Should Care*, 2001 Symposium Issue, PROF. LAW. 67 (2001) (forthcoming) *available at* http://www.crossingtnebar.com/GATS2000.htm (last visisted Oct. 6, 2001) [hereinafter Terry, *A Challenge to Monitor the GATS 2000 Negotiations*]. Similar to the Crossing the Bar E-Interview, *supra* note 5, this article was based in significant part on the research I conducted in connection with the Vanderbilt Symposium and I am grateful to the Vanderbilt editors for their permission to include sections of my Vanderbilt article in this article.

7. *See infra* Part III.G for a discussion of the GATS 2000 negotiations. As that discussion explains, the American Bar Association has not made any efforts to educate its members about the GATS and GATS 2000's effect on the regulation of the profession. The ABA efforts stand in contrast to the efforts of the European Bar Association known as the CCBE, which has made some efforts, and the Canadian Bar Association, which has done a superb job.

applies to legal services. Section II of this Article focuses on the GATS and explains its applicability to legal services. The first part of Section II sets forth three key aspects of GATS, which are its general obligations, the most-favored nation exemption, and the significance of a country including legal services on its *Schedule of Specific Commitments*.[8] In setting forth these aspects of the GATS, I have highlighted those provisions that are most significant. Section II also explains the meaning of the "modes of supply" terminology that must be used in a country's *Schedule of Specific Commitments* and highlights some examples from the *Schedule of Specific Commitments* that the United States filed with the WTO with respect to legal services. Section II concludes by focusing on the implementation and enforcement mechanisms included within the GATS.

Section III of this Article focuses on the developments that have occurred subsequent to the signing of the GATS, including their possible significance to U.S. regulation of the legal profession. In particular, this section explains the developments that have occurred in the accountancy sector, which theoretically might be extended to the legal profession during the ongoing GATS 2000 negotiations.

Section IV identifies questions that I have had when thinking about the GATS' application to U.S. lawyers. Section V is an "issue-spotting" section and identifies some of the arguments that have been made or might be made about the GATS' effect on a state's regulation of both transnational and domestic lawyers. Section VI concludes by attempting to synthesize this information and answer a slightly revised version of the question posed by this Symposium, which is the impact of the GATS in the twenty-first century on global legal practice and ethics, especially U.S. legal ethics rules.

I. BACKGROUND—THE GLOBALIZATION OF LEGAL SERVICES

The GATS was the first multilateral trade agreement that applied to services, rather than goods.[9] Trade agreements were expanded to cover services because the global trade in services is increasingly important.[10] Although U.S. lawyers may not be accustomed to thinking in these terms, legal services are important

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8. This terminology, especially the term "Schedule of Specific Commitments," is explained *infra* in notes 49-51.

9. *The Agreements: Services: Rules for Growth and Investment*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm (visited July 16, 2001) ("[t]he GATS is the first ever set of multilateral, legally-enforceable rules covering international trade in services. It was negotiated in the Uruguay Round.").

10. *See, e.g.*, *2001 Trade Policy Agenda and 2000 Annual Report of the President of the United States on the Trade Agreements Program*, *at* http://www.ustr.gov/reports/2001.html, at 11 ("Cross-border trade in services accounts for more than 25 percent of world trade, or about $1.4 trillion annually.").

not just to clients, society, and lawyers, but are also part of the world services economy and the U.S. services economy.

For example, in the United States, trade in "services" is a much larger part of our economy than is trade in goods and represents eighty percent of the gross domestic product.[11] Moreover, legal services are a significant part of this services trade. In 1999, legal services were the third largest U.S. export in the business services sector.[12] In 1999, $844 million in legal services was imported into the United States[13] and $2.56 billion in legal services was exported by U.S. lawyers.[14] During at least five of the last ten years, the export of U.S. legal services has experienced double-digit growth, increasing at a rate of approximately ten percent per year.[15]

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11. *U.S. Dep't of Commerce, Services, Exports and the U.S. Economy* (May 2001), *at* http://www.ita.doc.gov/td/sif/Charts04012001/0104Page1.htm (visited June 22, 2001); *2001 Trade Policy Agenda and 2000 Annual Report of the President of the United States on the Trade Agreements Program*, *at* http://www.ustr.gov/reports/2001.html ("Services are what most Americans do for a living. Service industries account for nearly 80 percent of U.S. employment and GDP."). According to the President's 2000 Annual Report:

> In many respects, lawyers and law firms pave the way for international trade and investment and they are regarded as a part of the infrastructure of commerce. For the United States, balance of payments receipts for legal services amount to roughly $2.5. billion annually.

Id. at 16.

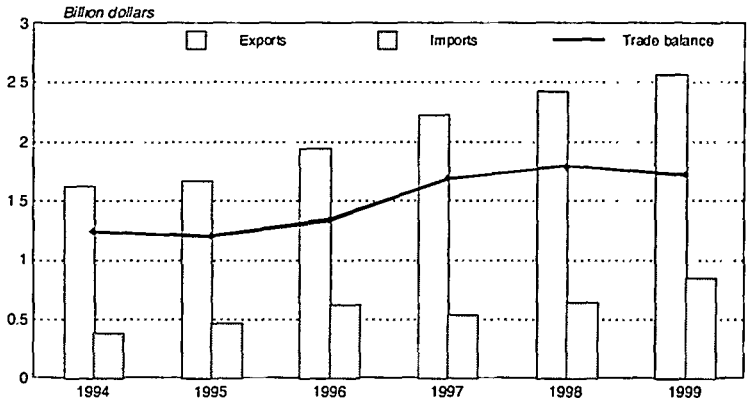
12. U.S. Department of Commerce, Bureau of Economic Analysis, *U.S. International Services, Cross-Border Trade in 1999 and Sales Through Affiliates in 1998*, Survey of Current Business, Table 1, 130-31 (Oct. 2000), *at* http://www.ita.doc.gov/td/sif/Trade%20Data%20(1999).pdf (visited June 18, 2001).

13. *Id.* This compares with $40 million that was paid in 1986, which is more than a twenty-one fold increase in thirteen years.

14. *Id.* This compares with $97 million that was paid in 1986, which is more than a twenty-six fold increase in thirteen years.

15. *See* U.S. Int'l Trade Comm'n, *Recent Trends in U.S. Services Trade, 2001* ANN. REP., Publication 3409, 15-1 (2001), *available at* ftp://ftp.usitc.gov/pub/reports/studies/pub3409.pdf (visited June 18, 2001) (reporting a "10.6 annual average growth rate recorded during 1994-1998"); U.S. Int'l Trade Com'n, *Recent Trends in U.S. Services Trade, 1999 Annual Report*, Publication 3198, p. 15-2 (May 1999) (reporting a "10-percent average annual increase [in exports of U.S. legal services] achieved during 1992-1996."). See Figure 15-1.

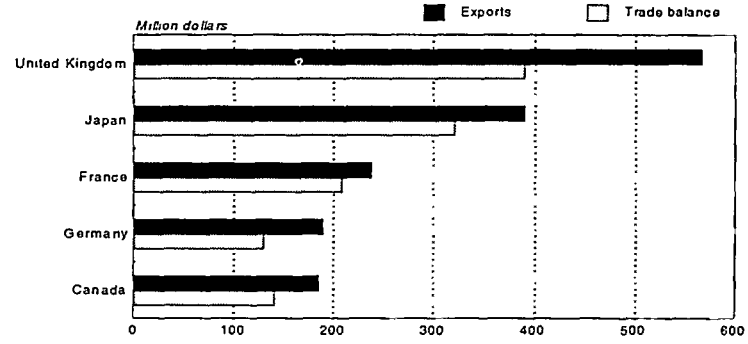
Figure 15-1
Legal services: U.S. cross-border exports, imports, and trade balance, 1994-99



Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, Oct. 2000, pp. 130-131

A recent analysis of the U.S. balance of trade regarding legal services showed that for every country listed, the U.S. exported more in legal services than it imported:

Figure 15-2
Legal services: U.S. cross-border exports and trade balance, by major trading partners, 1999



Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, Oct. 2000, p. 157

Furthermore, the 2001 Annual Report on Recent Trends in U.S. Services Trade noted that many lawyers believe that the value of U.S. cross-border exports of legal services is substantially understated and that the actual value may be closer to twice the $2.6 billion figure.[16] U.S. firms have advised the Department of Commerce that they expect that opportunities in Europe will continue to grow.[17] In short, these government statistics show why it is that many U.S. lawyers feel that it is increasingly likely that clients in the United States—and thus U.S. lawyers—will encounter foreign lawyers in the United States and why U.S. clients—and thus U.S. lawyers—will be involved in matters outside of the United States.

This export of U.S. legal services occurs both in the context of temporary services, in which lawyers "fly in" or appear "virtually" in the foreign jurisdiction, and through "establishment," in which the lawyer or law firm opens a branch office in the foreign jurisdiction. With respect to establishment, Carole Silver has reported that in 1999, seventy-two of the largest or most international of U.S. law firms had offices in other countries.[18]

In sum, these statistics help explain why the GATS applies to legal services and also support the conclusion that the GATS will be relevant to U.S. lawyers and regulators. Because global multijurisdictional practice is only increasing,[19] U.S. regulators will likely have to confront issues of the GATS' effect on U.S. regulation of foreign lawyers in the United States. Moreover, if the GATS

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16. U.S. Int'l Trade Comm'n, *supra* note 15, 15.1 n.1.

> Industry representatives believe that the value of U.S. cross-border exports of legal services is substantially understated and that the actual value may be closer to twice the $2.6 billion figure. This discrepancy may occur because export revenues captured within the balance of payments between countries do not always account for the various ways law firms actually charge and collect fees. For example, a U.S.-based law firm representing a German firm in Germany may be paid in the United States by a U.S. affiliate of the German firm. Industry representative, telephone interview by USITC staff, Jan. 22, 2001.

Accord Sydney M. Cone, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE 1:19 (1996) (suggesting that these numbers are misleading because they seem "to combine gross fees and reimbursed expenses and to lump together all such revenues that were received in respect of 'foreign clients' whether generated domestically or abroad. Being a gross-revenue number, it also does not reveal the net effect, either on revenues generally or on revenues generated abroad, operating expenses and capital outlaw abroad, including the outpost-launching costs and 'financial burdens' . . .").

17. U.S. Int'l Trade Comm'n, *supra* note 15, 15-3 n.3.

18. Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1105-07 (2000).

19. ABA, *Statement of the American Bar Association Section of International Law and Practice to the ABA Commission on Multijurisdictional Practice*, *available at* http://www.abanet.org/cpr/mjp-comm_silp3.html (visited Oct. 13, 2001).

ultimately affects U.S. state regulation of foreign lawyers and results in differential treatment of foreign lawyers and out-of-state U.S. lawyers, then out-of-state lawyers may demand equivalent treatment. Accordingly, although GATS *currently* has very little impact on the regulation of lawyers in the United States, I am convinced that its potential regulatory impact is large and that the scope and impact of the GATS are topics that should be of interest and reflection to every U.S. lawyer.

II. THE GATS' APPLICABILITY TO LEGAL SERVICES[20]

The GATS is one of many trade agreements that were signed in April 1994 as part of the set of agreements creating the World Trade Organization; technically, the GATS is "Annex 1b" to the Agreement creating the World Trade Organization.[21] The GATS and other trade agreements emerged from a round of trade negotiations that are commonly referred to as the "Uruguay Round." These multi-year negotiations concluded on December 15, 1993; the resulting agreements were signed on April 15, 1994 in Marrakech, Morocco.[22] The "Final Act" agreements, as they are called, include several annexes in addition to the GATS, such as the GATT and TRIPS, twenty "Decisions," three "Declarations," and one "Understanding."[23] Eight "Decisions" and one "Understanding" are relevant to the GATS; one of these "Decisions" directly addresses professional services, which includes legal services.[24]

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20. Some of this section is taken from Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession,* 18 DICK. J. INT'L L. 1 (1999) [hereinafter Terry, *Paris Forum Introduction*].

21. *See* GATS, *supra* note 4. The Uruguay Round of GATT negotiations produced a group of multilateral trade agreements. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* 33 I.L.M. 1125 (1994) [hereinafter *Uruguay Round*]. This group includes, but is not limited to: 1) an agreement creating the World Trade Organization [WTO]; 2) the General Agreement on Tariffs and Trade 1994 [GATT 1994]; 3) the Agreement on Trade Related Aspects of Intellectual Property [TRIPS]; and 4) the General Agreement on Trade in Services, with which this article is concerned [GATS]. *Id.* at 1141.

22. Cone, *supra* note 16, 2:14.

23. *Legal Texts: The WTO Final Agreements, at* http://www.wto.org/english/docs_e/legal_e/final_e.htm (visited June 15, 2001) (Copy on file with Vanderbilt Journal of Transnational Law) (listing all decisions, declarations and understanding); *The World Trade Organization: A Training Package,* at http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (visited June 15, 2001) (Copy on file with Vanderbilt Journal of Transnational Law) (specifying that eight decisions and one understanding are relevant to the GATS).

24. *See supra* note 23; *The World Trade Organization: A Training Package, at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (visited June 15, 2001) (explaining the "Decision on Professional Services").

As of June 2001, 141 countries had signed the GATS, including the United States.[25] The GATS itself has six parts, twenty-nine articles, eight annexes—one of which is relevant to legal services—and is approximately twenty-four pages long, without annexes.[26]

Legal services are included within the basic framework of the GATS.[27] Because the GATS is the first multilateral trade agreement that applies to services, rather than goods, and because it includes legal services, I believe the GATS has the potential to have a large effect on transnational legal services. The WTO webpage acknowledges that because the GATS applies to services, rather than goods, the GATS has ventured into new territory: "This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities is the most pertinent example."[28]

The inclusion of "legal services" in the GATS, however, does not mean that a country's regulation of cross-border legal services automatically must comply with all twenty-nine articles in the GATS. To determine the effect of the GATS on cross-border legal services, one must examine three different aspects of the GATS.[29] First, one must consider the provisions that automatically apply to every

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25. There were 141 members of the WTO as of May 31, 2001. *The World Trade Organization: Members and Observers, at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited June 18, 2000).

26. GATS, *supra* note 4.

27. *Id.* Legal services were included within the coverage of the GATS despite the objections of some countries. For example, the United States initially sought inclusion of legal services in the GATS and preferred a special annex addressing legal services. The annex approach was rejected and, by the conclusion of the GATS negotiations, many U.S. lawyers were unhappy that legal services had been included. Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 54-57 [hereinafter Dillon, *Unfair Trade?*]. For a fuller discussion of the events that occurred at the conclusion of the U.S. negotiations, see *infra* notes 302-09 and accompanying text. *See also* Cone, *supra* note 16, at 1:19-20 and 2:2-13 (providing a detailed description of the evolution of legal services in the GATS, including the last minute developments regarding legal services); Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 178 nn.146, 164-66 (1996) (noting that France initially objected to inclusion of legal services in the GATS and summarizing the U.S. position).

28. *GATS, Scope and Definition: Regulatory Implications, at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_11.htm (visited June 15, 2001) (Copy on file with Vanderbilt Journal of Transnational Law).

29. In contrast to this three-part analysis, the WTO webpage separates the GATS into five types of obligations. These include: (1) unconditional obligations; (2) conditional obligations; (3) permissive provisions; (4) exceptions provisions; and (5) provisions for further rule making. *See, e.g., WTO: A Training Package, Services: GATS: The Legal Text, at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (visited June 15, 2001).

In my view, however, the simplest way for the uninitiated to come to grips with the GATS is to think about its three separate functions. Thus, I have used the same structure to discuss the GATS that appears in Sydney Cone's treatise, *supra* note 16, 2:15 (utilizing these three aspects to analyze GATS).

must consider the provisions that automatically apply to every country that is a WTO Member State and GATS signatory. Second, one must determine if a country exempted itself from the most-favored nation provision in the GATS (the *MFN Exemption List*).[30] Third, one must consult the *Schedules of Specific Commitments* (the *Schedule*) submitted by individual countries.[31] This three-part analysis can be represented as follows:

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 general commitments?	What does the country's *Schedule of Specific Commitments* promise with respect to legal services?

Each of these steps of the analysis is discussed below.

A. *Commitments Based on One's Status as a GATS Signatory*

Once a country signs the GATS, its regulation of legal services is subject to many of the first fifteen articles in the GATS. For example, all GATS signatories are subject to a transparency requirement, which specifies that all relevant measures be published or otherwise publicly available.[32] Thus, because the United States is a GATS signatory, it has agreed that all of its measures regulating legal services will be published or publicly available.

Another important provision to which a signatory country is subject is the most-favored nation (MFN) provision in the GATS.[33] This provision generally requires each country to accord all WTO Member States the same treatment that it provides to any WTO Member State. In other words, it is an equal protection type of provision that requires equal treatment as between foreign countries. The GATS MFN provision thus prohibits reciprocity provisions insofar as they are applied to foreign service providers.[34]

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30. Cone, *supra* note 16, 2:15.

31. *Id.*

32. GATS, *supra* note 4, art. III; Terry, *Cross Border Legal Practice*, *supra* note 3, at 1395.

33. *See, e.g.*, GATS, *supra* note 4, art. II(1), which states:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to 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.

34. *But see* Carol Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L. J. 1126, 1134-36 (1998) (describing the variations

A third important provision to which all WTO Member States are subject is the domestic regulation provision in Article VI.[35]

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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. This provision states:

> **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 potentially significant to legal services regulators because of its requirement that 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."[36] 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.[37] 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.

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

(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.

B. *The MFN Exemption*

As explained above, each WTO Member State is subject to an MFN provision that requires a WTO Member State to accord all Member States the same treatment that it affords to any Member State. At the time the GATS was signed, however, a WTO Member State was entitled to place legal services on an MFN exemption list.[38] If a country exercised this option, it need not comply with the MFN requirement. According to commentator Sydney Cone, as of 1998, only thirteen countries out of a total of 120 had placed legal services on the MFN exemption lists: Brunei Darussalam, China, Costa Rica, Cyprus, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Malta, Singapore, Turkey, and Venezuela.[39] Thus, most signatory countries will be subject to an MFN requirement with respect to legal services.

One of the unresolved issues in the GATS is the question of the duration of a country's MFN exemption. The WTO explained the issue as follows on its website:

> All MFN exemptions are to be reviewed after five years by the Council for Trade in Services: after ten years they should in principle be terminated. Many countries have nevertheless indicated in their list of Article II exemptions that their intended duration was indefinite. The legal consequences of such an entry in the exemption list are unclear.[40]

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38. *Id.* art. II(2) (requires MFN exemptions to be listed in Annex II, which was filed with the schedules when the GATS was signed).

39. Cone, *supra* note 16, 2:22 (identifying countries that placed legal services on the MFN exemption list). The WTO recently added to its website links to the documents containing Article II (MFN) Exemptions. *See* http://www.wto.org/english/tratop_e/serv_e/23-iiexm_e.htm (visited Oct. 13, 2001).

40. *GATS: Annexes*, *at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_31.htm#note1 (visited Nov. 7, 2000) (Copy on file with Vanderbilt Journal of Transnational Law).

A different webpage, however, does not acknowledge this issue, simply stating:

> Most-favoured-nation treatment is a general obligation that applies to all measures affecting trade in services. However, it has been agreed that particular measures inconsistent with the MFN obligation can be maintained—in principle for not more than ten years and subject to review after not more than five years. Such measures must have been specified in a list of MFN Exemptions submitted by the end of the Uruguay Round of Multilateral Trade Negotiations or by the conclusion of extended negotiations on certain sectors for which the delayed submission of related exceptions was espressly authorized. Subsequently, requests for exemptions from Article II (MFN) can only be granted under the waiver procedures of the Marrakesh Agreement.

World Trade Organization, *Guide to Reading the GATS Schedules of Specific Commitments and the Lists of Article II (MFN) Exemptions*, *at* http://www.wto.org/wto/english/tratop_e/serv_e/guide1.htm (visited June 15, 2001) (Copy on file with Vanderbilt Journal of Transnational Law).

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*."[41] At a certain specified deadline, each country had to submit its final proposal, including its *Schedule of Specific Commitments*.[42]

Most countries, including the United States,[43] 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 those aspects of the GATS that apply to "scheduled" services.[44] In other words, this structure has the effect of requiring a country's future regulation of legal services to comply with the GATS

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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.

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 (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).

and be no more restrictive than its current regulation, but "grandfathers in" the existing set of regulations.[45] Thus, commentators often describe the GATS as creating standstill provisions.[46]

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[47] 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.[48] The

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

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.

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, all of which are generally-applicable, 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?
• Transparency (art. III) • Most Favored Nation (MFN) treatment (art. II) • Domestic Regulation (art. VI) • Recognition (art. VII) • Progressive Liberalization (art. XIX)	• Is the county one of the few that exempted legal services from its MFN obligations?	• Are legal services "scheduled"? • If so, what limitations or "standstill" provisions are included with respect to. - Market Access (art XVI) - National Treatment (art. XVII)

D. *The Schedule of Specific Commitment's Organization According to Modes of Supply*

In addition to the terminology used in GATS' substantive provisions, there is additional terminology with which U.S. lawyers should become familiar. When each WTO Member State filed its *Schedule of Specific Commitment,* there was a specific format that it

was required to use; the WTO webpage identifies and explains this format.[49]

This format requires a country's *Schedule of Specific Commitments* to distinguish among four different modes by which legal services may be offered. The four modes of supply are:

- Cross-border supply—the possibility for non-resident service suppliers to supply services cross-border into the Member's territory.
- Consumption abroad—the freedom for the Member's residents to purchase services in the territory of another Member.
- Commercial presence—the opportunities for foreign service suppliers to establish, operate or expand a commercial presence in the Member's territory, such as a branch, agency, or wholly-owned subsidiary.
- Presence of natural persons—the possibilities offered for the entry and temporary stay in the Member's territory of foreign individuals in order to supply a service.[50]

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49. WTO Guide to Reading Schedules, *supra* note 40.

50. *Id.* Among other things, this WTO guide to reading Schedules states:

> The national schedules all conform to a standard format which is intended to facilitate comparative analysis. For each service sector or sub-sector that is offered, the schedule must indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained. A commitment therefore consists of eight entries which indicate the presence or absence of market access or national treatment limitations with respect to each mode of supply. The first column in the standard format contains the sector or subsector which is the subject of the commitment; the second column contains limitations on market access; the third column contains limitations on national treatment. In the fourth column governments may enter any additional commitments which are not subject to scheduling under market access or national treatment.
>
> In nearly all schedules, commitments are split into two sections: First, "horizontal" commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the second section of the schedule, commitments which apply to trade in services in a particular sector or subsector are listed.

Id.

THE UNITED STATES OF AMERICA

Modes of supply:	1) Cross-border supply	2) Consumption abroad	3) Commercial presence	4) Presence of natural persons
Sector or subsector	Limitation on market access	Limitations on national treatment		Additional commitments
II. SECTOR-SPECIFIC COMMITMENTS				
1 BUSINESS SERVICES				
A PROFESSIONAL SERVICES				
a) 1) Legal Services: practice as or through a qualified US lawyer				

Let me explain how these "modes of supply" would operate from the perspective of a U.S. regulator responsible for legal services. In Mode 1, or cross-border supply, the service itself crosses the border. Thus, Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the U.S. border to clients inside the United States; this delivery may occur by means of mail, telephonically, or electronically.[51] Mode 2, or Consumption abroad, involves the ability of U.S. citizens to purchase abroad the services of foreign lawyers. Mode 3, or Commercial presence, involves the ability of foreign lawyers to set up a permanent presence in the United States, such as a branch office. Mode 4, or the presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter the United States in order to offer legal services.

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51. Mode 1 applies to situations where the service itself crosses international borders, as for example, legal advice or reports transmitted by U.S. lawyers to foreign clients electronically, telephonically or by mail. Mode 1 therefore would be involved if the service provided by U.S. lawyers—from inside the United States—crossed an international border to reach clients outside of the United States, for example, by means that were electronic, telephonic or mail. The U.S. Schedule of Specific Commitments, is only concerned, however, with the situation in which services provided by foreign lawyers from outside the United States reach cross an international border in order to reach clients inside the United States. The Schedules of Specific Commitments of other countries will address the situation of U.S. lawyers whose services cross from the U.S. into another country. I would like to thank Bernard Ascher, Director, Service Industry Affairs of the Office of the U.S. Trade Representative, for helping me better understand Mode 1 in particular. Interview with Bernard Ascher, Director, Service Industries Affairs, Office of the U.S. Trade Representative, Washington, D.C. (Apr. 27, 2001).

The difference between Mode 1 and Mode 4, then, is that in Mode 1, it is the service that crosses the border—for example, in a "virtual" fashion by mailing, emailing, or faxing an "opinion letter"—whereas in Mode 4, it is the service provider or lawyer who crosses the border. In some countries, there may be different tax consequences between using Mode 1 and Mode 4.[52]

Thus, in order to understand a country's obligations under the GATS, one must consult that country's *Schedule of Specific Commitments*. And, in order to understand the *Schedule,* one must be able to understand the distinctions drawn above because a country's exceptions are listed as subsets of these four "modes of supply." Finally, one must understand that when the term "unbound" is used in a country's *Schedule* in the "market access" or "national treatment" columns, this means that the country has not agreed that the service in question must comply with that particular GATS requirement with respect to the particular item that is listed as "unbound."[53]

And, even after one masters these terms, one must recognize that there sometimes are errors in the way that a country has listed its exceptions or "standstill" provisions on its *Schedule of Specific Commitments.*[54] This undoubtedly is because some of the individuals who assisted in collecting and preparing the information on which the Schedules were based were not familiar with this trade terminology.[55]

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52. *Id.*

53. For example, the WTO Guide to Reading Schedules states:

> In essence, the entries which constitute a legally binding commitment in a Member's schedule indicate the presence or absence of limitations on market access and national treatment in relation to each of the four modes of supply for a listed sector, sub-sector or activity. In the following cases the entries use uniform terminology:
>
> - Where there are no limitations on market access or national treatment in a given sector and mode of supply, the entry reads NONE. However, it should be noted that when the term NONE is used in the second or sector-specific part of the schedule it means that there no limitations specific to this sector: it must be borne in mind that, as noted above, there may be relevant horizontal limitations in the first part of the schedule.
> - All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.

WTO Guide to Reading Schedules, *supra* note 40.

54. Interview with Bernard Ascher, *supra* note 51.

55. *Id.*

In sum, some provisions of the GATS only apply to services identified in a country's *Schedule of Specific Commitments.* By listing its existing laws in its *Schedule*, a country creates "standstill" provisions and exempts those laws from certain requirements in the GATS while agreeing not to adopt any provisions that are more restrictive than the standstill provisions. Therefore, it is important to read a country's *Schedule* to determine the laws for which it only assumed "standstill" obligations.

E. *The U.S. Schedule of Commitments Regarding Legal Services*

For U.S. legal regulators, a key question will be to learn what the U.S. *Schedule of Specific Commitments* lists with respect to legal services. The short answer to this question is: quite a lot. The U.S. *Schedule of Specific Commitments* is approximately 175 pages long; of these pages, approximately fourteen pages apply to all services—horizontal commitments—and approximately twenty pages are devoted exclusively to legal services.[56] The detailed provisions concerning legal services in the U.S. *Schedule* were prepared by the U.S. Office of Trade Representative after consulting with the appropriate state regulators.[57] Appendices A and B at the end of this Article are excerpts from the *U.S. Schedule of Specific Commitments.* The "headings" to Appendix A and B show that, as required by the WTO, for each of the four modes of service, the U.S. describes its obligations and its limitations in terms of "market access," "national treatment," and "additional obligations."[58] In other words, when the U.S. includes an existing law in its *Schedule,* it has the right to continue applying that U.S. law, even if the law should be inconsistent with the market access, national treatment, and other applicable aspects of the GATS. To state it differently, the U.S. laws listed on its *Schedule* are standstill provisions.

The U.S. *Schedule* begins by listing its reservations that are applicable horizontally, that is to all services covered by the GATS. An example of this type of reservation is reproduced in Appendix A at the end of the Article.

In addition to the provisions that apply horizontally, the U.S. *Schedule* includes sections that apply specifically to legal services.

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56. U.S. Int'l Trade Comm'n, U.S. Schedule of Specific Commitments Under the General Agreement on Trade in Services No. 332-54 (May 1997), *available at* ftp://ftp.usitc.gov/pub/reports/studies/GATS97.pdf (visited June 18, 2001). The WTO website now contains the Schedules of WTO Member States. WTO, *Schedules of Specific Commitments, at* http://www.wto.org/ English/tratop_e/serv_e/22-specm_e.htm (visited Oct. 13, 2001).

57. *See infra* notes 241-49 and accompanying test; *see generally* Dillon, *Unfair Trade?, supra* note 27 (discussing the procedure by which the U.S. Schedule of Specific Commitments regarding legal services was prepared).

58. *See infra* Appendices A and B (providing a WTO schedule).

That portion of the U.S. *Schedule* devoted to legal services has—in essence—three different kinds of listings. It begins with general listings that cover all fifty states and the District of Columbia. Second, it includes state-specific listings for sixteen jurisdictions: Alaska, California, Connecticut, the District of Columbia, Florida, Geogia, Hawaii, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Texas, and Washington. Third, it includes listings for a category entitled "Other States."

Reproduced in its entirety in Appendix B is that portion of the U.S. *Schedule* concerning legal services that lists provisions generally, rather than by a particular state.

In order to provide an example of the type of provisions included for a specific U.S. state, I have reproduced in Appendix C that portion of the U.S. *Schedule* that exempts certain New York regulations governing lawyers.

Appendix D reproduces in its entirety that portion of the U.S. *Schedule* that addresses legal services for "Other States."

Because the U.S. *Schedule* regarding legal services is almost twenty pages long, it is beyond the scope of this Article to provide a comprehensive review of the limitations and conditions contained in the *Schedule*. By way of example, however, with respect to "market access" limitations, the U.S. *Schedule* specifies that an in-state office must be maintained for licensure in the District of Columbia, Minnesota, Missouri, Mississippi, New Jersey, Ohio, South Dakota, and Tennessee with respect to Modes 1, 2, and 4—Cross Border Supply, Consumption Abroad, and Presence of Natural Persons.[59] It further specifies that partnership in law firms is limited to persons licensed as lawyers and that U.S. citizenship is required to practice before the U.S. Patent and Trademark Office with respect to Mode 3—Commercial Presence. It also states with respect to market access that Mode 3—Commercial Presence is "unbound" in thirty-five states and by all states in Mode 4—Presence of Natural Persons.[60] By way of review, "unbound" in this column means that for legal services delivered through Mode 4 by natural persons, the United States has assumed no market access obligations.

The U.S. *Schedule* also includes limitations on the U.S. obligation to provide national treatment for legal services, as well as limitations on market access. For example, for Modes 1, 2, and 4, the U.S. *Schedule* specifies that in-state or U.S. residency is required for licensure in Hawaii, Iowa, Kansas, Massachusetts, Michigan,

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59. U.S. Schedule of Specific Commitments, *supra* note 56, at 47-66.

60. The "Other States" listing in the U.S. Schedule (Appendix D) provides that for the Presence of Natural Persons—Mode 4, the market access obligations are "unbound" for all the states listed. In addition, for each state that is listed individually, the Schedule states that the market access obligations in Mode 4 for that state are "unbound, except as indicated in the horizontal section." *Id.*

Minnesota, Mississippi, New Jersey, New Hampshire, Oklahoma, Rhode Island, Vermont, Virginia, and Wyoming.[61]

In the "additional commitments" section of its *Schedule*, the United States includes various provisions of existing laws concerning the practice of international law, foreign legal consultants, partnerships with foreign lawyers, and firm names.[62] The identified provisions are thus permitted to continue as "standstill" provisions.

In sum, in order to understand the effect of the GATS on U.S. regulation of transnational legal services, one must be able to read and understand the extensive U.S. *Schedule of Specific Commitments* provisions regarding legal services.

F. *Enforcement Mechanism for the GATS*

The most important thing to realize about the enforcement of the GATS is that it is enforced by governments, not individuals. Like the *Agreement Establishing the WTO* and the other related agreements, the GATS was designed as an intergovernmental agreement, enforceable by governments, not private individuals.[63] One of the participants in the Vanderbilt Symposium for which this Article was written, Mr. James Bacchus, is a member of the Appellate Body of the World Trade Organization, which is, in essence, the "Supreme Court" of the WTO; his remarks in the Vanderbilt Symposium provide greater insight into the WTO dispute resolution mechanisms.[64] This Article therefore only briefly touches on the mechanisms for enforcing the GATS.

GATS provides three distinct stages for the settlement of disputes. As a first step towards solving any disagreements, Article XXII provides that each WTO member "shall afford adequate opportunity for consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to such consultations."[65] If the "consultation" between WTO Member States is unsuccessful, then the GATS authorizes the Council for Trade in Services or the Dispute Settlement Body to "consult" and attempt to

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61. *Id.*

62. *Id.*

63. *See generally Annex 2 to the Agreement Establishing the World Trade Organization: Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 I.L.M. 1125, 1226 (1994) (providing the series of procedures governments use to settle disputes).

64. James Bacchus, *Symposium Address: The Role of Lawyers in the WTO*, 34 VAND. J. TRANSNAT'L L. 953 (2001). Mr. Bacchus is the only representative from North America on the seven-member WTO Appellate Body. As he explained, this body currently has jurisdiction over 90% of the world's commerce.

65. GATS, *supra* note 4, art. XXII(1).

find a satisfactory solution.[66] Finally, if the complaining country still feels aggrieved, it may invoke the dispute settlement procedures in Article XXIII of the GATS; this section incorporates the provisions of the Dispute Resolution Understanding, which is Annex 2 to the *Agreement Establishing the World Trade Organization*.[67]

The "Frequently Asked Questions" section of the WTO webpage confirms that the GATS is not intended to provide a private cause of action to individuals. One of the questions on this webpage is whether, in the event of violations of the GATS, private suppliers or consumers may directly invoke WTO dispute settlement procedures.[68] The answer supplied is a clear "no;"[69] it continues by stating:

> All WTO Agreements, including the GATS, are intergovernmental in nature. It is thus for the individual Members to raise a case in the WTO and seek redress to any infringements perceived to affect their services sector. Several Members have established internal procedures with a view to facilitating consultations with private parties in such instances.[70]

If the aggrieved WTO Member State prevails, its primary remedy is the right to impose retaliatory trade sanctions.[71] Thus, it

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66. *Id.* art. XXII(2).

67. *Id.* art. XXIII. This article states:

> Dispute Settlement and Enforcement
>
> 1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.
>
> 2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of such obligations and specific commitments in accordance with Article 22 of the DSU.
>
> 3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

The provisions of the DSU and procedures of the DSB are set forth in *Annex 2 to the Agreement Establishing the World Trade Organization, supra* note 63.

68. *See WTO, Training Package, supra* note 23, *at* Services: GATS, Section: Module 6: FAQs, *at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_44.htm.

69. *See id.*

70. *Id.*

71. *See generally Annex 2 to the Agreement Establishing the World Trade Organization, supra* note 63; Bacchus, *supra* note 64.

appears clear that even if a foreign lawyer believes that a U.S. lawyer regulation violates the GATS, that foreign lawyer has no remedy other than to ask his or her government to invoke the dispute settlement procedures and to impose trade sanctions on the United States in retaliation for the regulation that allegedly violates the GATS.[72]

Hence, as U.S. regulators consider the GATS, it is important to remember that the sanction for a U.S. state's violation of the GATS will be retaliatory trade sanctions against the United States imposed by the country against whose citizen the United States allegedly has acted improperly. If the sanction is large enough—think "banana wars"—I imagine that the federal government might possibly pressure the U.S. state to change its practice. Whether the federal government could require the state to change its practice through preemption and the Supremacy Clause is an issue that it is well-beyond the scope of this Article. In my view, however, it is not out of the question that there might be circumstances under which the federal government might want to pressure U.S. state lawyer regulators to change their practices and that the federal government would be able to muster some arguments justifying its ability to override the state regulatory practices.[73]

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72. For similar reasons, I disagree with some of the remarks commentator Anthony Davis offered in a somewhat analogous NAFTA situation. He said:

> NAFTA (the North American Free Trade Agreement) already, in a limited fashion, gives the right of lawyers from one signatory state to open offices and to practice their own national law within the other member states (12). This means, for instance, that if the Birbrower firm were Mexican or Canadian rather than from New York, and was physically located in California or New York, and only one other fact were different (that Birbrower was advising on a contract governed by Canadian rather than California law) the case Birbrower, Montalbano, Condon & Frank, P.C., et al.,Petitioners, v. the Superior Court of Santa Clara County, Respondent; Esq Business Services, Inc., Real Party in Interest 17 Cal. 4th 119; 949 P.2d 1; 1998 Cal. LEXIS 2; 70 Cal. Rptr. 2d 304 (1998). *would*—by virtue of that Treaty—*necessarily* be decided differently. (Emphasis added).

Anthony E. Davis, Multijurisdiction Practice by Transactional Lawyers—Why the Sky Really Is Falling 9, *at* http://www.abanet.org/cpr/mjp-adavis.html (visited Oct. 26, 2000).

Because private individuals may not enforce the provisions of the GATS or NAFTA agreements, I do not think the results in the *Birbrower* case would have been different even if the facts were changed and the lawyers had been from Canada or Mexico.

73. The American Bar Association, for example, recently seemed to accept the premise of federal regulation of lawyers. It circulated a memo indicating that the new privacy law applies to lawyers. Rather than challenge the law as outside the authority of the federal government, the ABA lobbyists plan to ask for an exemption for legal services. Memorandum, ABA and State Bar Leaders from Robert D. Evans, Director, ABA Governmental Affairs Office, Regarding New Privacy Regulations Affect Law Firms (June 20, 2001) (on file with author); *see also* ABA/BNA Lawyers Manual on

G. *Implementation Process for the GATS*

The last important aspect to note about the GATS is the incomplete nature of its regulation of legal and other services. In an earlier article, I described the GATS as an example of a legislative delegation model of regulating cross-border legal practice.[74] I used this term because the GATS does not definitively regulate legal services, but delegates to another WTO institution the obligation to develop a more detailed understanding of how the provisions of the GATS should apply to legal and other services.[75]

The first example of such delegation is found in Article VI of the GATS. This article delegates to the WTO Council on Trade in Services the authority to establish the necessary bodies to create "disciplines" regarding domestic regulation; these "disciplines" are required to address qualification requirements, such as the bar admission process.[76] The Council for Trade in Services is the WTO entity responsible for administering the GATS.[77] The key portion of this delegation states:

> 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.[78]

In fact, however, the WTO agreements removed some of this delegated power. On April 15, 1995, at the same time the GATS was signed, the GATS Ministers issued a "Decision on Professional Services;" this "Decision" is considered to be part of the "Final Act"

Professional Conduct, *New York State Bar Association Asks FTC for Exemption from GLB Privacy Regulations*, 17 CURRENT REP. 407 (July 4, 2001).

74. This "legislative delegation" method of regulating cross border legal services is discussed in Terry, Cross-Border Legal Practice, *supra* note 3, at 1392.

75. *See infra* notes 76-78, 81-85, 86-89, 141-42 and accompanying text.

76. GATS, *supra* note 4, art. VI(4).

77. *Introduction to the WTO: The Organization*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org0_e.htm (visited July 16, 2001) ("The highest authority is the ministerial conference which meets at least once every two years. More routine work is supervised by the General Council (in three guises). Numerous other councils, committees, working parties and negotiating groups cover the wide range of WTO issues. [the linked organizational chart then lists the Council for Trade in Services as responsible for the GATS].").

78. GATS, *supra* note 4, art. VI(4) (emphasis added).

agreements.[79] It directed the Council on Trade in Services to create the Working Party on Professional Services and to begin its effort to develop disciplines by focusing on the accountancy sector.[80] Thus, part of the WTO Final Act agreements tell the Council for Trade in Services how it must exercise the authority delegated to it in Article VI of the GATS.

Article VII contains the second example of delegation found in the GATS. As a general matter, Article VII addresses the issue of recognition, in which a WTO Member State evaluates the qualifications of foreign lawyers and decides whether to "recognize" those qualifications as valid in the Member [Host] State; in this respect, "recognition" is somewhat analogous to the U.S. "admission by motion" process.[81]

Article VII contemplates that recognition may be provided autonomously—as an independent decision by each country—or that recognition may be "based upon an agreement or arrangement with the country concerned. . . ."[82] In either case, however, the GATS does not itself provide the standards upon which "recognition" decisions should be made. Instead, it requires its Member States to "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."[83] In other words, the GATS delegates to a later time and a later body the obligation to develop standards and criteria for recognition. As was true with the disciplines, the Member States eliminated some of the power of the Council for Trade in Services by directing that the obligation to develop recognition criteria be delegated to the Working Party on Professional Services with a mandate to begin with the accountancy sector.[84]

The third example of delegation and delayed implementation is found in Article XIX of the GATS. This provision mandates further

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79. *Decision on Professional Services*, 33 I.L.M. 1125, 1259 (1994) (table of contents shows that this is considered part of the documents related to the GATS); *see also Legal Texts: The WTO Agreements*, *supra* note 29 (including Decision on Professional Services).

80. *See Decision on Professional Services*, *supra* note 79 (contains the text of the Decision on Professional Services). This decision is also found on the WTO webpage. *Legal Texts: The WTO Agreements*, *supra* note 29.

81. *See generally* GATS, *supra* note 4, art. VII (providing the framework for the recognition process).

82. *Id.* art. VII(1).

83. *Id.* art. VII(5).

84. *Decision on Professional Services*, *supra* note 79. This decision is also found on the WTO webpage, *supra* note 29.

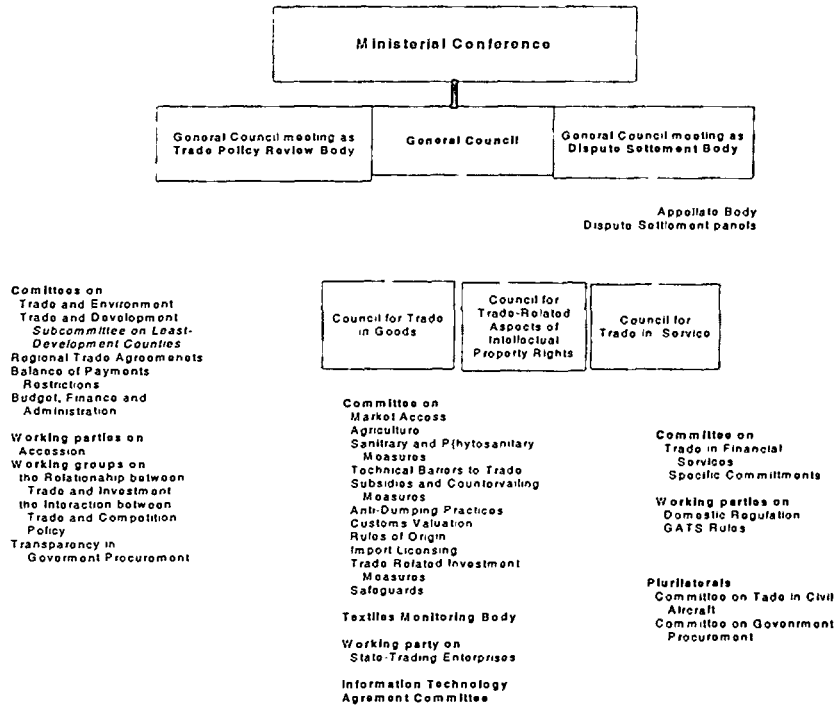
liberalization, requiring a new set of negotiations to begin five years after the signing of the GATS.[85]

In order to better understand these examples of delegation, it may be useful to consult the following graphic found on the WTO website.

85. GATS, *supra* note 4, art. XIX(1).

WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, Textiles Monitoring Body, and plurilateral committees.



Key

Reporting to General Council (or a subsidiary)

Reporting to Dispute Settlement Body

Plurilateral committees inform the General Council of their activities although these agreements are not signed by all WTO Members

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

For the current negotiations, the Services Council and Agriculture Committee meet in "special sessions" and report directly to the General Council

To summarize, the GATS itself delegates to Council for Trade in Services the obligation to establish the necessary bodies to develop disciplines for domestic regulation and recognition guidelines. The Ministerial Conference, however, issued a Decision that directed the Council for Trade in Services to exercise this delegation by creating a Working Party on Professional Services, or WPPS, that would begin its work with the accountancy sector. As discussed in Section III, the Council on Trade in Services implemented this Ministerial *Decision* by creating the WPPS, which issued *Disciplines* and *Recognition Guidelines.* As Section III.F explains, in April 1999, the Council on Trade in Services replaced the WPPS with the Working Party on Domestic Regulation. Finally, as is discussed in Section III.G, the Council on Trade in Services, acting in Special Session, is coordinating the negotiations that are undertaken in accordance with the "progressive liberalization" obligations contained in Article XIX of the GATS.

Thus, in order to understand the impact of the GATS on U.S. regulation of legal services, one must understand the structure of the GATS. In addition, one must recognize that because GATS used a legislative-delegation model, one cannot fully understand the obligations imposed by the GATS until one examines the post-GATS developments. In other words, the GATS is somewhat similar to the U.S. administrative system in which one cannot understand one's obligations simply by reading the statute, but must instead wait to find out what the administrative agency regulations say. The post-GATS developments that are relevant to legal services are considered in the next section.

III. DEVELOPMENTS THAT HAVE OCCURRED SUBSEQUENT TO THE SIGNING OF THE GATS

Although the developments subsequent to the signing of the GATS are interrelated, I have divided them into seven distinct phases in order to help the reader better understand what has happened since the GATS was signed in April 1994. The first development I explain is the creation of the Working Party on Professional Services and its initial work. Second, I introduce the OECD Conferences on Professional Services and the related Paris Forum on Transnational Practice for the Legal Profession. Third, I discuss the contributions of the WTO Secretariat and the importance of the WTO website. The fourth development is the issuance of the *Guidelines for Recognition of Qualifications in the Accountancy Sector.* The fifth development discussed below is the issuance of the *Disciplines Relating to the Accountancy Sector.* Sixth, I introduce the Working Party on Domestic Regulation, which replaced the Working Party on Professional Services. Finally, I discuss the GATS 2000 negotiations,

which are currently underway. While there is overlap between these developments, it is important to understand each of these developments and their significance for legal services.

A. *Creation of the Working Party on Professional Services and Its Initial Work*

On March 1, 1995, approximately one year after the GATS was signed, the WTO Council on Trade in Services implemented the Ministers *Decision on Professional Services* and issued its own "Decision" that created the Working Party on Professional Services (WPPS).[86] In this *Decision,* the Council for Trade in Services gave the WPPS two primary assignments. First, it directed the WPPS "to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade."[87] In addition to developing disciplines, the *Decision* instructed the WPPS to establish guidelines for the recognition of qualifications.[88] The *Decision* further instructed the WPPS to consider the accountancy sector first.[89]

Not surprisingly, the WPPS decided to start its work by gathering relevant information before it began drafting "disciplines" or "guidelines." The WTO has summarized as follows the initial work undertaken by the WPPS:

> The initial phase of work by the WPPS consisted of the collection and analysis of data and studies of domestic regulation in the accountancy sector. In this regard, several seminars were organized. A questionnaire on specific aspects of domestic regulation was circulated to Members, and a synthesis of questionnaire responses was prepared by the Secretariat.[90]

The 1996 Annual Report of the President to Congress about U.S. trade agreements provides additional detail about the type of information assembled by the WPPS and the methods by which the WPPS began to formulate issues:

> WPPS assembled an extensive information base on regulation in the accountancy sector. A seminar was organized at which the

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86. Council for Trade in Services, *Decision on Professional Services,* S/L/3 (Mar. 1, 1995).

87. *Id.*

88. *Id.*

89. "As a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector, so as to give operational effect to specific commitments." *Id.*

90. 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 (Dec. 10, 1998).

> International Federation of Accountants (IFAC) presented the results of a major international survey on the regulation and structure of accountancy services, explained its role and that of the International Accounting Standards Committee (IASC) in setting international standards in such areas as auditing, education for accountants and financial reporting, and introduced a statement on recognition of accountancy qualifications. Briefings were also received from the OECD and UNCTAD. The OECD presented the results of its survey on regulations on access for professional services and the categorized inventory of measures affecting trade in professional services. UNCTAD, through its Inter-governmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR), explained its main activities in promoting international harmonization of corporate accounting and reporting practices. Information on specific aspects of domestic regulation also was compiled from WPPS members.
>
> In 1996, members drew up a non-exhaustive list of priority issues, based on delegations' submissions and statements, which define in some detail the policy areas for which the Working Party is developing multilateral disciplines. The issues proposed for consideration include: qualification requirements and procedures; licensing requirements (other than qualification requirements) and procedures; regulations governing the establishment of a commercial presence; nationality/citizenship/residency requirements; professional liability and ethics; regulations governing entry and temporary stay of natural persons for the purpose of supplying accountancy services; guidelines for recognition of qualifications; and use of international standards.
>
> With respect to licensing requirements and procedures, the Working Party started to examine the applicability of the concepts and approaches taken in the Technical Barriers to Trade (TBT) Agreement and the Import Licensing Agreement as they apply to licensing requirements and the other measures covered by GATS Article VI:4, and the need to ensure that licensing procedures in the accountancy sector do not in themselves restrict trade.
>
> On the use of international standards in the accountancy sector, the main role of the WPPS is to keep track of work going on elsewhere and to encourage cooperation with relevant international organizations. Further information was obtained from the IFAC, IASC, and the International Auditing Practices Committee (IAPC), and on their cooperation with the International Organization of Securities Commissions (IOSCO).[91]

As this shows, the initial work of the WPPS consisted primarily of data collection and issue formulation, much of it limited to issues specific to the accounting profession.

B. *The Role of the WTO Secretariat and the Importance of the WTO Website*

In order to understand the work of the WPPS—and its successor-entity, the Working Party on Domestic Regulation—and the

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91. *1996 Annual Report of the President of the United States on the Trade Agreements Program*, *at* http://www.ustr.gov/html/1997tpa_part4_1.html (last visited June 26, 2001) (found in the section on "Working Party on Professional Services").

development of the *Disciplines* and *Guidelines*, which the WPPS ultimately prepared, one must understand the key role played by the WTO Secretariat. The Secretariat, which is based in Geneva, Switzerland, is the administrative body of the WTO. It is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics and preparing other analyses.[92] Thus, anyone interested in the GATS' regulation of legal services must consult the relevant Secretariat papers.

For legal services, the most relevant Secretariat paper is an analysis of legal services that was issued in July 1998.[93] Other papers of interest include: an analysis of the economic effects of services liberalization; an analysis of "Mode 4" involving the "Presence of Natural Persons;" and two background papers prepared in March 1999 in order to facilitate discussions of the issues related to the development of horizontal (i.e., generic) multilateral disciplines on domestic regulation (i.e., admission and qualification requirements).[94]

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92. *The WTO in Brief—Part 2—the Organization (the Secretariat)*, *at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited June 23, 2001). The WTO webpage explains as follows the role of the Secretariat:

> The WTO Secretariat, based in Geneva, has around 500 staff and is headed by a director-general. It does not have branch offices outside Geneva. Since decisions are taken by the members themselves, the Secretariat does not have the decision-making role that other international bureaucracies are given. The Secretariat's main duties are to supply technical support for the various councils and committees and the ministerial conferences, to provide technical assistance for developing countries, to analyze world trade, and to explain WTO affairs to the public and media. The Secretariat also provides some forms of legal assistance in the dispute settlement process and advises governments wishing to become members of the WTO. The annual budget is roughly 117 million Swiss francs.

Id.

93. Council for Trade in Services, *Legal Services, Background Note by the Secretariat*, S/C/W/43 (July 6, 1998).

94. For a list of the key Secretariat papers, see the list maintained on the WTO website *at* http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm (last visited June 25, 2001).

In addition to the Secretariat's Note on Legal Services, *supra* note 93, the papers most relevant to the issue of legal services and disciplines for domestic regulation include: Council for Trade in Services, *Economic Effects of Services Liberalization*, Background Note by the Secretariat, S/C/W/26 (Oct. 7, 1997); *Accountancy Services, Background Note by the Secretariat*, S/C/W/73 (Dec. 4, 1998); Council for Trade in Services, Presence of Natural Persons, *(Mode 4), Background Note by the Secretariat*, S/C/W/75 (Dec. 8, 1998); 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 (Mar. 1, 1999); and Council for Trade in Services, *International Regulatory Initiatives in Services, Note by the Secretariat*, S/C/W/97 (Mar. 1, 1999).

See also the reports prepared specifically for the Working Party on Professional Services, which include: Working Party on Professional Services, *Questionnaire on the Accountancy Sector, Note by the Secretariat*, S/WPPS/W/7 (Apr. 3, 1996); *Working Party*

All of the WTO's official public documents are available on its website. These include minutes of meetings, actions taken, and secretariat papers. Documents that are not available on the website include documents entitled "jobs," which are the informal, non-public working drafts. Until early 2001, most documents could be directly accessed from the WTO website by clicking on a hotlink to the document.

Since 2001, however, the WTO website is slightly more cumbersome to use because many documents must be decompressed and downloaded, rather than simply hitting a "link;" on the other hand, the documents are now much easier to read because they are downloaded with the formatting intact, and the organization and comprehensiveness of the site is much better.

While legal research instructions typically are not included in an article, law of lawyering experts interested in the GATS might benefit from some guidance. Each WTO document that is publicly available has a unique set of numbers and letters assigned to it, which is its "name" or symbol. All documents related to the GATS begin with the letter "S." The second letter designates the entity issuing the document: for example, "C" is used for the Council for Trade in Services; "WPPS" is used for the Working Party for Professional Services; and "WPDR" is used for the Working Party on Domestic Regulation.

The third letter indicates the type of document: "M" designates minutes of meetings; "W" indicates a working paper submitted to the entity in question. If no letter is included, it means that the document is an "action" document, such as a *Decision* or *Report.*

The fourth item listed is a number; these numbers are issued in chronological order so that S/C/M/24 indicates the twenty-fourth set of minutes issued by the Council for Trade in Services. Secretariat papers are listed as working paper or "W" documents, as are comments and drafts submitted by Member States. "W" documents are non-public, restricted documents unless the author indicates otherwise. Sometimes documents are "derestricted" at a time point after they were first issued. The symbol for each document appears

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on Professional Services, Synthesis of the Responses to the Questionnaire on the Accountancy Sector, Note by the Secretariat, S/WPPS/11 (May 5, 1997); Working Party on Professional Services, *Mutual Recognition Agreements in the Accountancy Sector, Note by the Secretariat*, S/WPPS/W/10 (Sept. 13, 1996); Working Party on Professional Services, *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services, Note by the Secretariat*, S/WPPS/W/9 (Sept. 11, 1996); Working Party on Professional Services, *Functions of the Working Party on Professional Services in Relation to Accountancy, Note by the Secretariat*, S/WPPS/W/1 (June 27, 1995); Working Party on Professional Services, *The Accountancy Sector, Note by the Secretariat*, S/WPPS/W/2 (June 27, 1995).

in the upper right-hand corner of the first page of the document, together with the date on which the document was prepared.

Reproduced below is an example of a downloaded WTO document that includes the WTO document symbol. This document is the U.S. negotiating proposal for legal services that was submitted as part of the GATS 2000 negotiations and that is described in greater detail in Section III.G.5. The identifying information at the beginning of the U.S. proposal on legal services is as follows:

> WORLD TRADE ORGANIZATION
>
> S/CSS/W/28
> 18 December 2000
> (00-5557)
>
> Council for Trade in Services
> Special Session
>
> Original: English
>
> COMMUNICATION FROM THE UNITED STATES
>
> Legal services

In this document, the first letter in the WTO document symbol—"S"—indicates that this document relates to the GATS, rather than the GATT or the TRIPS or any of the other WTO agreements.

The second group of letters—"CSS"—refers to the WTO entity to which this document was submitted. In this case, the U.S. proposal was submitted to the Council for Trade in Services Meeting in Special Session to coordinate the GATS 2000 negotiations which are described in Section III.G.

The third symbol—"W"—indicates that this is a working document prepared by a WTO Member State, interested body such as the OECD, or the Secretariat. Working documents stand in contrast to WTO entity minutes or the official reports or action documents by the WTO entity.

The fourth entry—"28"—indicates that the U.S. legal services proposal was the twenty-eighth working document filed with the Council for Special Session. The date of December 16, 2000 indicates the date on which this document was submitted. If the document had been minutes of a WTO-entity meeting, then the date would indicate the date on which the minutes were prepared and the title of the document would indicate the date on which the meeting was held.

In order to find a specific document or a category of documents, one can use the "document dissemination facility" on the WTO website. One should select the "search" function rather than

"browse." In the first entry, which says "document symbol," one should insert the symbol for the specific document desired, for example, S/C/M/24. Alternately, one can search for a group or category of documents. For example, if one inserted the term "S/C/M," then one would retrieve all minutes of the Council for Trade in Services that are publicly available. If one inserted the term "S/C/," then one would retrieve a list of all available Council documents. Alternately, one could use the last entry on the search function, which is called "full text search criteria," to search for terms such as "legal services."

Once one has a list of documents, one can select the documents—and language—to be downloaded. On my computer, it took some practice to be able to find successfully and then open the downloaded documents, but it now works quite smoothly if not efficiently.[95] In sum, one cannot fully understand the GATS' applicability to legal services unless one consults the materials prepared by the Secretariat.

C. *The OECD Conferences and the Paris Forum on Transnational Practice for the Legal Profession*

During the same time period in which the WPPS was gathering information and the WTO Secretariat was drafting some of its papers, the OECD[96] shared information with the WPPS and WTO Secretariat[97] and also sponsored three conferences focusing on

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95. On my computer, I select a file into which the documents are downloaded, for example, "Vanderbilt article." The WTO documents are downloaded in "exe" format into a document called "ddf.exe" in my "Vanderbilt article" file. Operating from a program such as "My Computer" or "Explorer," I then click on "ddf.exe," which decompresses the file. At that point, a subfolder is created entitled "DDF" which automatically has a subfolder entitled "T" and another subfolder entitled "S" and a third folder that has the name of the second letter of the document symbol, for example, "WPPS." The "unzipped" documents are now in that file. While still in Explorer, I typically move the documents to someplace more accessible. After I have opened the file in Explorer, I can then access the documents through Microsoft Word, which is the format used for the later documents and which also reads the earlier documents.

96. OECD is an acronym for the Organisation for Economic Co-operation and Development. The OECD was created by a Convention signed in December 1960. In 1996, twenty-six countries were members of the OECD. The purposes of the OECD include fostering sustainable economic growth and expansion for member and non-member countries and contributing to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations. Organisation for Economic Co-operation and Development, OECD Docs., *reprinted in International Trade in Professional Services: Assessing Barriers and Encouraging Reform* 2 [hereinafter OECD, *Second Conference*].

97. Working Party on Professional Services, *Communication from the OECD: Work in the Area of Professional Services*, S/WPPS/W/4 (Nov. 14, 1995); *Communication from the OECD: Work in the Area of Professional Services—Addendum*, S/WPPS/W/4/Add.1 (Jan. 5, 1996); *Communication from the OECD Working Party on*

liberalization of professional services.[98] The papers from these three conferences, which focused on all professional services, including legal services, were published by the OECD;[99] they were also the basis for some of the information the OECD submitted to the WTO.[100]

Many of the lawyers who attended the OECD conferences did not like what they were hearing because these lawyers were troubled by the OECD conferences' failure to sufficiently distinguish between legal services and other professional services.[101] This dissatisfaction with the OECD Conferences was one of the primary reasons why the American Bar Association (ABA), the European Bar Association—called the CCBE[102]—and the Japan Federation of Bar Associations organized the *Paris Forum on Transnational Practice for the Legal Profession* in November 1998.[103] The November 1998 *Paris Forum* was the first meeting of world bar leaders devoted exclusively to regulation of global multi-jurisdictional legal practice. One of the goals of the *Paris Forum* was to "emphasize to the WPPS that the legal profession has unique character and responsibilities and hence the WTO positions with respect to other professions (e.g., accountancy) should not serve as a precedent or a guide in the formulation of principles to govern the international regulation of the legal profession."[104]

Professional Services, Work in the Area of Professional Services—Addendum, S/WPPS/W/4/Add.2 (Jan. 5, 1996).

98. Organisation for Economic Co-operation and Development, OECD Docs., *reprinted in* LIBERALISATION OF TRADE IN PROFESSIONAL SERVICE. (1995) [hereinafter *OECD, First Conference*]; OECD, *Second Conference, supra* note 96; Organisation for Economic Co-operation and Development, OECD Proceedings, *reprinted in* INTERNATIONAL TRADE IN PROFESSIONAL SERVICES (1977) [hereinafter OECD, Third Conference].

99. *Id.*

100. *Id.*

101. *See, e.g., ABA Paris Forum Discussion Paper, infra* note 182, at 85; *Japanese Paris Forum Discussion Paper, infra* note 182, at 111.

102. For a discussion of the CCBE, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993) [hereinafter Terry, *CCBE Code Part I*].

103. Terry, *Paris Forum Introduction, supra* note 20, at 10-11 (noting that the Paris Forum followed the OECD conferences during which "it transpired that the profession of the lawyer raises specific problems not found in other professions").

104. Council of the Bars and Law Societies of the European Community, Japan Federation of Bar Associations, American Bar Association, Organization Meeting of Proposed Forum on Transnational Practice of Law, Procés- Verbal (Paris, Nov. 22, 1997) at 2 (on file with author); *see also* Press Release, the Forum on the Transnational Practice for the Legal Profession (Apr. 22, 1998) (on file with author) (" On the occasion of the third Workshop of the OECD on professional services, held in Paris on 20 and 21 February 1997, the subject of which was "favoring the liberalisation (of professional services) through regulatory reforms," it transpired that the profession of the lawyer raises specific problems not found in other professions. . . . [I]t seems important to co-ordinate the self-scrutiny which is already taking place in the Bars themselves with a view to obtaining a consensus on the principles of liberalisation of services rendered by

The three sponsors of the *Paris Forum* agreed on an agenda before the meeting; each sponsor, as well as a few other entities, submitted a Discussion Paper that addressed the agreed-upon topics.[105] One of the three agenda topics included in the Discussion Papers was the "uniqueness and responsibility of the legal profession."[106]

Other than the Discussion Papers, the *Paris Forum* did not produce any documents other than a fairly inconclusive closing communique.[107] The *Paris Forum* sponsors held one post-Forum meeting in which they prepared for a second Forum, although plans for that Forum were later abandoned.[108] Thus, when one looks at the post-GATS developments concerning the legal profession, one should be aware of the papers prepared for the OECD Conferences and the Discussion Papers prepared for the *Paris Forum.*

D. *The Guidelines for the Accountancy Sector Formulated by the WPPS*

As noted earlier, the Council for Trade in Services' *Decision on Professional Services* required the WPPS to assist in "the effective application of paragraph 6 of Article VI of the Agreement by establishing guidelines for the recognition of qualifications." On May 28, 1997, the WPPS completed this assignment and issued its *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.*[109] The Council for Trade in Services approved

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lawyers. This consensus could later on and, if necessary also serve as a guide to the Working Party for the Professional Services of the World Trade Organisation.")

105. Terry, *Paris Forum Introduction*, *supra* note 20, at 21.

106. *Id.* at 16, 19.

107. *Id.* at 25-27.

108. *Id.* at 27-28. In September, 1999, representatives from the three bars that organized the *Paris Forum* met to discuss the *Paris Forum* and to plan for a new forum. The minutes of that meeting included an agenda of proposed topics for the *Forum 2000.* The second of three topics was *Formulation of Proposed WTO Disciplines on Domestic Regulation in the Legal Sector.* The planners further agreed that the ABA, CCBE and JFBA would each draft recommended WTO Disciplines for the legal profession following the pattern of the December 1998 WTO Disciplines on Domestic Regulation in the Accountancy Sector. *Id.* at 28. Plans for the second Forum were later abandoned. *Id.* at 28.

109. *See* Working Party on Professional Services, *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector—Revision*, S/WPPS/W/12/Rev.1 (May 20, 1997) (containing the text of the Guidelines); Working Party on Professional Services, *Recommendation of the Working Party on Professional Services to the Council for Trade in Services*, S/WPPS/W/14/Rev.1 (May 15, 1997) (contains the recommendation of the WPPS); Working Party on Professional Services, *Recommendation of the Working Party on Professional Services to the Council for Trade in Services*, S/WPPS/W/14/Rev.1/Corr.1 (May 22, 1997) (correcting citation to the Guidelines). The Guidelines are directly available on the web, without downloading.

these *Guidelines* on May 29, 1997.[110]

These *Guidelines* were prepared in order to facilitate the "Recognition" provision in the GATS.[111] The *Guidelines* are non-binding; the purpose of the *Guidelines* is to provide suggestions to WTO Member States about how they might negotiate bilateral or multilateral "recognition" agreements.[112] Among other things, these *Guidelines* suggest the types of information that should be included within a "Mutual Recognition Agreement" (MRA), and they request notification to the WTO of the opening of negotiations concerning an MRA and the result.[113] These *Guidelines* must be distinguished from disciplines, which address the domestic qualification and licensing requirements of what it takes to become an accountant—or lawyer—in a particular jurisdiction—the basic admission process—rather than recognition.

The minutes of the Council on Trade in Services reflect general satisfaction with the *Guidelines:*

> The Chairman of the Working Party on Professional Services, Mr Glyn Williams, stated that completing work on the Guidelines was an important first step and an encouraging sign for the completion of the mandate of the Working Party. The representative of the European Union said that her delegation was very pleased with the result achieved on mutual recognition guidelines and that this achievement created high expectations of further results on professional services.[114]

In sum, the "action" documents that reflect the adoption of the *Guidelines for the Accountancy Sector* include the following:

WTO Entity	Document Issued
Working Party on Professional Services	1. RECOMMENDATION OF THE WORKING PARTY ON PROFESSIONAL SERVICES TO THE COUNCIL FOR TRADE IN SERVICES [regarding the Recognition Guidelines], S/WPPS/W/14/Rev.1 (15 May

WTO adopts guidelines for recognition of qualifications in the accountancy sector, PRESS/73 (May 29, 1997), *available at* http://www.wto.org/english/news_e/pres97_e/pr73_e.htm (last visited Sept. 2, 2001).

110. Council for Trade in Services, *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/38 (May 28, 1997) [hereinafter *Guidelines for the Accountancy Sector*]. This action is also included in the press release about the Guidelines, which is available on the WTO website without downloading as part of press release 73, described *supra* note 109.

111. *Guidelines for the Accountancy Sector*, *supra* note 110, at 1.

112. The Guidelines "are non-binding and are intended to be used by Members on a voluntary basis, and cannot modify the rights or obligations of the Members of the WTO" and they are intended to be used by governments to make it easier to negotiate agreements on the mutual recognition of professional qualifications. *Id.*

113. *Id.*

114. Council for Trade in Services, *Report of the Meeting Held on May 29, 1997, Note by the Secretariat*, S/C/M/19 (June 11, 1997).

	1997) (contains the recommendation of the WPPS regarding the Recognition Guidelines);
	2. Recommendation of the Working Party on Professional Services to the Council for Trade in Services [regarding the Recognition Guidelines], S/WPPS/W/14/Rev.1/Corr.1 (22 May 1997) [1 sentence document correcting the citation to the Guidelines contained in the earlier recommendation, S/WPPS/W/14/Rev.1];
Council for Trade in Services	3. Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, S/L/38 (28 May 1997).

E. *The Disciplines for the Accountancy Sector*

After the WPPS completed its work on the *Guidelines,* it turned to the second mandate in the *Decision,* which was the obligation to develop "disciplines" for the accountancy sector.[115] On December 4, 1998, approximately one and one half years after it issued the *Guidelines for the Accountancy Sector,* the WPPS approved the *Disciplines for the Accountancy Sector.*[116] Ten days later, on

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115. Article VI, ¶ 4 of GATS requires the Council for Trade in Services, through any appropriate bodies it may establish, to develop necessary disciplines to ensure that a Member State's domestic regulation meets certain specified criteria including transparency and not being more burdensome than necessary. GATS, *supra* note 4, art. VI. The Council delegated this power, specifying that "a Working Party on Professional Services shall be established to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade." Council on Trade in Services, *Decision on Professional Services, Adopted by the Council for Trade in Services on 1 March 1995,* S/L/3 (Mar. 1995) (creates the WPPS and directs it to begin with the accountancy sector). The Decision further mandated that as "a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector." *Id.*

116. 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 (Dec. 10, 1998) (transmittal of the Disciplines by the WPPS to the Council for Trade in Services for its approval); Working Party on Professional Services, *Note on the Meeting Held on 4 December 1998, Note by the Secretariat,* S/WPPS/M/24 (Dec. 18, 1998) (minutes of the WPPS meeting at which the Disciplines were approved); Working Party on Professional Services, *Disciplines on Domestic Regulation in the Accountancy Sector Draft,* S/WPPS/W21 (Nov. 30, 1998) (contains the text of the disciplines approved at the meeting memorialized in S/WPPS/M/24) [hereinafter

December 14, 1998, the Council for Trade in Services approved the *Disciplines* that had been drafted by the WPPS.[117]

The WTO has highlighted four paragraphs as the "main elements" of the *Disciplines*. In its 1999 Annual Report, the WTO identified the following: paragraph 1 concerning the objective of the disciplines; the general provisions in paragraph 2, which set the standards by which domestic regulations must be measured; paragraph 5 about licensing procedures; and paragraph 6 about qualification requirements.[118] The provisions not mentioned include the transparency provisions in paragraph 3, the licensing requirements in paragraph 4, the qualification procedures in paragraph 7, and the technical standards provisions in paragraph 8.[119] Some of the key aspects of these main provisions are described below.

Paragraph 1 explains that the purpose of the *Disciplines* is to implement the domestic regulation provisions of the GATS, rather than the national treatment or market access provisions.[120] Because

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Disciplines for the Accountancy Sector] (ultimately adopted by the Council for Trade in Services as explained *infra* note 117). *See infra* notes 135-38 and accompanying text, for a discussion of the Chairman's Note.

The Disciplines for the Accountancy Sectory contained in the Report to the Council for Trade in Services, *supra*, also included an informal note by the Chairman discussing Articles VI, XVI and XVII. Working Party on Professional Services, *Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection With the Disciplines on Domestic Regulation in the Accountancy Sector—Informal Note by the Chairman*, S/WPPS/4, at 9, Job No. 6496 (Nov. 25, 1998) (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. *See infra* notes 135-38 and accompanying text.

117. *Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998*, S/L/63 (Dec. 15, 1998) [hereinafter *Council Decision Adopting the Disciplines for the Accountancy Sector*].

The Council Decision Adopting the Disciplines for the Accountancy Sector and the Disciplines themselves were published by the WTO in a news release that included: (1) the WTO news release explaining the adoption and significance of these Disciplines; (2) the Council Decision adopting the Disciplines on Domestic Regulation for the Accountancy Sector developed by the WPPS; (3) the Disciplines as drafted by the WPPS; and (4) note to the editor discussing the interplay between the GATS and the disciplines. *WTO adopts Disciplines on Domestic Regulation for the Accountancy Sector* (Dec. 14, 1998), *available at* http://www.wto.org/english/news_e/pres98_e/pr118_e.htm (last visited on Sept. 2, 2001).

118. WTO 1999 Annual Report 71 (1999), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/anre99_e.pdf (last visited June 23, 2001).

119. *Disciplines for the Accountancy Sector*, *supra* note 116.

120. "The purpose of these disciplines is to to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS,

this distinction had been the basis of much discussion and confusion, the WPPS Chairman drafted an explanatory note to accompany the *Disciplines*; this note is addressed in greater detail below.[121]

Paragraph 2 of the *Disciplines* is perhaps the most important. It elaborates upon the domestic regulation requirement in the GATS and requires all WTO Member States to:

> [E]nsure that [licensing requirements and procedures, technical standards and qualification requirements and procedures] are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.[122]

In my view, one of the concrete accomplishments of the *Disciplines* is that it provides a definition of what constitutes a "legitimate objective." While some may disagree with this definition, the fact that a definition exists makes it more likely that countries will be using the same standards to explain their disagreements, even if they apply those standards differently.

Section 5 of the *Disciplines* requires licensing procedures to be pre-established and requires prompt notification of the applicant. In addition, this paragraph specifies the manner in which substantive requirements shall be applied:

> Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.[123]

Section 6 addresses the issue of how applicants from other jurisdictions should be treated. It states that:

> 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.

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which restrict access to the domestic market or limit the application of national treatment to foreign suppliers." *Id.* ¶ 1.

121. *Disciplines for the Accountancy Sector, supra* note 116; for a fuller discussion of this note, *see infra* notes 136-38 and accompanying text.

122. *Disciplines for the Accountancy Sector, supra* note 116, ¶ 2.

123. *Id.* ¶ 15.

> The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.[124]

In his report to Congress, the U.S. President noted the importance of the *Disciplines*, stating "[t]his is the first time the WTO has issued rules and principles for regulation of a profession as a means of guarding against regulations that impede trade in services. The rules are of a general nature and could apply to other professions as well as accounting."[125]

Although at first glance it may not appear that there is much substance in these *Disciplines*, it required many drafts and much discussion before the WTO Member States could agree on these provisions. The report accompanying the *Disciplines*, which the WPPS submitted to the Council for Trade in Services, described the process by which the *Disciplines* were developed.[126] This report indicates that during the early stages of deliberation, several WTO members submitted proposed disciplines, which were then consolidated by the Secretariat into an informal note.[127] During a series of meetings, draft disciplines were discussed, clarified, and revised by Members.[128] Ten revisions of the disciplines were prepared by the Secretariat before a consensus was reached and the final version was approved.[129]

One of the issues that the WPPS and the Council had to confront was the legal form in which the disciplines should appear.[130] The three choices the WPPS considered included:

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124. *Id.* ¶¶ 19-20.

125. *U.S. Trade Representative, 1999 Trade Policy Agenda and 1998 Annual Report of the President of the United States on the Trade Agreements Program 67* (Mar. 1, 1999), *at* http://www.ustr.gov/pdf/1999tpa_iv-a.pdf (last visited June 19, 2001).

126. 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, (Dec. 10, 1998).

127. *Id.* ¶ 4 (indicating that these drafts are contained in WTO documents S/WPPS/W/15-19).

128. *Id.* ¶ 5 (indicating that the minutes of these meetings are contained in documents S/WPPS/M/11-24).

129. Working Party on Professional Services, *Note on the Meeting Held on 29 July 1998, Note by the Secretariat*, S/WPPS/M/21 (Sept. 29, 1998); Working Party on Professional Services, *Note on the Meeting Held on 4 December 1998, Note by the Secretariat*, S/WPPS/M/24 (Dec. 18, 1998). During the final meeting at which the disciplines were approved, India expressed various reservations about the disciplines. According to the minutes, "The Chairman also noted that there was a 'consensus minus one,' and therefore asked, and urged, the Indian delegation to show maximum flexibility," which India ultimately did by agreeing to the disciplines after articulating its understanding. Working Party on Professional Services, *Note on the Meeting Held on 4 December 1998, Note by the Secretariat*, S/WPPS/M/24 (Dec. 18, 1998).

130. "Members extensively discussed the question of potential legal forms for adoption of the accountancy disciplines. The outcome of the discussions is the attached

- 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.[131]

The WPPS and Council ultimately chose the third legal form.[132] The *Decision* issued by the Council for Trade in Services memorializes this *Decision* by stating that 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. [133]

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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 (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 the WPPS are to be integrated into the GATS and will then become legally binding. Today's decision by the Council includes a "standstill provision", effective immediately, under which all WTO Members, including those without GATS commitments in the accountancy sector, agree, to the fullest extent

The WTO Annual Report for 1999 gives no explanation as to why this legal form, rather than the other two, was preferred. While the minutes of the WPPS indicate that discussions occurred about the appropriate legal form of the disciplines, the minutes do not include details about these discussions because they usually took place in "informal mode," which is not included in the minutes of the meeting.[134] Because of the legal form of these *Guidelines*, they cannot be enforced by individuals and may only be enforced in a limited sense at this time by WTO Member States.

In addition to deciding what legal form the *Disciplines* should take, the WPPS had to decide which provisions of the GATS were governed by the *Disciplines*. As noted earlier, Paragraph 1 of the *Disciplines* memorializes the results of the WPPS' deliberations on this issue. The 1998 WTO Annual Report explained this issue as follows:

> The Working Party discussed at length the relationship between measures falling on the one hand within the scope of Articles XVI (Market Access) and XVII (National Treatment) and on the other hand within the scope of Article VI:4 (Domestic Regulation). A consensus emerged that the Disciplines should apply only to non-discriminatory measures falling out of the scope of Articles XVI and XVII. All remaining Market Access and National Treatment barriers should be dealt with in specific commitments negotiations.[135]

If the reader is confused at this point, that confusion is understandable. As the Chairman's Note that accompanied the *Disciplines* makes clear, this issue is not straightforward. As that note explains, there is the possibility of overlap—and thus

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consistent with their existing legislation, not to take measures which would be inconsistent with the accountancy disciplines.

Id.

134. *See, e.g., Note on the Meeting Held on 16 July 1998, Note by the Secretariat*, S/WPPS/M/20/Rev.1, ¶ 7 (Aug. 10, 1998).

> Discussion of the remaining item on the agenda, the issue of the legal form of the disciplines, also took place in informal mode. Progress was made in refining previously suggested options, and additional possibilities were raised. Members also agreed to study the issue of how to initiate the future discussion of horizontal issues, and accepted the offer of the Chairman to prepare a new background Note.

Id. Note on the Meeting Held on 29 July 1998, Note by the Secretariat, S/WPPS/M/21 ¶ 9 (Sept. 29, 1998) ("Under 'Other Business,' the Chairman observed that he had produced two Notes . . . and the second was a written statement of the Chairman's proposal on the legal form of the disciplines, as requested by Members at the previous meeting."); *Note on the Meeting Held on 22 October 1998, Note by the Secretariat*, S/WPPS/M/22 ¶ 3 (Nov. 11, 1998) ("Discussion of the Chairman's Note, 'Legal Form of the Disciplines on Accountancy' (Job No. 5362, 7 October 1998) was held in informal mode, during which most Members supported adoption of the draft Council Decision, with amendments.").

135. WTO, ANNUAL REPORT 1998, *supra* note 131, at 101.

confusion—because one cannot always tell when a Member State's law should be viewed as a domestic regulation provision and when it should be viewed as a market access or national treatment provision.[136] Although this determination may be difficult, this distinction is important because the Council decided that the first type of law is covered by the *Disciplines,* but the latter two are not. The "Chairman's Note," which has no official status, elaborates upon the issue as follows:

> It has been noted that Article XVI (Market Access) covers the categories of measures referred to in paragraph 2 (a) to (f), whether or not any discrimination is made in their application between domestic and foreign suppliers. Article XVII—National Treatment—captures within its scope any measure that discriminates—whether de jure or de facto—against foreign services or service suppliers in favour of like services or service suppliers of national origin. A Member scheduling commitments under Articles XVI and XVII has the right to maintain limitations on market access and national treatment and inscribe them in its schedule. On the other hand, the disciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII. However, it is also recognized that for some categories of measures the determination as to whether an individual measure falls under Article VI:4 disciplines or is subject to scheduling under Article XVII will require careful consideration.

After providing this explanation, the Chairman's Note continued by identifying measures that some Member States considered to be examples of restrictions that would not be covered by the *Disciplines* because they were discriminatory measures that should be addressed through scheduling on market access and national treatment.[137] The examples cited by the Chairman include:

> * Restrictions relating to the number of foreign accountants that can be employed, the number of new licences to be issued, the legal form of establishment and the ownership of firms;
>
> * 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

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136. *Chairman's Note on discussion of Articles VI, XVI and XVII* (Job No. 6496, (Nov. 25, 1998); attached to S/WPPS/4).

> For the purpose of transparency, this Note 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. For the avoidance of any doubt, it is emphasised that this Note has no legal status.

Id. ¶ 1.

137. *Id.* ¶ 4.

> 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 all Member States, regardless of what they have done with their *Schedules of Specific Commitments*. Second, one should understand that the *Disciplines* only apply to those laws of a Member State 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 a 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	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]; 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]; 3. Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy

138. *Id.*

	Sector, S/WPPS/4 (10 Dec. 1998) [transmittal of the Disciplines by the WPPS to the Council for Trade in Services for its approval]; 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.]
Council for Trade in Services	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]

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.[139] 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.[140] 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.

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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.*

F. *Replacement of the Working Party on Professional Services with the Working Party on Domestic Regulation*

In April 1999, approximately four months after the WPPS had completed its work on the *Disciplines for the Accountancy Sector*, the WTO Council for Trade in Services issued a *Decision* that disbanded the WPPS and replaced it with a new entity, entitled the Working Party on Domestic Regulation.[141] This *Decision* contains four paragraphs, but the main task assigned to the Working Party on Domestic Regulation (WPDR) was the obligation to develop the disciplines required by the "domestic regulation" provision of the GATS.[142] One explanation for the change from the WPPS to the WPDR is found in the minutes of the last meeting of the WPPS; these minutes state:

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141. *See Decision on Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999*, S/L/70 ¶ 2 (Apr. 28, 1999) [hereinafter *Decision on Domestic Regulation*].

> In accordance with paragraph 4 of Article VI of the GATS, the Working Party shall develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services. This shall also encompass the tasks assigned to the Working Party on Professional Services, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector (S/L/63).

Id.

According to Bernard Ascher, who is Director of Service Industry Affairs for the Office of the U.S. Trade Representative, one of the reasons for this change was that smaller countries wanted all services to be handled together because they did not have the resources to monitor and negotiate separately. *See* Interview with Bernard Ascher, *supra* note 51.

142. *Decision on Domestic Regulation, supra* note 141, ¶¶ 1-4. The key aspects of this Decision state:

> 1. A Working Party on Domestic Regulation shall be established and the Working Party on Professional Services shall cease to exist.
>
> 2. In accordance with paragraph 4 of Article VI of the GATS, the Working Party shall develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services. This shall also encompass the tasks assigned to the Working Party on Professional Services, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector (S/L/63).
>
> 3. In fulfilling its tasks the Working Party shall develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof.
>
> 4 The Working Party shall report to the Council with recommendations no later than the conclusion of the forthcoming round of services negotiations.

Id.

> There was also a widely-held view that all work on domestic regulation should ideally take place in a single forum. This should probably be the WPPS—perhaps under a new name reflecting a wider remit. It was also the view of most speakers that work should proceed on a horizontal rather than a sectoral basis, and that the accountancy disciplines would provide a useful starting-point for such work.[143]

By the time the WPPS was disbanded, it had held twenty-five meetings, only one of which occurred after WPPS' approval of the *Disciplines for the Accountancy Sector*.[144] Thus, as of April 1999, the WPDR was granted jurisdiction to develop whatever disciplines would apply to legal services.

As a theoretical matter, there are three major types of disciplines that the WPDR could develop to govern the domestic regulation of legal services. First, the WPDR could choose to develop a separate discipline focusing only on the legal profession. Second, the WPDR could draft a discipline that covers the legal profession and some or all of the other services that the WTO classifies as "professional services." Third, the WPDR could draft a generic discipline that applies to all types of services covered by GATS, including professional services, non-professional services, and legal services.[145] In its *Decision* creating the WPDR, the GATS Council for Trade in Services expressly acknowledged the possibility that individual sectors, such as legal services, could be treated in disciplines specific

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143. Working Party on Professional Services, *Note on the Meeting Held on 9 February 1999, Note by the Secretariat*, S/WPPS/M/25 (Mar. 5, 1999).

144. This information is based on the *Note on the Meeting Held on 9 February 1999, Note by the Secretariat*, S/WPPS/M/25 (Mar. 5, 1999) (last meeting of the WPPS according to the WTO minutes available on its website) and *Note on the Meeting Held on 4 December 1998, Note by the Secretariat*, S/WPPS/M/24 (Dec. 18, 1998) (noting that this meeting was the twenty-fourth meeting of the WPPS and that the meeting of February 9, 1999 was the next meeting).

145. "Professional Services" includes ten specific subcategories, one of which is legal services, and an eleventh category entitled "other." *Services Sectoral Classification List, Note by the Secretariat*, MTN GNS/W/120 at 2 (July 10, 1991), *available at* http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm (last visited July 16, 2001). The WTO includes on its website a powerpoint presentation about the GATS. In this document, the WTO identifies all of the categories of professional services except "other." It states:

> Professional services include legal services, accounting, auditing and book-keeping services, taxation services, architectural services, engineering and integrated engineering services, urban planning and landscape architectural services, medical and dental services, veterinary services and services provided by mid-wives, nurses, physiotherapists and para-medical personnel. These various sub-sectors have been covered in the schedules of specific commitments of the Members of the Organization to a varying degree.

The World Trade Organization, A Training Package, GATS—Professional Services, at http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (last visited July 16, 2001).

to that service, but delegated to the WPDR the judgment about whether to do so.[146]

From its formation in April 1999 through December 2000, the WPDR held nine formal meetings and two informal meetings.[147] As of June 2001, the WTO had "derestricted" and placed on its website two annual reports prepared by the WPDR,[148] seven sets of minutes,[149] and fourteen "working documents."[150] The fourteen working documents included formal papers that were submitted by Australia, the European Communities, Hong Kong, China, Japan, Korea, Poland, Canada, and the United States.[151] The WPDR has reported that it also considered informal papers from the Chairpersons, Members, and the Secretariat.[152] At the request of Members, the Secretariat prepared an informal *Checklist of Issues for WPDR*. The *Checklist* was used as basis for the discussion of substantive issues at an informal meeting preceding the formal WPDR meeting on October 2, 2000.[153] Unfortunately, this *Checklist*

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146. *Decision on Domestic Regulation*, *supra* note 141, ¶ 3.

147. *See* Working Party on Domestic Regulation, *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, S/WPDR/2 ¶ 1 (Nov. 24, 2000).

148. *See, e.g.*, Working Party on Domestic Regulation, *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, S/WPDR/1 (Oct. 20, 1999); *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, S/WPDR/2 (Nov. 24, 2000).

149. *See generally* the minutes of the Working Party on Domestic Regulation (recording the meetings of the WPDR). These minutes are documents S/WPDR/M/1-7 and are available at http://docsonline.wto.org/gen_search.asp.

150. *Id.*

151. Working Party on Domestic Regulation, *Communication from Australia*, S/WPDR/W/1 (July 19, 1999); Working Party on Domestic Regulation, *Communication From Hong Kong, China*, S/WPDR/W/3 (Apr. 28, 2000); Working Party on Domestic Regulation, *Communication from the United States*, S/WPDR/W/4 (May 3, 2000); Working Party on Domestic Regulation, *Communication from the European Communities and Their Member States*, S/WPDR/W/5 (May 19, 2000); Working Party on Domestic Regulation, *Communication from Japan*, S/WPDR/W/6 (May 19, 2000); Working Party on Domestic Regulation, *Communication From Poland*, S/WPDR/W/7 (May 23, 2000); Working Party on Domestic Regulation, *Communication from Australia*, S/WPDR/W/8 (Sept. 18, 2000); Working Party on Domestic Regulation, *Communication from the Republic of Korea*, S/WPDR/W/9 (Sept. 28, 2000); Working Party on Domestic Regulation, *Communication from Canada*, S/WPDR/W/13 (Mar. 16, 2001); Working Party on Domestic Regulation, *Communication from the European Communities and their Member States*, S/WPDR/W/14 (May 1, 2001); Working Party on Domestic Regulation, *Communication from Australia*, S/WPDR/W/15 (May 3, 2001).

152. *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, *supra* note 147, ¶ 4.

153. *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, *supra* note 148, ¶ 4 (containing the WPDR's annual report for 1999 and explaining that "Informal papers were submitted by the Chairperson and the Secretariat (Job No. 2800, 12 May 1999, and Job No. 5929, 8 October 1999)"); *Report of the Working Party on Domestic Regulation to the Council for Trade in Services*, *supra* note 147 (containing the WPDR's annual report for 2000).

is considered an internal document and has not yet been made available to the public.[154]

During the past two years, most of the discussion within the WPDR has addressed the scope and content of possible "horizontal" disciplines that would apply to multiple service sectors.[155] At the request of the WPPS, the WTO Secretariat prepared two papers that addressed "domestic regulation" and horizontal disciplines. Because these papers were issued one month before the WPDR was formed, much of the discussion in the WPDR about horizontal disciplines has focused on the issues contained in the Secretariat's papers.[156] The Secretariat's papers identified four key issues: (1) necessity; (2) transparency; (3) equivalence; and (4) international standards.[157] In addition to these issues, there has been some discussion in the WPDR about the desirability of having a separate discipline for the legal profession. Each of these discussions is summarized below.

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154. E-mail from John Dickson to Laurel S. Terry, (June 26, 2001) (on file with author) (stating that "Jobs are internal documents and not available to the general public."). Mr. Dickson did not provide his title, but answered an e-mail inquiry to public@wto.org, which was the address given on WTO document dissemination facility webpage.

155. Working Party on Domestic Regulation, *Report on the Meeting Held on 17 May 1999, Note by the Secretariat*, S/WPDR/M/1 ¶ 5 (June 14, 1999); *see also* Working Party on Domestic Regulation, *Report on the Meeting Held on 14 July 1999, Note by the Secretariat*, S/WPDR/M/2 (Sept. 2, 1999) (summarizing the WPDR's discussion of the four issues contained in Council for Trade in Services, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services, Note by the Secretariat 1 March 1999 S/C/W/96 and Council for Trade in Services, International Regulatory Initiatives in Services, Note by the Secretariat 1 March 1999 S/C/W/97).

156. *See, e.g.*, *Report on the Meeting Held on 14 July 1999, supra* note 155, ¶ 1 ("The main item on the agenda was further discussion of the four concepts addressed in the Secretariat paper S/C/W/96, i.e. necessity, transparency, equivalence and international standards, together with continued discussion, and adoption, of the proposal by Hong Kong, China regarding professional services."); *Report on the Meeting Held on 17 May 1999, supra* note 155, ¶ 5.

> The discussion of future work was initiated by the Chairperson, on the basis of the Secretariat paper S/C/W/96 and an informal Chairperson's Note (Job No. 2800). The discussion was held in informal mode, and included initial comments on the four concepts discussed in the Secretariat paper, i.e. necessity, transparency, equivalence and international standards, regarding the development of horizontally applicable disciplines on domestic regulation.

Id.

157. 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 (Mar. 1, 1999); *see also Report on the Meeting Held on 14 July 1999, supra* note 155 (highlighting these four issues from the Secretariat's Paper S/C/W/96).

1. Necessity

One of the issues that has concerned the WPDR is the meaning of the term "necessary." As explained earlier,[158] GATS Article VI(4) requires the appropriate body, which is now the WPDR, to develop disciplines that aim to ensure that qualification and licensing requirements are "not more burdensome *than necessary* to ensure the quality of the service."[159]

The meaning of the term "necessary" has been the subject of much discussion. Some members have expressed the view that the meaning of the term "necessary" was directly linked to the question of what constitutes legitimate objectives.[160] Most members indicated that it would not be practical to create an exhaustive list of legitimate objectives; some members expressed the view that legitimate objectives might vary between members.[161] One delegation recommended that the WPDR examine "necessity" from the perspective of the five areas addressed in the accountancy disciplines: qualification requirements, qualification procedures, licensing requirements, licensing procedures, and technical standards.[162]

The importance of the issue of "necessity" has recently been illustrated on the WTO website. After a recent letter to the editor in *The Observer* complaining about the potential for abuse inherent in the "necessity" doctrine, David Hartridge, the former director of the WTO Secretariat Services Division wrote a defense, which is posted on the WTO website.[163]

2. Transparency

With respect to transparency, discussion has focused on the relationship between the transparency provision in Article III of the GATS and Article VI on Domestic Regulation.[164] Some delegations expressed the view that the two provisions were not in conflict, whereas other delegations said the relationship needed to be further explored. The delegations also discussed the view expressed in Paragraph 31 of the Secretariat paper S/C/W/96 that some of the

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158. *See supra* notes 86-89 and accompanying text.

159. GATS, *supra* note 4, art. VI(4)(b) (emphasis added).

160. *Report on the Meeting Held on 14 July 1999, supra* note 155, ¶ 3 (Sept. 2, 1999).

161. *Id.*

162. *Id.* ¶ 4.

163. *WTO: Services: Analyses & Publications- Letter to the Observer, at* http://www.wto.org/english/tratop_e/serv_e/hart_letterapril01_e.htm (last visited July 17, 2001).

164. *Report on the Meeting Held on 17 May 1999, supra* note 155, ¶ 1.

transparency measures from the accountancy disciplines may not be applicable horizontally—generally.[165]

As was true for the issue of "necessity," some delegations suggested that the WPDR examine "transparency" from the perspective of the five areas addressed in the accountancy disciplines. They further indicated that similar provisions could be applied to at least some services sectors.[166] Finally, one Member State—the United States—suggested that the transparency requirements found in the *Disciplines for the Accountancy Sector* were more stringent and developed than the transparency requirements in the GATS; the United States favored the greater transparency approach used in the *Disciplines* and other trade agreements, such as the WTO Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements.[167]

3. Equivalence

Although the WPDR has indicated that the issues of necessity and transparency have been the focus of most of the discussions, the WPDR minutes also memorialize some discussion about "equivalency."[168] As the Secretariat explained, the "equivalency" doctrine is relevant to disciplines and domestic regulation because:

> [R]egulators are often called upon to assess the equivalence of domestic and foreign qualifications. In many cases they may require foreign applicants for licences or other authority to provide a service to undergo tests or to fulfill conditions to demonstrate equivalence. Since such tests are imposed in order to ensure that a domestic standard is met, they may be regarded as domestic regulations.[169]

The minutes show that some delegations believed that equivalency is less likely than transparency to be applicable horizontally—to all different kinds of services.[170] There also was some disagreement about whether equivalency primarily concerned Article VII of the GATS, related to recognition, rather than domestic regulation and disciplines.[171] A number of members expressed the view that additional information was required on this point.[172]

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165. *Id.* ¶ 5.

166. *Report on the Meeting Held on 14 July 1999, supra* note 155, ¶ 6.

167. Working Party on Domestic Regulation, *Communication from the United States: GATS Article IV:4: Possible Disciplines on Transparency in Domestic Regulation*, S/WPDR/W/4 ¶ 6 (May 3, 2000).

168. *Report on the Meeting Held on 14 July 1999, supra* note 155.

169. *Article VI:4 of the GATS, supra* note 157.

170. Working Party on Domestic Regulation, *Report on the Meeting Held on 17 May 1999, Note by the Secretariat*, S/WPDR/M/1 ¶ 9 (June 14, 1999).

171. *Id.*

172. *Id.*

4. International Standards

Although not the main focus of discussion, the WPDR has also discussed international standards, which was the fourth point in the Secretariat's memo S/C/W/96. Article VII(5) of the GATS requires WTO Member States to "work in cooperation 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."[173]

When discussing international standards, the WPDR delegations identified as issues for further discussion the issues of voluntary versus mandatory standards and technical versus performance standards.[174] There was also some discussion among delegation members about the proper role of international professional organizations:

> Canada and the United States stated their concerns that direct consultations with international professional organizations might cause misunderstandings over their participation in the development of future regulatory disciplines. They also inquired as to which professions would be consulted, the timing of consultation and the role of the Secretariat in respect to the information collected. The delegate of the European Communities stated she was somewhat less concerned about the possibility of referring to international bodies, as there would be a balance of interests. The delegate said the consultations should include all professions. . . . The Chairperson said that initial reactions by Members on the Hong Kong, China informal paper had been generally positive. Several issues had been raised which required further discussion, including the professions concerned, compilation of information and how international organizations would be approached.[175]

In a subsequent meeting, the Secretariat indicated that consultations would occur in two stages—with the Secretariat consultations with international professional associations taking place on a slower track—and that the Secretariat was waiting for information from delegations concerning relevant international organizations.[176]

5. Consultations with Domestic Organizations

As a result of a suggestion from Hong Kong, the WPDR decided that Members should consult on a voluntary basis with their domestic professional associations concerning the potential applicability of the

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

174. *Report on the Meeting Held on 17 May 1999, supra* note 170, ¶ 10.

175. *Id.* ¶¶ 13, 15.

176. *Note by the Secretariat, Report on the Meeting Held on 14 July 1999, supra* note 155.

accountancy disciplines for their professions.[177] The WPDR set a deadline of December 31, 1999 to complete these domestic consultations with the relevant professional organizations and until March 31, 2000 to notify the WTO of the results of the consultations.[178] During a series of meetings in July 2000, the WPDR heard from WTO Member States about these consultations:

> Several Members informed the working party on their consultations with domestic professional organizations regarding the applicability of the accountancy disciplines to other professions. In general, these organizations think the disciplines are useful and relevant and could apply, with some changes for each profession, to them.
>
> The Members went on to discuss concepts relating to the development of regulatory disciplines based on a draft Secretariat Check-list of issues currently under discussion, focusing primarily on the concepts of necessity and transparency.[179]

The WPDR's Annual Report for 2000 provided additional detail about these consultations:

> Members reporting on their domestic consultations stated that the initial responses, although limited in number, were generally positive. Some professions requested additional disciplines to cover the specificities of their particular sector. A number of Members circulated formal and informal written reports of their consultations, including Australia; the European Communities; Hong Kong, China; Japan; Poland; the United States and Uruguay. The Secretariat was asked to compile a synthesis of Member responses to date. Regarding international professional services organizations, the Secretariat prepared and revised a listing of the organizations identified by Members. As of the October 2000 meeting, Members had not yet determined the procedures for Secretariat consultations.[180]

Although the United States reported the results of its consultations with some professions, it did not report on any consultations with the U.S. legal profession.[181]

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177. *Report of the Working Party on Domestic Regulation to the Council for Trade in Services, supra* note 148; *Report on the Meeting Held on 17 May 1999, supra* note 155; *Report on the Meeting Held on 14 July 1999, supra* note 155.

178. *Report on the Meeting Held on 14 July 1999, supra* note 155.

179. WTO News: 2000 news items, Services week 5 - 14 July 2000, *at* http://www.wto.org/english/news_e/news00_e/servju_e.htm (last visited Feb. 5, 2001).

180. *See supra* note 148, ¶ 4.

181. Working Party on Domestic Regulation, *Report on the Meeting Held on 13 April 2000, Note by the Secretariat*, S/WPDR/M/5 ¶¶ 11, 18 (May 18, 2000). This document states:

> Before opening the floor for comments on the Secretariat compilation, the Chairperson observed that the agreed deadline for communicating the results of the Members' own consultations with domestic professional organizations was 31 March 2000. As no communications had yet been received as of the meeting, Members therefore needed to decide on the next steps to take. As part of that process, he urged Members to describe to the Working Party their progress to date. . . . The representative of the *United States* said they had

6. Should the Legal Profession Be Governed by Horizontal Disciplines or Subject to its Own Discipline?

One of the issues that has concerned WTO Member States is the question of whether the legal profession should be covered by its own discipline. Perhaps not surprisingly, many lawyers and bar leaders believe that the legal profession should be addressed in a separate discipline. Thus, in contexts outside of the WTO, bar associations have expressed the view that domestic regulation of the legal profession should be addressed separately. For example, this point was made repeatedly in the Discussion Papers prepared for the *Paris Forum*.[182] The Canadian Bar Association has also expressed strong

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consulted with four bodies representing architects, engineers and surveyors, which had found the disciplines generally appropriate to their professions. Regarding international organizations, he suggested the Secretariat send a letter to several organizations enquiring about the general applicability of the accountancy disciplines. The delegate said the initial list of those to be consulted should be kept short, in order to test the process, suggesting the International Union of Architects, the International Federation of Consulting Engineers, the World Federation of Engineering Organizations and the International Bar Association.

Id.

182. Shigeru Kobori, *Discussion Papers: Presented by the Japan Federation of Bar Associations*, 18 DICK. J. INT'L L. 109, 111 (1999) ("the legal profession should be separately and independently considered from other professional services in the preparation of multilateral regulations and mutual recognition standards under WTO/GATS.") [hereinafter *Japanese Paris Forum Discussion Paper*]; Donald H. Rivkin, *Discussion Papers:* Presented by the American Bar Association Section for International Law and Practice, 18 DICK. J. INT'L L. 55, 85 (1999) [hereinafter *ABA Paris Forum Discussion Paper*].

> We do not believe that codes or standards respecting the accounting profession promulgated by the Working Party on Professional Services of the World Trade Organization should serve as a precedent or a guide to international regulation of the legal profession, whose unique role in society is discussed above. Nonetheless, some of the criteria set forth in the WPPS "Disciplines on Domestic Regulation in the Accountancy Sector" (Eight Revision, May 20, 1998) do in our view provide guidance for the appropriate licensing of foreign lawyers, whatever form the licensure might take.

Id.; Ham Jung-Ho, *The Unique Characteristics of Korean Attorneys' System*, 18 DICKINSON J. INT'L L. 171, 172 (1999) ("In this regard, in dealing with the transnational practice issue in the legal profession, I believe that the unique characteristics of each country's legal profession should be considered and that such an attempt to apply uniform principles across the board is very inappropriate."); CCBE Discussion Paper, *infra* note 267, at 107.

> It is the urgent task of the professional bodies of lawyers such as the ABA, Japan Federation of Bar Associations, CCBE and others to offer common reasonable solutions so that the interest of clients as well as of the profession are best served and the rule of law upheld. If we speak with a single voice and act together, our views will prevail with the authorities, more in particular the WPPS and the WTO.

opposition to applying the *Disciplines for the Accountancy Sector* to legal services:

> One of the big questions is whether the accounting disciplines will simply be used as a model for the other professions, including the legal profession. The position of the CBA is that the unique characteristics and core values of the legal profession in a democratic society require it to be treated separately, and in some key respects quite differently.[183]

The Canadian Bar Association also is responsible for one of the most detailed papers about why it believes it would be inappropriate to apply the *Disciplines for the Accountancy Sector* to the legal profession. This paper, which is entitled "Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession," [184] asserts that "law society rules concerning matters which relate to the public interest not be subject to review by a third party dispute settlement body" because, inter alia, "issues of 'public protection' should not be left to a panel of 'experts' from other countries with little or no familiarity of Canada's legal history and culture."[185] In its discussion, the CBA identified eight provisions in the Accountancy Disciplines "which . . . raised concerns." [186]

Id.

183. *The World Trade Organization General Agreement on Trade in Services Negotiations: What it Means to Canadian Lawyers*, *at* http://www.cba.org/EPIIgram/February2000 (last visited Mar. 3, 2001).

184. 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* 1 (Nov. 2000), *available at* http://www.cba.org/EPIIgram/November2000/pdf/00-30-eng.pdf (last visited June 15, 2001).

185. *Id.* at 17.

186. *Id.* at 9-15. The eight provisions that raised concerns included:

1) Art. I, para. 1, because of its prohibition on unnecessary barriers to trade, its requirement that measures not be more trade restrictive than necessary to a fulfill a legitimate objective and its non-exhaustive list of legitimate objectives;

a. Art. III, para. 2 regarding licensing requirements insofar as it requires member states to consider whether less restrictive means than residency requirements would suffice;

b. Art. III, para. 2 regarding licensing requirements insofar as it provides that if membership in a professional organization is required to fulfill a legitimate objective, members must ensure that the terms of membership are reasonable and do not include conditions unrelated to the fulfillment of the objective;

c. Art. III, para. 4, insofar as it provides that members ensure that the use of firm names is not restrictive unless in fulfillment of a legitimate objective;

d. Art. III, para. 5 insofar as it covers indemnity insurance and requires regulators to take into account the applicant's existing coverage insofar

In addition to these statements by bar associations, some of the official submissions prepared by WTO Member States also have expressed concerns about having the *Disciplines for the Accountancy Sector* apply to lawyers or having lawyers subject to generally-applicable horizontal disciplines. For example, Japan submitted a paper that takes the position that the legal profession should not be treated similarly to the accounting profession. [187] At this point in time, it is not clear where the work of the WPDR will lead, whether it will issue horizontal disciplines, and whether those disciplines will apply to legal services. As the remarks of one of the principal U.S. negotiators makes clear:

> The difficulty of getting countries to undertake and conform to international commitments in this field [of trade restrictive effects of domestic regulations] should not be underestimated. A great deal of time and effort was expended [with the Accountancy Disciplines] with a result that did not meet the expectations of representatives of the accounting profession. WTO delegations, however, brought this exercise as far as they could under the circumstances. It has been a useful experiment which signals the challenges ahead.[188]

Thus, it is not clear what result the WPDR will produce or whether lawyers will be treated separately or with other service providers. While the WPDR is engaged in its work regarding horizontal disciplines, however, developments are also occurring in the GATS 2000 negotiations, which are discussed below.

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as it covers activities in the host member's territory and is consistent with the legislation in the host state;

e. Art. V, para. 1 regarding qualification requirements insofar as it requires member states to ensure that their governing bodies take into account qualifications acquired in the territory of another member state;

f. Art. V. para. 2 regarding qualification requirements insofar as it requires that the scope of examinations and other qualifications requirement be limited to subjects relevant to the activities for which authorization is sought; and

g. Art. VII, para. 1 and 2, regarding technical standards insofar as they require member states to ensure that measures relating to technical standards only fulfill legitimate objectives and urges member states to take into account internationally recognized standards of relevant international organizations

Id. It is beyond the scope of this article to explain the rationale underlying these eight concerns; many of these issues are discussed *infra* notes 272-302 and accompanying text.

187. *Communication from Japan: Report of the Results of Research on Professional Services*, S/WPDR/W/6 (May 19, 2000).

188. Bernard Ascher, *Trade Disciplines for Regulation: Lessons from the Accountancy Sector* 15 (Center for Quality Assurance in International Education, Washington, D.C. (2000)) (Address before the Center at the Conference on (R)Evolution of Quality and Competency Assurance in the Global Marketplace, Santa Fe, NM, June 2-4, 1999) (available on file with author).

G. *The GATS 2000 Round of Negotiations to Further Reduce Trade Barriers Background*

Part IV of the GATS is entitled "Progressive Liberalization." Section XIX requires a new round of negotiations five years after the signing of the GATS; these negotiations must aim at "the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access."[189] Although this new round of negotiations was intended to begin at the WTO Third Ministerial Conference in Seattle, Washington in November 1999,[190]

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189. GATS, *supra* note 4, art. XIX states:

Negotiation of Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the [WTO Agreement] and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country [Members] for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

See also USTR Fact Sheet, WTO SERVICES—U.S. NEGOTIATING PROPOSALS, 12/14/00, *at* http://www.ustr.gov/releases/2000/12/factsheet.html (last visited Feb. 5, 2001) (summarizing the various areas of U.S. negotiations)[hereinafter *USTR Fact Sheet*].

190. *Third WTO Ministerial Conference, Seattle, Washington, United States of America, 30 November-3 December 1999, at* http://www.wto.org/english/thewto_e/minist_e/min99_e.htm (last visited Sept. 1, 2001).

it was formally launched on February 25, 2000.[191] These negotiations have been referred to both as the "GATS 2000 negotiations"[192] and the "built-in agenda" negotiations.[193] The latter name refers to the fact that a requirement of additional negotiations to commence within five years was "built-into" Article XIX of the GATS.

1. The Timing and Procedure for GATS 2000 Negotiations

The GATS 2000 negotiations currently are taking place under the auspices of the WTO Council for Trade in Services, meeting in special session, under the chairmanship of Sergio Marchi, who is Canada's ambassador in Geneva.[194] Currently, there is no firm date by which the GATS 2000 round of negotiations are scheduled to conclude. Although the United States originally proposed that Members "conclude the [GATS 2000] negotiations within three years by December 2003,"[195] the WTO ultimately did not adopt a final date by which the negotiations should conclude.[196] Some countries apparently opposed the idea of a firm deadline because of concern that it would undermine efforts to develop a more comprehensive round of trade negotiations.[197]

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191. *Services Negotiations Formally Launched, at* http://www.wto.org/english/news_e/news00_e/servfe_e.htm (last visited Feb. 5, 2001).

192. *Council of Bars and Law Societies of the European Union, at* http://www.ccbe.org/uk/homeuk.htm (last visited Apr. 3, 2001) (the CCBE's ad hoc committees include both a GATS committee and a GATS 2000 committee); *List of Services 2000 Proposals, at* http://www.wto.org/english/tratop_e/werv_e/s_propnewnegs_e.htm (last visited Sept. 1, 2001); *Government of Canada, Services 2000, Professional Services,* http://strategis.ic.gc.ca/SSG/sk00052e.html (last visited Apr. 3, 2001).

193. Interview with Bernard Ascher, *supra* note 51. In response to question 14 asking "What is the so-called 'built-in agenda' of the GATS?," the WTO webpage states:

> The GATS, including its Annexes and Related Instruments, sets out a work programme which is normally referred to as the 'built-in' agenda. The programme reflects both the fact that not all services-related negotiations could be concluded within the time frame of the Uruguay Round, and that Members have already committed themselves, in Article XIX, to successive rounds aimed at achieving a progressively higher level of liberalization. In addition, various GATS Articles provide for issue-specific negotiations intended to define rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). These negotiations are currently under way.

194. The document code for these documents is S/CSS/.

195. Council for Trade in Services, Special Session, *Communication from the United States: Framework for Negotiation,* S/CSS/W/4 (Jul. 13, 2000) [hereinafter *U.S. Framework for Negotiations*], *available at* http://www.ustr.gov/sectors/services/gatt.html (last visited Feb. 5, 2001).

196. *Guidelines and procedures for the Negotiations on Trade in Services* S/L/93 (Mar. 29, 2001) [hereinafter *WTO Negotiation Guidelines*] (Adopted by the Special Session of the Council for Trade in Services on 28 March 2001), *at* http://www.wto.org/english/news_e/ pres01_e/pr217_e.htm (last visited June 18, 2001).

197. Interview with Bernard Ascher, *supra* note 51.

Although there currently is no scheduled end for the GATS 2000 negotiations, there has been agreement among WTO members about some interim dates. On May 26, 2000, for example, during a meeting of the Council on Trade in Services, WTO Member States agreed on a "roadmap" or work program with respect to the timing and procedures of the GATS 2000 negotiations.[198] This "roadmap" contained two target deadlines, although it did not specify a deadline by which negotiations would be completed.[199] In this "roadmap," members agreed that they would submit negotiating proposals by December 2000, if possible, recognizing that there was flexibility for further and more detailed submissions thereafter.[200] Second, members agreed to aim to complete work on classification systems and scheduling guidelines by March 2001.[201] The classification system is important because it determines the form in which the request-offer negotiation proposals must be submitted.

Many WTO members met the first of the two "target deadlines" in the "roadmap." As is described in greater detail below, several WTO members, including the United States, submitted negotiating proposals by December 2000 or shortly thereafter. The second "target deadline," however, was only partially met. On March 28, 2001, the GATS Council for Trade in Services agreed on a set of guidelines and procedures for GATS 2000.[202] As of June 2000, however, they had not yet completed their work on the classification system by which request-offer proposals must be made.[203]

The March 2001 Guidelines and Procedures contain three sections: (1) Objectives and Principles; (2) Scope; and (3) Modalities and Procedures.[204] The only specific deadline in the March 2001 Guidelines is a March 15, 2002 deadline to complete negotiations on "safeguards under Article X."[205] Like the earlier "roadmap"

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198. *Report of the Meeting Held on 26 May 2000, Note by the Secretariat*, S/CSS/M/3 (June 26, 2000).

199. *Id.* ¶ 24 (contains the text of the "roadmap.")

200. *Statement by the Chairman of the Council for Trade in Services to the General Council*, 17 July 2000, S/CSS/1 (Nov. 22, 2000).

201. *U.S. Framework for Negotiations*, *supra* note 195, ¶ 8 ("For the latter two issues [classification and scheduling guidelines], Members have agreed to aim to complete work by March 2001, and we should make every effort to do so.")

202. Council for Trade in Services, Special Session, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services* (GATS), S/L/92 (Mar. 28, 2001).

203. *WTO News: Services Week 2000: Week of July 5-14 2000*, *supra* note 179 (the most recent report available on the WTO website about this issue found was the webpage labeled "Services Week from 5-4 July 2000" and stated "Members are looking at the need to create new classifications for new services (for example, some environmental services and energy services) or the need to reclassify certain existing services.").

204. *WTO Negotiation Guidelines*, *supra* note 196.

205. *Id.* ¶ 7.

document, the March 2001 GATS 2000 Guidelines do not include a firm "end" date for the general negotiations.[206]

Individual members of the WTO had suggested more specific deadlines than the Council adopted in its March 2001 Guidelines. For example, in its July 13, 2000 *Framework for Negotiation,* the U.S. suggested four additional deadlines that it asked other WTO members to consider.[207] First, the United States proposed that the negotiating and guideline procedures be completed by the October 2000 special session.[208] This document ultimately was adopted as the March 2001 Guidelines.[209] Second, the United States proposed that negotiations be concluded within three years, by December 2002.[210] Third, the United States proposed that members agree on modalities for liberalization by the 2001 midterm of negotiations.[211] Fourth, the United States proposed that by the 2001 midterm of negotiations, the WPDR complete its work on possible new disciplines so that the results could be incorporated into the market access negotiations.[212] The Council did not adopt any of these suggested deadlines in its March 2001 Guidelines.[213]

Although the GATS 2000 negotiations currently are underway, most U.S. lawyers with whom I have spoken seem unaware of this fact. Moreover, unlike the Canadian Bar Association, the American Bar Association has not made it particularly easy for U.S. lawyers to learn about these negotiations or share their views about these negotiations.[214] Although the Canadian Bar Association maintains links on its webpage to the GATS 2000 negotiations and solicits reactions to the GATS 2000 from its members, none of the ABA entities currently has any information available on its webpage about the status of the GATS 2000 negotiations.[215]

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206. *Id.*

207. *U.S. Framework for Negotiations, supra* note 195.

208. *Id.* § I(5). The United States also suggested that in the negotiating guidelines and procedures, Members should explain how to proceed with the work in the WPDR and the Working Party on GATS Rules. *Id.* § II(8).

209. *WTO Negotiation Guidelines, supra* note 196.

210. *Id.* § IV.

211. *Id.*

212. *WTO Negotiation Guidelines, supra* note 196.

213. *Id.* ("The Council for Trade in Services shall, when appropriate, develop time schedules for the conduct of the negotiations in accordance with any relevant decisions taken by the General Council.")

214. Terry, *A Challenge to Monitor the GATS 2000 Negotiations, supra* note 6.

215. *Id.* at 379-80.

2. GATS 2000 Proposals Regarding Legal Services

As of August 2001, approximately seven countries, including the United States, had issued GATS 2000 proposals that addressed—directly or indirectly—legal services.[216] Some of these countries, such as the United States and Australia, issued proposals that focused exclusively on legal services.[217] Other Member States, such as the European Union and Canada, issued proposals directed toward professional services, which included legal services.[218] Some countries, such as Japan and India, issued proposals that addressed legal services or professional services, even though the scope of the proposal was not apparent from the title of the document.[219] In addition to the proposals directed towards specific sectors, such as legal services, some countries, including some of those countries listed above, submitted proposals about negotiating procedures.[220] The WTO currently maintains a very useful page on its website in which

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216. Council for Trade in Services, Special Session, *Communication from Australia, Negotiating Proposal for Legal Services*, S/CSS/W/67 (Mar. 28, 2001); Council for Trade in Services, *Communication from Australia, Negotiating Proposal for Legal Services, Supplement*, S/CSS/W/67/Suppl.1 (July 9, 2001); Council for Trade in Services, *Communication from Australia, Negotiating Proposal for Legal Services, Revision*, S/CSS/W/67/Suppl.1/Rev. 1 (July 10, 2001); Council for Trade in Services, Special Session, *Communication from Canada, Initial Negotiating Proposal on Professional Services*, S/CSS/W/52 (Mar. 14, 2001); Communication from Columbia, *Professional Services*, S/CSS/W/98 (July 9, 2001); Council for Trade in Services, Special Session, *Communication from the European Communities and their Member States, GATS 2000: Professional Services*, S/CSS/W/33 (Dec. 22, 2000); Council for Trade in Services, Special Session, *Communication from India: Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services* (GATS), S/CSS/W/12 (Nov. 24, 2000); Council for Trade in Services, Special Session, *Communication from Japan, The Negotiations on Trade in Services*, S/CSS/W/42 (Dec. 22, 2000); Council for Trade in Services, Special Session, *Communication from the United States, Legal Services*, S/CSS/W/28 (Dec. 18, 2000); Council for Trade in Services, Special Session, *Communication from the United States, Movement of Natural Persons*, S/CSS/W/29 (Dec. 18, 2000).

217. Australia S/CSS/W/67, *supra* note 216.

218. Europe S/CSS/W/33, *supra* note 216; Canada S/CSS/W152, *supra* note 216.

219. India S/CSS/W/12, *supra* note 216; Japan S/CSS/W/42, *supra* note 216.

220. Some countries filed comments about negotiating guidelines early. *See, e.g.*, Council for Trade in Services, *Communication from Australia and Singapore: Elements of a Proposed First Phase for the Services Negotiation: Mandated under GATS Article XIX*, S/CSS/W/1 (Apr. 14, 2000); Council for Trade in Services, *Communication from Mercosur Members: Elements of a Proposed First Phase for the Services Negotiation: Mandated under GATS Article XIX*, S/CSS/W/2 (Apr. 14, 2000) (Mercosur members: Argentina, Brazil, Paraguay, Uruguay).

Other countries filed them later. *See, e.g.*, Council for Trade in Services, *Communication from Argentina et al: Elements for Negotiating Guidelines and Procedures*, S/CSS/W/13 (Nov. 24, 2000); Council for Trade in Services, *Communication from Switzerland: Guidelines for the Mandated Services Negotiations*, S/CSS/W/16, (Dec. 5, 2000); Council for Trade in Services, *Communication from Norway, The Negotiations on Trade in Services*, S/CSS/W/59 (Mar. 21, 2001).

it lists many—but not necessarily all—of the negotiating proposals submitted by WTO members and organizes these proposals according to subject matter.[221]

Some countries appear to have made efforts to obtain widespread consultation among the members of their bar associations before submitting proposals. The Canadian Bar Association, for example, makes extensive information available on its website, solicits the opinions of its members, and has adopted policy papers relevant to the development of the government policy.[222] One explanation for this may be the fact that a Canadian heads the GATS 2000 Special Session.[223] In other countries, however, such as the United States, the organized bar has been much less visible in the process of developing the country's GATS 2000 proposals.[224]

3. Issues that Appear in the GATS 2000 Legal Services Proposals

An analysis of the various GATS 2000 proposals regarding legal services is beyond the scope of this article. Nevertheless, it may be appropriate to include several general observations. From my perspective, one notable aspect of the proposals is the lack of concrete detail. Yet, despite the lack of detail, one can often sense strong differences in the tone of the submissions concerning legal services. For example, the Australian submission seems to welcome liberalization, whereas the Japanese submission is clearly cautious about liberalization.[225] Finally, it is worth noting that there are two

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221. *Proposals for New Negotiations: List of 2000 Services Proposals, at* http://www.wto.org/wto/english/tratop_e/serv_e/s_propnewnegs_etest.htm (last visited June 21, 2001). For example, at the time this article was prepared, the WTO webpage did not list the legal services proposal from Australia or the Professional Services proposal from Canada even though both of those documents had been filed and were publicly available through the WTO webpage document dissemination site. *Id.*

222. *See, e.g.*, http://strategis.ic.gc.ca/SSG/sk00052e.html (visited Feb. 5, 2001) (the link to the Legal Services Discussion Paper in pdf format brings up a document entitled "CANADIAN LEGAL SERVICES, A Consultation Paper in preparation for the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) Negotiations"); 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* (Nov. 2000) *at* http://www.cba.org/EPIIgram/November2000/default.asp (last visited June 21, 2001).

223. *See, e.g.*, Council for Trade in Services, Special Session, *Report of the Meeting Held on 25 February 2000, Note by the Secretariat*, S/CSS/M/1 WTO (Apr. 12, 2000) (the minutes of the first meeting of the Council for Trade in Services Special Session indicate that it was chaired by Ambassador Sergio Marchi of Canada).

224. *See* Terry, *A Challenge to Monitor the GATS 2000 Negotiations*, *supra* note 6.

225. *Compare Communication from Japan*, *supra* note 216:

> As overseas business activities are expanding, there is an increasing need for professional knowledge to conduct business abroad smoothly. As a result, globalisation has become an important issue for professional services.

overriding issues that have dominated much of the discussion in the proposals and that undoubtedly will affect the development of the GATS 2000 negotiations concerning legal services.

The first issue that has arisen in the GATS 2000 proposals is a reprise of an issue that appears in the discussions of the WPDR. Even though the WPDR is charged with responsibility for addressing the issue of horizontal disciplines, several countries have offered comments about this issue in their GATS 2000 proposals. On the one hand, some Member States have expressed the view that the *Disciplines for the Accountancy Sector* could be extended to cover legal services with very little changes.[226] Others, however, have expressed reservations about including the legal profession within the scope of a more general discipline.[227]

However, each professional service is carried out by a professional with a specific qualification, such as a lawyer, an accountant, a patent attorney, an architect and an engineer. It should be noted that the scope for each profession varies from one country to another and each profession is subject to a specific discipline that is unique to each profession and country. Liberalisation in these sectors, therefore, needs to take into account the specific characteristics of the profession in question.

Id.

with Communication from Australia, supra note 216.

Australia has consistently argued within the WTO the importance of liberalising trade in legal services. Not only would such liberalisation improve opportunities for legal service providers, but it would also facilitate access by businesses, particularly those operating across different jurisdictions, to a comprehensive range of legal services by a common provider. The current market access barriers in legal services serve as a hindrance to trade in other services—for example, when firms in other service areas are unable to gain access for their own legal advisers to foreign jurisdictions.

Id.

226. *See, e.g., Communication from Australia, supra* note 216.

Australia also considers that with further strengthening, the disciplines developed for the accountancy sector in 1998 by the Working Party on Professional Services (WTO document S/L/64) could be extended to the legal services sector. These disciplines represent a significant step forward in terms of improving the transparency of, and minimising the trade restrictiveness of, licensing procedures, technical standards and qualification recognition. However, Australia considers there is scope to tighten the disciplines, including by extending their reach to measures subject to scheduling under Articles XVI and XVII of the GATS.

Id.

227. *See supra* notes 182-86 and accompanying text; *Communication from Japan, supra* note 216 ("It should be noted that the scope for each profession varies from one country to another and each profession is subject to a specific discipline that is unique to each profession and country. Liberalisation in these sectors, therefore, needs to take into account the specific characteristics of the profession in question."). For a discussion of the opposition to including legal services within the Disciplines for the Accountancy Sector or horizontal disciplines, see the discussion *infra* Part III.G.4.

A second major issue that dominates the GATS 2000 proposals concerning legal services is the appropriate "classification system" that should be used for legal services. When a country submits its "request-offer" proposals during the GATS 2000 negotiations, it generally does so using the agreed-upon classification system.

During the initial GATS negotiations, countries made their proposals based on the "Services Sector Classification System"[228] in which legal services was a single item.[229] Under the classification system, the term "legal services" is not defined.[230] In the GATS 2000 negotiations, however, some countries have suggested that sub-sectors for legal services should be created and that a revised classification system should be used during the negotiations to formulate the "offer-request" proposals.[231]

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228. *See, e.g.*, Council for Trade in Services, Special Session, *Communication from the United States, Framework for Negotiation*, S/CSS/W/4 WTO (July 13, 2000), which states:

> ***Improved classification***: The United States advocates an improved classification scheme that better reflects the realities of trade in services to which all Members will adhere. The classification scheme that many Members use to schedule their commitments, contained in MTN.GNS/W/120, served a useful purpose in the Uruguay Round, allowing negotiators to move quickly into market access negotiations. Significant improvements can be accomplished with limited, specific changes to W/120 as it now stands. We intend to work with other Members to meet the agreed deadline of March 2001 to conclude classification work in the Committee on Specific Commitments, as this will provide a stronger basis for more meaningful market access negotiations. *The GATS classification system should better reflect the reality of the marketplace.*

Id.

229. *Services Sectoral Classification List, Note by the Secretariat*, MTN.GNS/W/120 WTO (July 10, 1991); *Accord The W120: Services Sectoral Classification List, at* http://www.ita.doc.gov/td/sif/GATS/W120.htm (last visited June 21, 2001).

230. *Communication from the United States, Legal Services*, (Dec. 18, 2001), *supra* note 216.

231. *See, e.g., Services Week, 29 November to 6 December 2000, at* http://www.wto.org/english/tratop_e/serv_e/servwk_novdec2000_e.htm (last visited June 21, 2001). In reporting on the discussions during early December 2000, the WTO webpage states:

> The Committee on Specific Commitments held an informal meeting on classification and its formal eighteenth meeting. The informal work on classification, which is a substantial part of the Committee's current agenda, took place in the informal mode and will be channelled into the formal meeting through a written report by the Chairman, to be included in the minutes of the meeting. The Committee's on-going work includes:
>
> (a) possible amendments to the existing services sectoral classification (environmental services, energy services, legal services, postal and courier services and construction services), including where appropriate the development of clusters; and (b) the revision of the guidelines for the scheduling of specific commitments.

Id.

Some of the GATS 2000 proposals submitted by Member States offer concrete suggestions as to the appropriate classification system for legal services. India, for example, suggested that legal services be divided into subsectors that focus on the individual professionals.[232] The United States suggested that "the classification should be understood to include the provision of legal advice or legal representation in such capacities as counseling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying."[233] Canada suggested that there be a sub-sector for "foreign legal consultancy services (advisory services on foreign and international public law.)"[234]

Approximately one year ago, the Canadian Bar Association summarized its view of the likely outcome of the sectoral classification discussions concerning legal services:

> It appears that the regulation of legal services will be considered in different categories: home country law (the law of the jurisdiction of the lawyer); host country law (the law of the jurisdiction where the lawyer is "practising") and international law. Each category has been subdivided into advice and representation in court. It is possible for a country to have different qualification and licensing rules for the different types of practice.[235]

4. The December 2000 U.S. Proposal Regarding Legal Services

In July 2000, the United States presented a document entitled *Framework for Negotiations* that presented the U.S. view about its interests, objectives, and proposed approaches for the negotiations.[236] On December 14, 2000 the United States issued its negotiating proposal for legal services, among others.[237] Because this document is relatively short, it is reproduced below in its entirety:

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232. *Communication from India, supra* note 216 (suggesting "Superimposition of ISCO-88 of ILO relating to category of Professionals on the Professional Services sector of Services Sectoral Classification list-MTN/GNS/W/120" and identifying three types of legal professionals as classification categories, including under the category 242 Legal professionals: 2421 Lawyers, 2422 Judges, and 2429 Legal professionals not elsewhere classified.).

233. *U.S. Legal Services Proposal, infra* note 237, ¶ IV.

234. *Communication from Canada, supra* note 216, ¶ 5.

235. *The World Trade Organization General Agreement on Trade in Services Negotiations: What it Means to Canadian Lawyers, at* http://www.cba.org/EPIIgram/February2000 (last visited Mar. 3, 2001).

236. *U.S. Framework for Negotiations, supra* note 195.

237. *USTR Fact Sheet, supra* note 189. The WTO symbol for the U.S. proposal for legal services is Council for Trade in Services, Special Session, *Communication from the United States, Legal Services*, S/CSS/W/28 (Dec. 18, 2000), *available at* http://www.ustr.gov/ sectors/services/legal.html (last visited Feb. 5, 2001) [hereinafter *U.S. Legal Services Proposal*]. This document was initially drafted by Bernard Ascher,

I INTRODUCTION

The United States presents this proposal on legal services for consideration of all Members. It is intended to stimulate discussion and liberalization of this important sector in the world economy.

II IMPORTANCE OF LEGAL SERVICES

With the acceleration of world economic integration, law firms have become increasingly involved in advising clients on international transactions covering a variety of business matters, including mergers and acquisitions with foreign companies and contractual arrangements for franchises, dealerships, and product sales. Increasingly businesses are requesting advice from law firms on transactions involving multiple jurisdictions. In many respects, lawyers and law firms pave the way for international trade and investment and are regarded as part of the infrastructure of commerce.

III PURPOSE

The purpose of this proposal is to make it easier for lawyers and law firms to provide services to clients involved in international transactions, enabling those clients to conduct business successfully and in compliance with applicable laws and regulations, thereby contributing to economic and social progress in various countries.

Lawyers often encounter difficulties becoming licensed in other countries, or in providing advice to clients in foreign countries. A basic problem stems from the national character of each country's legal system and the need to demonstrate knowledge and competence in the law of that jurisdiction in order to become licensed there. In some cases, licensing is limited to citizens of the country.

IV SECTOR COVERAGE

The WTO services classification list (W/120) does not specifically define legal services. The United States suggests that the classification should be understood to include the provision of legal advice or legal representation in such capacities as counseling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying.

V PROPOSAL

An important goal for negotiations on legal services should be for WTO Members to examine liberalization opportunities with regard to market access and national treatment barriers as those terms are understood in the GATS. The specific focus of such liberalization would be most beneficial in the context of mode 3 (commercial presence, including citizenship and residency requirements for licensing, scope of practice, and association of foreign-qualified lawyers with local lawyers

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who is Director of Service Industry Affairs in the Office of the Trade Representative. Before being presented as official U.S. policy, this document was approved by the ISAC-13 advisory group, *see infra* note 243, and the appropriate "chain of command" within the USTR's office, which included approval at the Assistant U.S. Trade Representative level and the Trade Policy Staff Committee, following coordination with other executive branch agencies. Mr. Ascher, who is a nonlawyer, was responsible for developing the negotiating positions for several other service industries, in addition to the legal services industry.

> and association of foreign-partner law firms with local law firms). Discussions should include other relevant modes of supply, including mode 4 (movement of personnel).
>
> PROPOSED REFERENCE PAPER
>
> A reference paper could be drafted to address problems faced by lawyers and law firms in serving clients internationally. The United States looks forward to working with all Members to develop an appropriate reference paper, elaborating on these matters and expects to present a proposed text in the near future.[238]

As one can see, there is not much specific information contained in this document; for the most part, it consists of general platitudes with which few would disagree. In my view, however, there are two noteworthy points about this proposal. First, the United States has joined those who recommend that the classification system for legal services be changed.[239] This recommendation is important because it affects the manner by which request-offer negotiations will be made.

Second, this document appears to focus more on Mode 3, or permanent establishment methods of global multi-jurisdictional legal practice, rather than Mode 4, which would involve the temporary presence of foreign lawyers in the United States.[240]

5. The U.S. Procedure for GATS 2000 Negotiations Concerning Legal Services

After reading the U.S. proposal regarding legal services, a logical question to ask is "Who prepared this document?" The U.S. proposals for the GATS 2000 negotiations are prepared by the Office of the U.S Trade Representative (USTR),[241] in conjunction with other

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238. *See U.S. Legal Services Proposal, supra* note 237. Because some have commented that the legal profession should simply recommend adoption of the Guidelines and Disciplines developed for the accountancy sector, readers may also be interested in the U.S. negotiating proposal for the accountancy sector, which is entitled Council for Trade in Services, Special Session, *Communication from the United States, Accounting Services*, S/CSS/W/20 (Dec. 18, 2000). It is available without downloading from http://www.ustr.gov/sectors/services/acct.html (last visited Feb. 5, 2001).

239. *U.S. Legal Services Proposal, supra* note 237, ¶ IV.

240. *Id.* ¶ V.

241. *About USTR, at* http://www.ustr.gov/about-ustr/index.shtml (last visited Feb. 21, 2001).

> The U.S. Trade Representative is America's chief trade negotiator and the principal trade policy advisor to the President. In this role, the USTR and the Agency's staff are responsible for developing and implementing trade policies which promote world growth, and create new opportunities for American businesses, workers and agricultural producers. USTR has permanent offices at the World Trade Organization in Geneva, as well as in Washington, D.C.

Id.

departments of the government, depending on the sector involved.[242]

The USTR's negotiating proposals are made after statutorily-required consultations with private sector advisory committees.[243] Interestingly, although services represent eighty percent of the U.S.

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242. *USTR Outreach: Trade Policy Advisory Committee System*, *at* http://www.ustr.gov/outreach/advise.shtml (last visited Feb. 21, 2001). As this page states:

> The six policy advisory committees are appointed by the USTR alone or in conjunction with other Cabinet officers. Those managed solely by USTR are the Intergovernmental Policy Advisory Committee (IGPAC), and the Trade Advisory Committee on Africa (TACA). Those policy advisory committees managed jointly with the Departments of Agriculture, Labor, and Defense and the Environmental Protection Agency are, respectively, the Agricultural Policy Advisory Committee (APAC), Labor Advisory Committee (LAC), Defense Policy Advisory Committee (DPACT), and Trade and Environment Policy Advisory Committee (TEPAC). Each committee provides advice based upon the perspective of its specific area.
>
> The 26 sectoral, functional, and technical advisory committees are organized in two areas: industry and agriculture. Representatives are appointed jointly by the USTR and the Secretaries of Commerce and Agriculture, respectively.

Id.

243. *Id.* The United States explains as follows the private advisory committee system, including ISAC-13, which advises the USTR with respect to services, including legal services:

> The U.S. Congress established the private sector advisory committee system in 1974 to ensure that U.S. trade policy and trade negotiation objectives adequately reflect U.S. commercial and economic interests. Congress expanded and enhanced the role of this system in three subsequent trade acts.
>
> The advisory committees provide information and advice with respect to U.S. negotiating objectives and bargaining positions before entering into trade agreements, on the operation of any trade agreement once entered into, and on other matters arising in connection with the development, implementation, and administration of U.S. trade policy.
>
> The trade policy advisory committee system consists of 33 advisory committees, with a total membership of up to 1,000 advisors. Recommendations for candidates for committee membership are collected from a number of sources including Members of Congress, associations and organizations, publications, and other individuals who have demonstrated an interest or expertise in U.S. trade policy. Membership selection is based on qualifications, geography, and the needs of the specific committee. Members pay for their own travel and other related expenses. The 26 sectoral, functional, and technical advisory committees are organized in two areas: industry and agriculture. Representatives are appointed jointly by the USTR and the Secretaries of Commerce and Agriculture, respectively. Each sectoral or technical committee represents a specific sector or commodity group (such as textiles or dairy products) and provides specific technical advice concerning the effect that trade policy decisions may have on its sector.

USTR and Department of Commerce Administered Committees for Services ISAC 13.

GNP,[244] only one of the thirty-three advisory committees advises about the services sector.[245] The advisory committee for services meets monthly, and its agendas are published in the Federal Register shortly before the meeting. Portions of the meetings are often open to the public and attended by reporters.[246] Currently, there is one position in ISAC-13 designated for a representative of legal services; that position currently is held by Peter Ehrenhaft, who was appointed by the ABA president for a three-year term.[247]

In addition to the statutory consultation of ISAC, the USTR regularly solicits input from interested entities. Such requests for comment are published in the Federal Register.[248] One of the entities that regularly offers comments is the Council of Service Industries, or CSI.[249] Currently, CSI includes five U.S. law firms: White & Case; Baker & McKenzie; Wilmer, Cutler; Akin Gump; and Cleary Gottlieb.[250] CSI appears to be the major lobbyist regarding legal

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244. *See supra* note 11; *see also USTR Fact Sheet, WTO Services—U.S Negotiating Proposals Dec. 14, 2000, at* http://www.ustr.gov/releases/2000/12/factsheet.html (last visited June 26, 2001).

245. *Charter of the Industry Sector Advisory Committee on Services for Trade Policy Matters, at* http://www.ita.doc.gov/td/icp/Charter-13.html (last visited Feb. 20, 2001) (includes the charter for the ISAC 13 advisory committee devoted to services.).

246. Reporters from the Bureau of National Affairs and Washington Trade Daily have attended public sessions of the Industry Sector Advisory Committee on Services (ISAC-13). *See* E-mail Letter From Bernard Ascher, Director of Service Industry Affairs in the Office of the Trade Representative, to Laurel S. Terry (July 26, 2001) (on file with author).

247. Interview with Peter Ehrenhaft, (Feb. 16, 2001). *See also* http://www.ita.doc.gov/td/icp/Finalist13.html (last visited June 26, 2001) (identifies the members of ISAC-13).

248. *See, e.g., Trade Policy Staff Committee; Public Comments for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization (WTO) and Priorities for Future Market Access Negotiations on Non-Agricultural Goods: Notice and request for comments*, 65 Fed. Reg. 60, 16450 (Mar. 28, 2000) (requesting comments on GATS 2000 negotiations), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-7516-filed (last visited June 26, 2001). *See also USTR-WTO & Multilateral Affairs—Federal Register Notices, available at* http://www.ustr.gov/wto/federal.shtml (June 26, 2001) (U.S. Trade Representative webpage consolidates federal register notice "requests for comments").

249. *See, e.g., What's New, Coalition of Service Industries, at* http://www.uscsi.org/news/ (visited June 26, 2001); Selected Websites for Services Industries (linked from the U.S. Trade Representative Webpage by selecting the "Related Websites" link, then the "DOC Services Office" link and then the "Related Websites Link) *available at* http://www.ita.doc.gov/td/sif/websites.htm (visited June 26, 2001) (including the cite for CSI).

250. *Membership, CSI at* http://www.uscsi.org/members/current.htm (last visited July 17, 2001).

services.[251] CSI has a working group on legal services.[252] The fee to join the legal services working group of CSI is seven thousand dollars,[253] although CSI recently solicited law firms and offered free membership in a general committee, rather than the steering committee.[254]

The USTR received twenty-three submissions in response to its Federal Register notice asking for comments about the GATS 2000 Services negotiations; although all of the submissions address topics that may also be relevant to GATS 2000 and legal services, only the three page submission from the law firm White & Case LLP and the submission from CSI explicitly addressed the topic of legal services.[255] This Article focuses on CSI's submission. In its

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251. *About CSI, at* http://www.uscsi.org/about/ (last visited Feb. 20, 2001). CSI's webpage contains the following description of itself:

> CSI is the leading business organization dedicated to the reduction of barriers to US services exports, and to the development of constructive domestic US policies, including tax policies, that enhance the global competitiveness of its members. [CSI's in-depth knowledge of how to effectively] use services trade negotiations to advance the interests of its members[, and its close ties to the World Trade Organization,] are unmatched. CSI leverages its influence [on major issues affecting the services sector] through close relationships with services associations and companies in Europe, Latin America and Asia. CSI is above all an advocacy organization, aggressively representing the interests of its members in all US and international forums where [progress can be made toward trade liberalization].

252. *Working Groups, CSI at* http://www.uscsi.org/groups/legal.htm (visited Feb. 20, 2001). The webpage describes the working group as follows: "Recently formed, the Legal Services Working Group interacts with multilateral institutions and US trade negotiators to secure the liberalization of trade and investment in legal services. The group works closely with CSI's Services 2000 Working Group on the current WTO negotiations focusing on market access liberalization in services trade." *Id.*

253. *See Membership, CSI, at* http://www.uscsi.org/members/dues.htm (last visited June 26, 2001) (listing Legal Services Working Group as $7,000).

254. *See* Letter from J. Robert Vastine, President, CSI, to Timothy Powers, Haynes and Boone (May 23, 2001) (on file with author) ("We also invite you to join the CSI Legal Services Committee. Membership is open without charge."); Telephone Interview with J. Robert Vastine, President, CSI (July 2, 2001) (stating that the committee for which membership is free is a different committee than the legal services "steering committee" for which a membership fee is charged.).

255. *See* Federal Register Notice Public Comments for Mandated Multilateral Trade Negotiations on Services in WTO, Submissions, *available in* the USTR Reading Room, 1724 F St., N.W., Washington D.C. and on file as an attachment to an E-mail Letter from Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the Trade Representative, October 1, 2001 (on file with author).

The submission from White & Case consisted of a two-page letter, and a one-page attachment entitled "Trade in Legal Services," which White & Case explained was a statement of negotiating objectives for legal services that was developed at the World Services Congress in Atlanta in November 1999. Because White & Case's submission stated that it "had jointed the U.S. Coalition of Service Industries and has undertaken the role of coordinating with other law firms to provide input to the U.S. Government for the WTO service negotiations," this Article focuses on CSI's submission.

comments to the USTR recommending a negotiating position for GATS 2000, CSI identified seventeen different kinds of barriers to trade. These included the following:

Impediments on Professional Firms

- Restrictions on the movement of capital and investment, such as foreign equity limits, screening of investments and the application of economic needs tests, and reserving ownership to locally-qualified professionals.
- Restrictions on making current payments, such as profit remittances and the payment of royalties and fees across borders.
- Restrictions on the types of business structures permitted.
- Numerical, geographic or other restrictions on the establishment of branch offices.
- Requirements to employ only local people and professionals or the use of quotas to limit intra-firm transfers.
- Inadequate protection on intellectual property, such as software, practice methodologies and training materials, as well as restriction on the use of international firm names.

Impediments on Individual Professionals

- Onerous professional qualification requirements, such as citizenship, permanent and/or prior residency, local university degrees, and excessively long experience requirements, and administering qualification examinations in languages other than the WTO working languages.
- The use of different technical standards or standards of practice in each national and/or sub-national jurisdiction.
- Difficulties in obtaining visas and work permits.

Impediments Affecting both Firms and Individuals

- The lack of transparency in the regulatory process, including the failure to make laws and regulations available, closed decision-making processes, the lack of opportunity to comment before rules are adopted, and the absence of appeal processes.

Interestingly, CSI has posted on its website an eighty-four page document that it says is its submission to the WTO on the GATS 2000 Services negotiations. *See* Coalition of Service Industries, Response to Federal Register Notice of March 28, 2000 [FR Doc. 00-7516], Solicitation of Public Comment for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization and Priorities for Future Market Access Negotiations on Non-Agricultural Goods, *available at* http://www.uscsi.org/publications/papers/CSIFedReg2000.pdf (last visited Oct. 6, 2001). Pages 71-77 of this document address "professional services," which is identified as including "legal services." *See id.* at 71-77. On October 5, 2001, however, this Author observed that the USTR Reading Room file only included a two-page document from CSI. The full CSI submission is now available in the USTR Reading Room. See E-mail Letter from Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the United States Trade Representative to Laurel S. Terry (Oct. 23, 2001) (on file with author).

- Local establishment requirements.
- Rules either requiring or prohibiting relationship between foreign and local professionals or professional firms.
- Customs duties on professional documents, project models, training materials, promotional publications, and software.
- Scope-of-practice limitations that may prohibit the provision of selected or multiple services to clients.
- The assignment of contract by government agencies, the mandatory rotation of providers, and "Buy National" policies.
- Prohibitions on advertising professional services.
- Reciprocity laws or regulatory requirements.[256]

In addition to its general recommendations to the USTR to attempt to reduce these barriers, CSI offered specific recommendations with respect to the legal profession. It recommended that:

> With respect specifically to legal services, U.S. negotiators should focus on two objectives: (1) adoption of the concept of "foreign legal consultants" whereby lawyers are permitted to practice their home country law (as well as third country and international law) in foreign jurisdictions; and (2) "model rules" on bar examinations that assure the exams are related the areas of law to be practices, follow transparent procedures, are based on information readily available (through training courses, etc.), and are administered in one of the working languages of the WTO.[257]

As one can see by comparing this CSI legal services proposal with the U.S. proposal, the USTR did not accept the suggestions offered by CSI. The closest the USTR came to accepting the CSI proposal was to recommend that the classification system for legal services be expanded—which might perhaps include "foreign legal consultancy"—and to emphasize the delivery of legal services through Mode 3—Permanent Establishment—which is consistent with the CSI orientation.

In sum, the procedures described in this section suggest that the mechanism by which the United States develops its GATS 2000 negotiating proposals about legal services is transparent. My sense, however, is that although the development of GATS 2000 proposals by the USTR regarding legal services is technically transparent, information about these negotiations is not widely-dispersed or well-known. For example, I am someone who is particularly interested in GATS because I teach a course on global regulation of lawyers.

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256. *Coalition of Service Industries, Response to Federal Register Notice of March 28, 2000 [FR Doc. 00-7516] Solicitation of Public Comment for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization and Priorities for Future Market Access Negotiations on Non-Agricultural Goods*, 74-75, *available at* http://www.uscsi.org/ (last visited Feb. 20, 2001).

257. *Id.* at 77.

However, until I recently interviewed Peter Ehrenhaft, I was unaware of the procedure by which USTR proposals were developed. Moreover, based on anecdotal conversations, I believe that I am more educated about GATS than are most academics or lawyers in the law of lawyering community.

While the vast majority of U.S. lawyers may not care about the GATS 2000 negotiations regarding legal services, I believe better efforts could be made to educate those who are interested and to make the procedures more transparent. For example, information about the GATS 2000 negotiations is available from the webpages of the Canadian Bar Association and the CCBE. [258] In contrast, GATS

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258. *See* Canadian Bar Association, *at* http://www.cba.org/Home.asp (last visited Apr. 3, 2001). When one clicks on this link, one of the topics listed is "Update—MDPs and International Trade in Legal Services (November 2000)" and another topic is "WTO/GATS Negotiations (February 2000)." *See EPIIgram (Newsletter of the Emerging Professional Issues Initiative), at* http://www.cba.org/advocacy/epii/Epiigrams.asp (last visited Apr. 3, 2001). By clicking on the link entitled "Update-MDPs and International Trade in Legal Services," one is immediately connected to a page that contains a narrative update of the GATS negotiations. *See* http://www.cba.org/EPIIgram/November2000/default.asp (last visited Apr. 3, 2001). *The World Trade Organization General Agreement on Trade in Services Negotiations: What It Means to Canadian Lawyers*, http://www.cba.org/EPIIgram/February2000/ (last visited Apr. 3, 2001). The earlier February 2000 document about the WTO GATS negotiations consists of an extensive "question and answer" format document that answers basic questions about the GATS' potential effect on the legal profession. *See* http://www.wto.org/english/tratop_e/serv_e/gatsintr.htm (last visited Apr. 3, 2001). On the left hand side of this February 2000 document are links to the primary GATS resources. These include the GATS treaty and some of the subsequent documents created under the auspices of the WTO, including the Disciplines for the Accountancy Sector and the background paper on legal services prepared by the WTO Secretariat. *WTO Adopts Disciplines on Domestic Regulation for the Accountancy, at* http://www.wto.org/english/news_e/pres98_e/pr118_e.htm (last visited Apr. 3, 2001). The links include a link to the "professional services" page maintained by the Canadian trade officials. When one clicks on this link, one downloads a copy in Microsoft Word of WTO document S/C/W/43 (July 6, 1998) entitled "*LEGAL SERVICES: Background Note by the Secretariat.*" One of the links listed on the Canadian "Professional Services" page connects one to the negotiating position on legal services filed by the U.S. Trade Representative in December 2000. *Government of Canada, Services 2000, Professional Services, at* http://strategis.ic.gc.ca/SSG/sk00052e.html (visited Apr. 3, 2001). Another main link connected the reader to a consultation paper on legal services for GATS 2000 prepared by the Canadian government entity entitled "International Investment and Services Directorate — Industry Canada." *Canadian Legal Services*, www.kawsic.org (visited Apr. 3, 2001). Last, but perhaps most importantly, the Canadian Bar Association webpage invites lawyers to respond to what they have read about GATS and legal services and provide feedback about the direction of the GATS 2000 negotiations. The November 2000 EPIIGRAM invites Canadian Bar members to click a button at the bottom of the screen in order to provide feedback. *WTO Initiative Feedback, at* http://www.cba.org/EPIIgram/November2000/wtofeedback.asp (visited Apr. 3, 2001) states: "We invite your comments on how the CBA should deal with this issue." The February 2000 EPIIGRAM includes a box at the bottom of the screen, into which Canadian Bar members—and presumably others—may type comments. *See* http://www.cba.org/EPIIgram/February2000/ (last visited Apr. 3, 2001).

2000 negotiations are not listed on the ABA home page, the homepage of the ABA Center for Professional Responsibility, or the homepage of the ABA Section of International Law.[259] In my view, it is important for U.S. lawyers to begin to monitor the GATS 2000 negotiations and participate in the development of the U.S. policies regarding legal services.

6. Summary

In order to understand the GATS' applicability to legal services in a particular country, one must consider the post-GATS developments, as well as the GATS itself. The seven key post-GATS developments related to legal services discussed in this section included:

- the creation of the Working Party on Professional Services [WPPS] and its initial work;
- the legal services paper issued by the WTO Secretariat;
- the OECD Conferences and Paris Forum on Transnational Practice for the Legal Profession;
- the Guidelines for the Accountancy Sector Formulated by the WPPS;
- the Disciplines for the Accountancy Sector Formulated by the WPPS;
- the replacement of the Working Party on Professional Services with the Working Party on Domestic Regulation and its work to develop horizontal disciplines; and
- the GATS 2000 round of negotiations to further reduce trade barriers, including the negotiating proposals from the U.S. and other WTO member states that address legal services.

The chart below organizes by issuing entity the key post-GATS documents related to legal services that may be retrieved from the WTO Document Dissemination Facility by Document Symbol.

The CCBE webpage is much less extensive and user-friendly than the Canadian Bar Association webpage, but it offers interested lawyers the opportunity to learn more about the GATS and the GATS 2000 negotiations. The CCBE webpage currently has no general search function. But if one looks at the listing of all CCBE Committees, one will discover that the CCBE's ad hoc committees include both a GATS committee and a GATS 2000 committee. Thus, from the CCBE webpage, interested lawyers can at least locate the names and contact information for the CCBE Committee members responsible for these areas. *See* http://www.ccbe.org/uk/homeuk.htm (last visited Apr. 3, 2001).

259. *See generally* American Bar Association Network, *at* http://www.abanet.org/ (last visited June 26, 2001), http://www.abanet.org/cpr/ (visited June 26, 2001). http://www.abanet.org/intlaw/home.html (last visited June 26, 2001).

WTO Entity	Document Issued
Ministerial Conference	1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: Annex 1b, General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [the GATS] 2. Decision on Profession Services, 33 I.L.M. 1259 (1994) [part of the Final Act documents, this Decision directs the Council for Trade in Services to create the Working Party on Professional Services and directs it to begin its work with the accountancy sector] 3. SERVICES SECTORAL CLASSIFICATION LIST, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991) [contains the sectoral classification system currently used in the ongoing GATS 2000 negotiations]
Council for Trade in Services	1. Decision on Professional Services Adopted March 1, 1995, S/L/3 [creates the WPPS and directs it to begin with the accountancy sector]; 2. Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, S/L/38 (28 May 1997) [adopts the Guidelines]. 3. 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] 4. DECISION ON DOMESTIC REGULATION Adopted by the Council for Trade in Services on 26 April 1999, S/L/70 (28 April 1999) [replacing the Working Party on Professional Services with the Working Party on Domestic Regulation].

Council for Trade in Services, Special Session [GATS 2000]	1. Report of the Meeting Held on 26 May 2000, Note by the Secretariat, S/CSS/M/3 (26 June 2000) [the "ROADMAP" document for GATS 2000] 2. Report of the Meeting Held on 26 May 2000, Note by the Secretariat, Corrigendum, S/CSS/M/3/Corr.1 (5 July 2000) [contains three corrections to the "ROADMAP" minutes, two of which were comments by Uruguay] 3. Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS) Adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (28 March 2001).
Working Party on Professional Services	1. Recommendation of the Working Party on Professional Services to the Council for Trade in Services [regarding the Recognition Guidelines], S/WPPS/W/14/Rev.1/Corr.1 (22 May 1997) [1 sentence document correcting the citation to the Guidelines contained in S/WPPS/W/14/Rev.1]; 2. RECOMMENDATION OF THE WORKING PARTY ON PROFESSIONAL SERVICES TO THE COUNCIL FOR TRADE IN SERVICES [regarding the Recognition Guidelines], S/WPPS/W/14/Rev.1 (15 May 1997) (contains the recommendation of the WPPS regarding the Recognition Guidelines); 3. GUIDELINES FOR MUTUAL RECOGNITION AGREEMENTS OR ARRANGEMENTS IN THE ACCOUNTANCY SECTOR—Revision, S/WPPS/W/12/Rev. 1 (20 May 1997) (contains the text of The Guidelines). 4. Report to the Council for Trade in Services on the Development of Disciplines on 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]; 5. 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]; 6. 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]; 7. Chairman's Note on discussion of Articles VI, XVI and XVII (Job No. 6496 (25 Nov. 1998); 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.]
Working Party on Domestic Regulation	1. No action documents as of July 2001; minutes reflect ongoing work to develop horizontal disciplines
Selected Secretariat Analyses	1. Legal Services, Background Note by the Secretariat, S/C/W/43 (6 July 1998); 2. Economic Effects of Services Liberalization. Background Note by the Secretariat, S/C/W/26 (7 Oct. 1997) and Addendum, S/C/W/26/Add.1 (29 May 1998); 3. Presence of Natural Persons (Mode 4), Background Note by the Secretariat, S/C/W/75 (8 Dec. 1998); 4. 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); 5. International Regulatory Initiatives in Services, Background Note by the Secretariat, S/C/W/97 (1 March 1999) 6. Functions of the Working Party on Professional Services in Relation to Accountancy, Note by the Secretariat, S/WPPS/W/1 (27 June 1995); 7. The Accountancy Sector, Note by the Secretariat S/WPPS/W/2 (27 June 1995). 8. Questionnaire on the Accountancy Sector, Note by the Secretariat, S/WPPS/W/7 (3 April 1996) [includes a summary of information from the OECD, UNCTAD and IFAC]; 9. THE RELEVANCE OF THE DISCIPLINES OF the Agreements on Technical Barriers to Trade (Tbt) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services: Note by the Secretariat, S/WPPS/W/9 (11 Sept. 1996); 10. Mutual Recognition Agreements in the Accountancy Sector: Note by the Secretariat, S/WPPS/W/10 (13 Sept. 1996); 11. Synthesis of the Responses to the Questionnaire on the Accountancy Sector: Note by the Secretariat, S/WPPS/11 (5 May 1997); 12. Accountancy Services, Background Note by the Secretariat, S/C/W/73 (4 Dec. 1998);
Selected U.S. Documents	1. COMMUNICATION FROM THE UNITED STATES: Framework for Negotiation, S/CSS/W/4 (13 July 2000) 2. COMMUNICATION FROM THE UNITED STATES, Legal Services,

	S/CSS/W/28 (18 Dec. 2000) [GATS 2000 negotiating proposal regarding legal services]; 3. COMMUNICATION FROM THE UNITED STATES, Movement of Natural Persons, S/CSS/W/29 (18 Dec. 2000).
Selected Other Documents	1. COMMUNICATION[S] FROM THE OECD: WORK IN THE AREA OF PROFESSIONAL SERVICES, S/WPPS/W/4 (15 Nov. 1995), and Addendum, S/WPPS/W/4/Add.1 (5 Jan. 1996); and Addendum, S/WPPS/W/4/Add.2 (5 Jan. 1996)[lengthy analyses of professional services, included data collected]; 2. COMMUNICATION FROM AUSTRALIA, Negotiating Proposal for Legal Services, S/CSS/W/67 (28 March 2001) [GATS 2000 proposal]; COMMUNICATION FROM AUSTRALIA, Negotiating Proposal for Legal Services, Supplement, S/CSS/W/67/Suppl.1 (9 July 2001); COMMUNICATION FROM AUSTRALIA, Negotiating Proposal for Legal Services, Revision, S/CSS/W/67/Suppl./Rev. 1 (10 July 2001). 3. COMMUNICATION FROM CANADA, Initial Negotiating Proposal on Professional Services, S/CSS/W/52 (14 March 2001) [GATS 2000 proposal]; 4. COMMUNICATION FROM COLOMBIA, Professional Services, S/CSS/W/98 (9 July 2001); 5. COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, GATS 2000: Professional Services, S/CSS/W/33 (22 Dec. 2000); 6. COMMUNICATION FROM INDIA: Proposed Liberalization of Movement of Professions under General Agreement on Trade in Services (GATS), S/CSS/W/12 (24

	Nov. 2000) [GATS 2000 proposal]; 7. COMMUNICATION FROM JAPAN, The Negotiations on Trade in Services, S/CSS/W/42 (22 Dec. 2000) [GATS 2000 proposal].

Thus, in order to understand the GATS' applicability to legal services, it is useful to understand the role of the documents identified above.

IV. QUESTIONS THAT I HAVE HAD WHEN THINKING ABOUT THE GATS' APPLICATION TO U.S. LAWYERS

Although I have presented much data in this article, I still have more questions than answers. Indeed, I initially was reluctant to write this Article because I worried whether I could adequately address by the Symposium paper deadline all of the issues related to the GATS' regulation of legal services. Given the ongoing GATS 2000 negotiations, however, I ultimately decided that it would be worthwhile to present an incomplete treatment immediately, rather than wait to produce a more-developed treatment; I hope the readers of this Article will share my "half full glass" perspective. Accordingly, I have listed below three of the most important issues that I have not addressed that will inevitably affect the analysis of the GATS' effect on U.S. lawyer regulation.

A. *Tenth Amendment Issues*

One of the issues that I would like to know more about is the Tenth Amendment implications of the GATS' regulation of foreign lawyers practicing in the United States. When I have mentioned that I would not be surprised to see greater federal regulation of lawyers in the future, I often have been met with the response that the Tenth Amendment to the U.S. Constitution[260] reserves this power to the states.[261] While I agree that U.S. states traditionally have regulated

260. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people. " U.S. CONST. amend. X.

261. In another context, the U.S. Supreme Court has stated that the regulation and licensing of lawyers has been left exclusively to the states. In *Leis v. Flynt*, 439 U.S. 438, 442 (1979), the Court held that there was no constitutional right to pro hac vice admission and thus it was a discretionary state decision. In my view, this is a different context than if Congress chooses to regulate. One commentator, however, has expressed skepticism about the ability of the federal government to regulate lawyers. Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union:*

lawyers, I am less sure that the states could insist on the exclusive power to regulate lawyers should the federal government choose to step in. I can imagine arguments that the Treaty Power of the United States and the Commerce Clause authorize federal regulation of lawyers, unless the Tenth Amendment prohibits otherwise. Thus, one of the issues that needs to be addressed is the scope of the Tenth Amendment with respect to lawyer regulation.

B. *If Horizontal Disciplines Are Adopted and Thereafter Accepted by a Member State Without Any Qualifications Concerning Legal Services, May That Country Continue to Rely on All of the "Standstill" Provisions in its Schedule of Specific Commitments?*

Another one of my questions concerns the interface among the existing *Schedules of Specific Commitments*, the GATS 2000 negotiations, and the efforts of the Working Party on Domestic Regulation (WPDR) to develop horizontal disciplines based on the *Disciplines for the Accountancy Sector*. By way of background, the existing *Accountancy Disciplines* state that they do not take effect immediately, but are intended to be incorporated into the GATS 2000 negotiations.[262] This statement in the *Accountancy Disciplines* raises in my mind the question of whether WTO Member States are obligated to include the *Accountancy Discipline*'s principles in their negotiating proposals.

My questions about the *Accountancy Discipline* and GATS 2000 have further led me to speculate about what would happen if the WPDR were to adopt horizontal disciplines applicable to legal services on the condition that this discipline also be included in the GATS 2000 negotiations. My speculations are based on three assumptions. First, I have assumed that the WPDR will be able to facilitate an agreement on horizontal disciplines that will apply to legal services. Second, I have assumed that some Member States—perhaps the United States—would be willing to include in their GATS 2000 negotiating proposals an agreement to abide by the horizontal disciplines they helped develop. Third, I have assumed that in agreeing to abide by these hypothetical horizontal disciplines, some Member States—perhaps the United States—would not include any reservations for legal services. If all of these assumptions were to occur—which may be very unlikely—I wonder what would happen to

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Lessons for the United States?, 34 INT'L L. 307 (2000). He says, for example, "Congressional legislation is out of the question—Congress's legislative power under the Commerce Clause to deal with a subject so closely related to state courts is quite dubious and political realities rule any such law out. A state uniform act would also appear unlikely."). *Id.* at 338. *But see supra* note 73.

262. *See Disciplines for the Accountancy Sector*, *supra* note 116.

the legal services "standstill" provisions contained in the U.S. *Schedule of Specific Commitments*.

From one perspective, the WPDR's adoption of horizontal disciplines and a Member State's agreement to be bound by these disciplines should not affect any of the limitations contained in a country's *Schedule of Specific Commitments*. The reason why the *Schedule* would remain intact is because a country's *Schedule* addresses its market access and national treatment obligations, whereas horizontal disciplines address a country's domestic regulation obligations. Therefore, an agreement to abide by the horizontal disciplines with respect to domestic regulation does not change the market access or national treatment obligations contained in a country's *Schedule of Specific Commitments*.

On the other hand, if a country were to adopt new horizontal disciplines and if those horizontal disciplines were similar to the *Disciplines for the Accountancy Sector*, then I can imagine someone arguing that, with respect to legal services, a country must abide by the horizontal disciplines. Furthermore, I can imagine the possibility that some of the "standstill" provisions in a country's *Schedule* might be challenged on the grounds that they are really domestic regulation provisions,[263] not market access or national treatment provisions and that some of these "standstill" provisions violate the requirement in the horizontal discipline that domestic regulation provisions not be "more burdensome than necessary to achieve a legitimate objective."

In a different context, the WPDR also has expressed uncertainty about the effect of any new horizontal disciplines on the GATS 2000 negotiations. For example, in its May 17, 1999 meeting, the WPDR noted that "there was a divergence of views as to whether the [horizontal disciplines under discussion] should be applicable only in sectors where Members have made specific commitments or whether they should be applicable unconditionally to all sectors; most delegations, however, agreed that a decision on this point was not urgently required."[264]

In sum, I am still uncertain whether all of the legal services "standstill" provisions in the *U.S. Schedule of Specific Commitments* would remain intact if the *Disciplines for the Accountancy Sector* were adopted verbatim as horizontal disciplines applicable to legal services and thereafter agreed to by the United States.

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263. *See supra* notes 135-38 and accompanying text.

264. *Report on the Meeting Held on 17 May 1999*, *supra* note 155.

C. *Would Any of the Proposals by the Ethics 2000 Commission Violate the GATS?*

Because the United States included legal services on its *Schedule of Specific Commitments*, it has agreed that, except as noted, it will not apply to foreign lawyers any provisions that are more restrictive than its existing rules. One of the questions that I have not had time to examine is the effect of this principle on the work of the ABA Ethics 2000 Commission. If the work of the Ethics 2000 Commission were adopted verbatim by a state regulator, I wonder whether any of the changes proposed by the ABA Ethics 2000 Commission might be considered "more restrictive" than the prior rule and might violate any of the agreements contained in the U.S. *Schedule of Specific Commitments*. If the new ethics rules were more restrictive, then I wonder whether such new rules might be considered invalid insofar as they apply to foreign lawyers. I also am not sure whether the prohibition on adopting more restrictive rules applies only to rules that discriminate expressly against foreign lawyers or whether it also applies to "domestic regulation" rules that, on their face, apply equally to domestic and foreign lawyers.

V. ISSUE SPOTTING: POSSIBLE EXAMPLES OF U.S. LAWYER REGULATIONS THAT COULD BE CHALLENGED ON THE BASIS OF THE GATS

At this point in time, it is unclear what effect the GATS will have on U.S. state regulation of lawyers. On the one hand, it is quite possible that the GATS will have absolutely no effect on U.S. state regulation of lawyers. For example, during the Vanderbilt Symposium at which this paper was presented, one commentator remarked, in response to this paper, that it was extremely unlikely that the federal government could or would take over the states' job of regulating lawyers.[265] The federal negotiators have a track record of federal-state cooperation in development of U.S. policy concerning the GATS. In the context of developing the *Disciplines for the Accountancy Sector*, for example, the relevant U.S. negotiators engaged in extensive consultations with state officials and industry representatives.[266] And, because of the structure of the GATS, in

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265. *See* Peter Jarvis, *Small World After All or Ball of Confusion? Some Thoughts on National Multijurisdictional Practice*, 34 VAND. J. TRANSNAT'L L. 1169 (2001).

266. E-mail Letter from Bernard Ascher, Director, Service Industry Affairs of the Office of the U.S. Trade Representative, to Laurel S. Terry (July 30, 2001) [hereinafter *E-mail Letter from Bernard Ascher*].

which Member States determine the nature and extent of their own commitments, it may be extremely unlikely that the federal government would agree to commitments to which the states or professions are opposed.

On the other hand, it is possible to imagine a scenario in which the GATS could affect U.S. state regulation of lawyers. Although the GATS itself is very general and the implementation for legal services has not yet occurred, several foreign bar associations already have expressed the view that the GATS might play an important role in the future system of lawyer regulation. For example, the President of the Japan Federation of Bar Associations commented at the *Paris Forum* that the GATS 2000 negotiations "will determine the global and legal framework of the legal profession, and will therefore greatly influence the role of lawyers in the 21st Century."[267] The European Union bar association expressed unease in its *Paris Forum Discussion Paper* about the possible effect of the GATS on its existing system of lawyer regulation.[268]

> The development of Accountancy Disciplines is a good example of such cooperation [between the federal government and state governments on matters of interest to the states]. The draft GATS paper underwent extensive review by representatives of state governments, the NAAG, as well as national organizations representing the accounting profession and the state regulatory boards. It went through ten drafts before reaching the final version.

Id.

267. Shigeru Kobori, *Remarks of Shigeru Kobori*, 18 DICK. J. INT'L L. 51, 51 (1999).

268. Carl Bevernage, *Discussion Papers: Presented by the Council of the Bars and Law Societies of the European Community*, 18 DICK. J. INT'L L. 89, 91-92 (1999) (emphasis added) [hereinafter *CCBE Discussion Paper*]. This paper stated in pertinent part:

> Therefore when the GATS brushed aside all of these considerations and decided that the transborder provision of legal services—whether by members of an independent regulated profession—or by anyone offering legal advice or assistance, are tradable services and must be performed in such a way that anyone who has the required qualifications may perform such services without undue hindrance, other than those barriers which are required for reasons of legal public order or the protection of the consumer, lawyers represented in and by the CCBE wondered whether the CCBE should collaborate with the Working Party on Professional Services set up by the WTO and accept to review for the benefit of the European Commission and/or National Governments, the restrictions, if any, on the practice of law by qualified professionals in Europe and elsewhere.
>
> This reluctance is fully understandable since it took almost twenty years in order to accomplish in the European Union and the countries belonging to the European Economic Area three major steps towards a European-wide practice of law by members of the regulated legal professions represented by the CCBE. The 1979 Services Directive, the 1989 Diploma Directive and the 1998 Establishment Directive are crucial legal instruments towards a unified

I have identified below several U.S. state lawyer regulations that conceivably might be challenged as inconsistent with the GATS. These hypothetical challenges assume that the federal government would agree to be bound by GATS implementation provisions to which U.S. states or industry representatives might object.[269] These hypothetical challenges also assume that foreign lawyers will be able to convince their governments to challenge the U.S. regulations and threaten trade sanctions.

Despite the fact that these challenges may be very unlikely, U.S. regulators may want to consider the arguments they would offer if the regulations listed below were challenged on the grounds that they violate the GATS because they are "more burdensome than necessary to ensure the quality of the service or ensure a legitimate objective." Although some may critique the inclusion of these "worst case scenarios" in this Article,[270] I believe that lawyers and regulators cannot discuss the normative questions associated with the GATS and participate in the policy debate unless they understand the worst-case scenario arguments that might be offered.[271]

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profession in Europe, to which one should add the CCBE Common Code of Conduct adopted on October 28, 1988.

Many within the CCBE have always regarded the *"foreign legal consultant or practitioner"* who prefers to practice under home title and resists integration in the local (national) professional regulated body, with some suspicion. Accordingly, the CCBE will never promote the liberalisation of professional practice rules which would lead to a legal practitioners' no-mans land. However, the increasing mobility of clients and lawyers alike, the international and even world-wide dimension of legal problems which need to be tackled and overcome, have prompted an ever increasing need for international co-operation between lawyers and have given birth to the "migration" of lawyers, transnational partnerships, foreign establishments of law firms, etc. . . . so that it appears indeed useful to revisit our practice rules and examine whether they are still in the best interests of clients and lawyers alike, wherever legal advice or assistance is provided.

Id.

269. I have not gone ahead and analyzed these issues as against the U.S. *Schedule.* The fact that Mode 4 is unbound for all states on market access means that the United States made no promises and the practices in these states cannot be challenged on market access grounds. But if this is the only thing limiting these arguments, it is important to know because these restrictions could theoretically be lifted during the progressive liberalization contemplated by the GATS 2000.

270. One commentator suggested that in this Article, that I "emphasize the possibility of a worst-case scenario with the federal government imposing restrictions on state regulation of the legal profession" and that my paper "is needlessly inflammatory and could be used by those groups who organize demonstrations against international organizations and who mislead others with respect to government intentions." *E-mail Letter from Bernard Ascher, supra* note 266.

271. As explained in the Introduction to this Article, *supra* pages 4-6, it was not my goal in this paper to address the normative issues connected with the issue of the GATS' effect on legal services. Thus, it has not been my intention to take sides in the

A. *May Foreign Lawyers Who Are Partners in a Legal MDP Practice in the United States?*

The ABA Model Rules of Professional Conduct prohibit lawyers from sharing fees with nonlawyers or from having nonlawyers as partners.[272] This ban is often referred to as a ban on multidisciplinary partnerships or MDPs. Every U.S. jurisdiction, except the District of Columbia, has adopted this ban on MDPs.[273] In some other countries, however, MDPs are either officially authorized by the lawyer regulations or tolerated.[274] Thus, one issue that might arise under the GATS is whether U.S. regulators may exclude foreign lawyers who practice in an MDP. These foreign lawyers who practice in an MDP might argue that the MDP ban is a restriction on trade and "is more burdensome than necessary to fulfill a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence,

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WTO-protestor debates or to evaluate the desirability of in including legal services within the ambit of the GATS.

Instead of a normative analysis, my first goal is to explain the structure and operation of the GATS, especially with respect to legal services. In doing so, I hope to correct some of the misinformation that has been circulated about the GATS and to raise the awareness level of U.S. lawyers with respect to the GATS and its potential affect on U.S. lawyer regulation. Second, this Article explores the important developments that have occurred since the signing of the GATS. If I accomplish the first two goals, then I hope that lawyers will be in a better position to address the normative questions about the effect of the GATS and GATS 2000 on legal ethics in the twenty-first century. Finally, I hope that this Article, together with an article I wrote during the Spring 2001, might inspire more U.S. lawyers to monitor and participate in the ongoing "GATS 2000" negotiations.

While I can understand why some commentators may believe that presenting the "worst case scenario" is inflammatory, it certainly has not been my intention to be inflammatory. I simply believe that whenever the public considers any ideas, they should always determine the worst case scenarios, in order to properly balance the costs and benefits of the proposed new idea. Thus, in my mind, when educating U.S. lawyers about the GATS and its possible effects on state regulation of lawyers, it would be inappropriate not to determine the worst-case scenarios.

272. MODEL RULES OF PROF'L CONDUCT, R. 5.5 (2001). *See* ABA, *Statement of the American Bar Association Section of International Law and Practice to the ABA Commission on Multijurisdictional Practice*, *available at* http://www.abanet.org/cpr/mjp-comm_silp3.html (visited Oct. 13, 2001).

273. Terry, *A Primer on MDPs*, *supra* note 1, at 875. Because U.S. lawyers are regulated, inter alia, based on state-wide rules of conduct, one must consult the rules of conduct for each individual state. *See, e.g.*, Charles W. Wolfram, *Modern Legal Ethics* 20-22, 48-50 (Practitioners' ed. 1986). Many states, however, currently are reexamining their MDP bans. The ABA Center for Professional Responsibility currently maintains on its website a chart showing the status of these efforts. *See* http://www.abanet.org/cpr/ mdp_state_summ.html.

274. Terry, *A Primer on MDPs*, *supra* note 1, at 883-89.

and the integrity of the profession."[275] There already are hints of how such an argument might be formulated. For example, during the third conference on professional services sponsored by the OECD, one of the Rapporteurs observed the following:

> Greater differences were evident in the idea of multi-disciplinary practices combining legal and accountancy services. The argument was put that independence was critical to legal practice and hence incompatible with multi-disciplinary approaches. Nevertheless, we heard that Germany and Australia accept multi-disciplinary practices in professional partnerships.
>
> This range of circumstances emphasises the need to revisit presumptions on the desired regulatory responses. If less burdensome regulatory response[s] exist in some OECD members, without negative effects, but not in others, what lessons could this provide to all of us? The fact is globalisation is affecting traditional styles of supplying professional services.
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> We heard, for example, that 18 of 25 OECD members have prohibitions on incorporation in accountancy and law. It would be useful to learn how those countries without regulation have sustained protection of the

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275. *WTO Adopts Disciplines on Domestic Regulation for the Accountancy Section, at* http://www.wto.org/english/news_e/pres98_e/pr118_2.htm. *See also supra* note 116 for an explanation of the development of the Disciplines and the citations to the relevant documents.

> Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

Id.

In one of its papers, the Secretariat also suggested the possibility of such a challenge:

> A controversial issue of domestic regulation is the treatment of multidisciplinary practices. Many countries prohibit them on public policy grounds, while other countries do not regulate the association between lawyers and non-lawyers. Those countries who do not regard foreign qualified lawyers as "lawyers" under national law might prohibit multinational partnerships on the same grounds of multidisciplinary partnerships (paragraph 51). Countries and professional organizations justify prohibitions on multidisciplinary partnerships on grounds of consumer protection and ensuring the quality of the service. In particular it is often argued that multidisciplinary partnerships endanger the lawyer-client privilege and the professional independence of the lawyer. It appears that multidisciplinary practices sometimes exist de facto in countries where they are prohibited or not regulated (paragraph 52).

Council for Trade in Services, *International Regulatory Initiatives in Services, Background Note by the Secretariat*, S/C/W/97 ¶ 45 (Mar. 1, 1999).

> public interest. Case studies could illustrate *options* and reflect the advantages of flexibility in country responses.[276]

Some bar associations clearly have concerns about this type of reasoning and the potential effect of the GATS on their MDP bans. For example, during the Paris Forum, the CCBE stated: "The CCBE is concerned that some governments and European institutions claim that a ban on MDP's for lawyers will represent an unjustified restriction on competition within the profession, to the detriment of the public."[277] Although the discussion papers presented by the JFBA and ABA Section of International Law and Practice did not highlight this concern quite so clearly as did the CCBE, the CCBE's summary statement is consistent with the tenor of the views expressed by the JFBA and ABA representatives.[278]

The Canadian Bar Association has expressed its concerns in more general terms, which are not limited specifically to MDPs:

> The CBA is concerned about the provision that measures not be "more trade-restrictive than necessary to fulfil a legitimate objective". In light of the restrictive test used by WTO dispute panels in defining the word "necessary", this requirement raises difficulties. The legal profession should not have to prove the "necessity" of rules which it is convinced are required to preserve its integrity and protect the public. The standard should be clarified to ensure that law societies have significant latitude in adopting such rules. Further, the WTO should take a cautious approach to opening up markets in the legal services sector, ensuring that the ability to regulate is in the public interest.[279]

In short, I can imagine arguments that foreign lawyers might use to challenge, on the basis of the GATS, U.S. lawyer regulations that would exclude foreign lawyers who practice in an MDP.

B. *May Lawyers From an Australian Publicly-Held Law Firm Practice in the United States?*

Because the U.S. MDP ban prohibits lawyers from having nonlawyer partners or shareholders,[280] U.S. lawyers may not practice in a publicly-held law firm. New South Wales, Australia, however, has recently adopted a new rule that permits law firms to be publicly

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276. *See* Rhonda Piggott, *Report of the Rapporteur (for Member Governments)*, *in* OECD Third Conference, *supra* note 98, at 235-36.

277. *CCBE Discussion Paper*, *supra* note 268, at 96. OECD Third Conference, *supra* note 98.

278. *Paris Forum Symposium Discussion Papers*, *supra* note 182.

279. *Canadian Bar Association: November 2000, Update—Multi-Disciplinary Practice and World Trade Organization*, *at* http://www.cba.org/EPIIgram/November2000/default.asp (visited Mar. 2, 2001).

280. *See supra* note 272 and accompanying text.

held.[281] What happens, then, when an Australian lawyer who practices in a publicly-held law firm wishes to practice in the United States? If the U.S. regulator attempts to exclude such a lawyer, will the lawyer be able to successfully argue that such a ban is "more restrictive than necessary to achieve a legitimate objective?" If such law firms appear to operate successfully in Australia, does that mean that there is at least a risk that a dispute panel will find that a U.S. restriction on publicly-held law firms is not "necessary"? And if there is such a risk, is it possible that the federal government would pressure state regulators to relax a restriction that could lead to a major trade war?

C. *May Lawyers from Landwell (Pricewaterhouse-Coopers) or Andersen Legal, Use Those Names in the United States?*

The ABA Model Rules of Professional Conduct prohibit lawyers from using names that are misleading; virtually all states have a comparable provision.[282] In addition, many states still prohibit trade names.[283] Thus, I can imagine the possibility that some U.S. state regulators might want to prohibit foreign lawyers from practicing in the United States under an MDP trade name such as Andersen Legal or Landwell.[284] The ABA has previously complained when Japan "attempted to prohibit the carrying on of [the foreign lawyers']

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281. *See* Steve Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173, 1202 (2001); Legal Profession Act 1987 (NSW) Pt. 3, Division 2A, §§ 47B-48 *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa1987179 (visited Oct. 12, 2001).

282. ANNOTATED MODEL RULES OF PROF'L CONDUCT, R. 7.1 (4th ed. 2000).

283. *See, e.g.*, Stephen Gillers and Roy Simon, *Regulation of Lawyers: Statutes and Standards 2001*, R. 7.5 (2001).

284. Andersen Legal is the name used by many of the law firms affiliated with the Big 5 firm Arthur Andersen. *Andersen Legal; About Us, at* http://www.andersenlegal.com/websitelegal.nsf/content/MarketOfferingsLegalServices AboutUs? OpenDocument (visited June 25, 2001) ("Andersen Legal has merged 36 respected law firms into a global organisation of legal specialists. Our lawyers have proven track records in local and international law and can deliver legal services globally or nationally."); Landwell is the name used by many of the law firms affiliated with the Big 5 firm PricewaterhouseCoopers. Terry, *Primer on MPDs*, *supra* note 1, at n.37. Many European regulators have seemed concerned about the name an MDP will use and have adopted rules that prohibit a law firm from using the MDP's name. *See id.* at n.117 (describing French ban); Terry, *German MDPs*, *supra* note 1, at 1591 (describing German ban). Indeed, the D.C.-based firm McKee Nelson Ernst & Young recently agreed to drop the "Ernst & Young" portion of its name before entering the New York market in order to comply with the New York rules. Andrew Crooke, *Ernst & Young re-brands US law arm for NY launch* (May 18, 2001), *available at* http://www.legalmediagroup.com/default.asp?Page=1&SID=7100&Type=News (visited May 23, 2001).

practice under any name other than that or those of the lawyers resident in the foreign office."[285]

Might the Japanese restriction or the hypothetical U.S. restriction be challenged as a violation of the GATS because the name limitation is more restrictive than necessary to achieve a legitimate objective? The *Disciplines for the Accountancy Sector*, for example, specifically state that countries "shall ensure that the use of firm names is not restricted, save in fulfilment of a legitimate objective."[286] In its report supporting the ABA Model Rule for the Licensing of Legal Consultants, the ABA objected to rules that restrict an FLC's ability to use the U.S. law firm name, stating that such a restriction:

> manifestly goes beyond what is objectively justified to achieve the only apparent purpose of such a requirement, namely that of ensuring that consumers of legal services can readily determine the identity of the lawyers in the branch office. While a requirement for disclosure of that information is reasonably related to protection of the public, that objective can be achieved just as effectively, and possibly more so, in other ways which do not create the possibility of confusion in the public mind as to whether the firm's foreign branch offices are in fact part of the same firm or separate entities.
>
> Name recognition is an extremely important asset of firms which carry on an international practice, and from the standpoint of consumers of legal services certainty as to the identity of the firm with which they are dealing, and knowledge that the responsibility of the entire firm is engaged, may well be at least as material to a potential client as the identity of the individuals involved. Indeed, it may be seriously misleading to the public to create confusion as to the relationship between a firm and its own branch offices.[287]

I can imagine this same argument being made with respect to U.S. state lawyer rules that bar the use of MDP names.

D. *May U.S. States Apply to Foreign Lawyers the Requirement of a Local Office?*

Some U.S. states currently require lawyers from other jurisdictions to maintain a bona fide local office in the Host State if the lawyer wishes to practice law in the Host State jurisdiction. New Jersey, for example, requires lawyers who reside and practice in

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285. American Bar Association Section of International Law and Practice, Report to the House of Delegates, *Model Rule for the Licensing of Legal Consultants*, 28 INT'L. LAW 207, n.62 (1994) [hereinafter ABA Model FLC Rule] (citing the Japanese restriction). For a discussion of the ABA Model FLC Rule, *see* Carol Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L. J. 1126 (1998). For a comparison of the ABA Model FLC rule with the International Bar Association FLC rule, *see* Terry, *Cross Border Legal Practice*, *supra* note 3.

286. *Disciplines for the Accountancy Sector*, *supra* note 116, ¶ IV—Licensing Requirements.

287. ABA Model FLC Rule, *supra* note 285.

Pennsylvania and who are licensed in both Pennsylvania and New Jersey to maintain an office in New Jersey; the Philadelphia Bar Association unsuccessfully challenged this rule.[288] There currently is pending before the New Jersey Supreme Court a request to allow Pennsylvania lawyers to use as their New Jersey office an office that would be maintained by the Philadelphia Bar Association for Pennsylvania lawyers who are also licensed in New Jersey and who wish to practice in New Jersey.[289]

What happens if a foreign lawyer wants to be licensed—as a foreign legal consultant or otherwise—in New Jersey without maintaining a bona fide office? If such an office were required, could the foreign lawyer argue that this requirement is "more restrictive than necessary to achieve a legitimate objective?" Might the WTO Dispute Resolution Body find this argument more sympathetic than does the New Jersey or U.S. Supreme Courts?

E. *Can the Current U.S. Licensing Rules for Foreign Lawyers be Justified on the Basis that They Test These Lawyers' Competence Appropriately or Upon Another Basis?*

Foreign lawyers who want to practice in the United States currently have three options. First, they can be licensed as foreign legal consultants; these provisions generally entitle foreign lawyers to practice the law of their Home State and international law, but not the law of the Host U.S. state.[290] These provisions have not been highly utilized in the United States, possibly because many foreign lawyers want to be able to practice the "law of the deal," which may include some aspects of Host State's law.[291]

Alternatively, a foreign lawyer who does not want to become "established" in the United States may simply "fly in" and hope that he or she does not encounter unauthorized practice of law or UPL difficulties. The ABA Section of International Law and Practice, for example, recently suggested to the ABA Commission on

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288. NEW JERSEY RULE OF PROF'L CONDUCT, R. 1:21-1(a) (2001); *Tolchin v. New Jersey Supreme Court*, 111 F.3d 1099 (1997), *cert. denied* 522 U.S. 977 (1997).

289. *Philadelphia Bar Seeks to Open N.J. Office for Pennsylvania Lawyers Licensed There*, ABA/BNA Lawyers Manual on Professional Conduct, 16 CURRENT REPORTS 444 (Aug. 16, 2000).

290. *See, e.g.*, ABA Model FLC Rule, *supra* note 285, at nn.52-61 and accompanying text (summarizing the "scope of practice provisions" contained in many FLC provisions).

291. The "law of the deal" phrase is taken from conversations I had in the past with Joseph Griffin, who was the former chair of the ABA Transnational Legal Practice Committee.

Multijurisdictional Practice that the proposed UPL safeharbor provisions include foreign lawyers.[292]

The third option available to a foreign lawyer who wishes to practice in the United States is to qualify as a U.S. lawyer in the manner provided. In many states, this would require the foreign lawyer to complete a certain number of credit hours in an ABA-accredited LL.M. program and to take the state bar examination.

What will happen, however, if a foreign lawyer wants the ability to practice in the United States, but does not want the limitations of the FLC license, does not want to risk UPL exposure, and does not want to devote the time and money to study for an LL.M. degree or bar review course? If a lawyer has been competently practicing in his or her Home Jurisdiction for a number of years, might such a lawyer be able to argue that the credit requirements, accreditation requirements, or bar examination requirements are not "necessary to achieve the legitimate objectives," such as the quality of the service, professional competence, and the integrity of the profession? While the ABA Commission on Multijurisdictional Practice hearings suggest that this argument does not resonate with many U.S. lawyers and regulators,[293] is it possible that this argument might be more persuasive to nonlawyer judges in Geneva? For example, the foreign lawyers challenging the U.S. rules as unnecessarily restrictive could point out that in the European Union, lawyers from one country are free to practice law in another European Union Member State, even though the languages, legal system, and rules may be fundamentally different from each other.[294] State bar associations would also have to convince the Geneva Court that its rules for passage are not market access restrictions and are not "limitations on the total number of natural persons that may be employed in a particular service sector."[295]

F. *May U.S. Foreign Legal Consultant Provisions Include Reciprocity as a Requirement?*

The American Bar Association Model Rule for the Licensing of Legal Consultants includes a reciprocity provision.[296] Several of the U.S. states that have enacted FLC provisions have included such a

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292. ABA, *Statement of the American Bar Association Section of International Law and Practice to the ABA Commission on Multijurisdictional Practice, available at* http://www.abanet.org/cpr/mjp-comm_silp3.html (visited Oct. 13, 2001).

293. *ABA Commission on Multijurisdictional Practice Hearings and Roundtable Discussions, at* http://www.abanet.org/cpr/mjp-home.html (visited June 23, 2001).

294. For a succinct discussion of the European Union's laws permitting cross border legal practice, see Interview with Laurel S. Terry, *supra* note 51.

295. GATS, *supra* note 4, art. XVI(a).

296. ABA Model FLC Rule, *supra* note 285, at nn. 48-51 and accompanying text.

reciprocity provision.[297] Yet, as the ABA Section of International Law and Practice conceded in its Paris Forum Discussion Paper, such reciprocity provisions may very well be violative of the GATS because they were not included as exceptions in the U.S. *Schedule of Specific Commitments*:

> Rules permitting the licensing of foreign lawyers as FLC's in virtually all major commercial States contain discretionary reciprocity provisions that permit the licensing authority, which is usually the highest court of the State in question, to take into consideration in deciding whether to grant an FLC license the question whether the country in which the applicant is qualified affords to members of the bar of that State a "reasonable and practical opportunity" to carry on the practice of law in that country. However, so far as we are aware no State has ever denied a license on this ground and, since no exemption was taken by the United States in this respect from the unconditional most-favored-nation requirements of the General Agreement on Trade in Services (GATS), such provisions cannot now be invoked without violating the GATS.[298]

Thus, one must wonder whether these provisions could be successfully challenged.

G. *Is it Possible that the GATS Could Affect U.S. Lawyer Regulations for Domestic Lawyers?*

As explained earlier, the GATS only imposes limitations on a Member State's treatment of foreign services and foreign service providers. Thus, technically, the GATS has no impact on U.S. lawyer regulations insofar as they govern U.S. lawyers. Is it possible, however, that the GATS might indirectly affect domestic lawyer regulation? In my view, the answer is yes, there is such a possibility, which is one reason why I think those interested only in domestic law of lawyering issues nevertheless should monitor the GATS 2000 negotiations.

In support of my thesis that the GATS could affect domestic regulation of U.S. lawyers, I will cite three examples. The first example focuses on developments in the European Union. Similar to the GATS, the European Union case law and regulations on cross-border legal practice only govern the obligations of a Member State with respect to lawyers from foreign EU countries; they did not purport to apply to an EU country's domestic regulation of its own lawyers.[299]

Despite this limitation, several EU countries have changed their domestic lawyer regulations after court decisions by the European Court of Justice in order to avoid having their domestic lawyers

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297. *Id.*
298. *ABA Paris Forum Discussion Paper, supra* note 182, at 78.
299. Interview with Bernard Ascher, *supra* note 51.

treated less favorably than the foreign lawyers. For example, in *Ordre des Avocats du Barreau de Paris v. Klopp*,[300] France argued that to ensure compliance with the professional rules of conduct the Paris Bar should be permitted to require that an *avocat* practice exclusively in Paris and not also practice from his Dusseldorf, Germany office. The European Court of Justice found the Paris Bar's concerns legitimate, but found that the existence of a second office did not prevent the Paris Bar from enforcing its rules. Accordingly, the European Court of Justice ruled that a country could not prohibit a foreign lawyer from operating two offices. After these decisions, some European countries changed their rules to permit their domestic lawyers, as well as foreign lawyers, to be able to open branch offices.[301]

My second example is drawn from a speech given by New York University School of Law Dean John Sexton during the 2001 AALS Annual Meeting. Dean Sexton pointed out that foreign lawyers currently can study at NYU for one year, receive an LL.M. degree, and then sit for the New York state bar examination.[302] He also pointed out that Princeton College will soon be offering a certificate program in law and that these Princeton graduates may apply to the NYU LL.M. program. Dean Sexton suggested that NYU may be very tempted to accept into its LL.M. program these Princeton graduates and that these graduates in turn may ask for permission to sit for the New York bar examination. If this hypothetical set of facts were to occur, one can only wonder whether the New York regulators would feel pressured to change the requirements to sit for the New York bar examination so that U.S. students who obtained an LL.M. but did not have a J.D. degree could sit for the New York bar examination under the same conditions as foreign students who obtained an LL.M. but did not have a J.D. degree.

My third example also focuses on foreign lawyers. Imagine that because of the GATS, among other reasons, a U.S. jurisdiction permits foreign lawyers who have not attended ABA-accredited law schools to practice law in that jurisdiction. What happens to a licensed U.S. lawyer from California who did not attend an ABA-accredited school? Will the jurisdiction continue to deny admission to the California lawyer, even though it permits the foreign lawyer to

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300. Case 107/83, [1984] E.C.R. 2971, [1985] 1 C.M.L.R. 99,

301. *See, e.g.*, Andreas G. Junius, *The German System, in* RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 59, 61 (Mary C. Daly & Roger J. Goebel, eds. 1995) ("As a consequence [of the European Court of Justice case law] we amended our domestic act. Now an EC attorney can appear in any court in Germany, and is not bound by the Localization Requirement."); *see also* Terry, *German MDPs*, *supra* note 1, at n.41 and accompanying text.

302. Remarks of Dean John Sexton, 2001 AALS Annual Meeting, as reported by Author.

practice? I suspect that sooner or later, pressure will be brought to avoid this type of discrimination.

Hence, I predict that the GATS' regulation of foreign lawyers will have an impact on U.S. lawyer regulations that only apply to U.S. lawyers. The reason is that if foreign lawyers are granted greater rights than domestic lawyers, the domestic lawyers will object—sooner or later—to this "reverse discrimination" and will lobby for equal treatment.

H. *Summary*

The situations identified in this section provide concrete examples of situations in which foreign lawyers might attempt to challenge U.S. state lawyer regulations on the basis of the GATS. Such challenges may never occur because state regulators and lawyers may convince the United States not to agree to anything that would provide basis for such a challenge. Moreover, it may be very unlikely that foreign lawyers could convince their government to impose trade sanctions on the basis of such a rule. Regardless of whether such challenges are likely, however, U.S. lawyers should recognize that there are circumstances in which such challenges would be possible.

VII. CONCLUSION: SELECTING THE CORRECT PARADIGM

The question posed at the beginning of this Article was what impact, if any, the GATS has or should have on a state ethics rule that prohibits MDPs or, indeed, any state ethics rules. Based on the research I conducted, I think there are two different answers or paradigms that one could give in response to this question. The first possible paradigm is that the GATS is unlikely to have any impact on U.S. domestic legal ethics rules and thus a state MDP committee need not consider the GATS.

In support of this viewpoint, one could cite the fact that the GATS does not apply to domestic regulation of lawyers, the fact that the federal government has a track record of consultations with the states and industry representatives, and the fact that the federal government is unlikely to want to take on the political battle of wresting control of the legal profession from the states. In other words, the correct paradigm may be Chicken Little, in which those who cite the GATS are analogous to the chicken who runs around saying "the sky is falling" when in fact it is not.

On the other hand, the appropriate paradigm may not be "Chicken Little" but "Peter and the Wolf." In the story of "Peter and the Wolf," the wolf ultimately appeared and threatened Peter; it is quite possible that the GATS is analogous to the wolf. Although the

GATS currently has little effect on U.S. ethics rules that regulate foreign lawyers or domestic lawyers, the GATS has the potential to directly affect U.S. regulation of foreign lawyers and indirectly affect U.S. regulation of domestic lawyers.

An article by Karen Dillon about the initial GATS negotiations convinces me that it is possible that the GATS 2000 negotiations might not defer to the interests of legal regulators, but instead might include the legal profession within horizontal disciplines that could be interpreted to invalidate existing U.S. lawyer regulations. While this may very well be desirable, I think it useful to recognize this possibility and discuss the desirability and normative aspects of such an event, rather than just waiting blindly for others to act.

According to Ms. Dillon, one of the key issues during the 1993 GATS negotiations was whether to include legal services in the U.S. *Schedule of Specific Commitments*.[303] The ABA representatives working with the U.S. Trade Representative advocated not including legal services unless concessions were made by the Japanese regarding legal services.[304] On the eve of negotiations, the Japanese had not made the desired concessions.[305] The ABA delegation and the USTR representative who had been responsible for legal services went to bed thinking that legal services would not be included.[306] During middle of the night negotiations, however, the chief negotiator traded lawyers as part of a larger set of negotiations, thus resulting in the legal services being included.[307] Karen Dillon summarized the situation as follows:

> Sometime in the late afternoon last December 14, deputy U.S. trade representative John Schmidt—a former Skadden, Arps, Slate, Meagher & Flom partner—made a decision that could cripple American lawyers seeking to compete in the global market. Trying to wrap up the General Agreement on Tariffs and Trade (GATT) in Geneva, Schmidt agreed to a Japanese proposal drastically limiting American legal practice in Japan, thereby reversing his earlier position, stymying years of negotiations, and rejecting the earlier advice of both his own staff and the American Bar Association [to exclude legal services from the scope of the GATS when the US did not receive the desired Japanese concessions.][308]

She explained how the situation developed:

> Indeed, the USTR staff who had worked most intensively on the issue believed that legal services had been pulled. According to three private lawyers who were subsequently briefed by government officials, one key mid-level staffer actually left Geneva believing the matter was over.

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303. *See generally* Dillon, *Unfair Trade*, *supra* note 27.
304. *Id.* at 56.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* at 53.

> And on Monday, December 13, USTR Japan specialist Charles Lake (who had not been in Geneva for the final negotiations but was closely briefed) told the legal services committee of the American Chamber of Commerce of Japan that legal services had been removed from GATT, recalls a lawyer who was present
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> "We thought we had everybody who was going to be influential wired," White & Case's Grondine recalls. "Everybody who was supposed to be influential was consulted. Nobody thought Schmidt would be able to do this."
>
> But he was. Ultimately, Schmidt decided that he could use legal services as part of a larger deal to help wrap up the GATT talks—and he changed his mind. "It was 'If you do D, we'll do A and B, and we'll split the difference on C,'" he recalls. Two lawyers involved in the talks say that they've been told that part of the deal included a Japanese agreement not to oppose *vigorously* American efforts to restrict patent flooding in respect of semiconductors: a strategy where competitors make it difficult for a patent holder to maintain a patent by filing many other patents similar to the original. Schmidt declines to comment on what was exchanged, except to say that legal services were part of a package deal. (Tsuruoka, however, confirms that Japan made a key concession on the issue of semiconductors in that deal.) "I was the person responsible for closing the overall [GATT] rounds," he says simply. So Schmidt gave in for what he perceived to be the greater overall good.[309]

Because the GATS 2000 negotiations are occurring at the same time as the negotiations covering agriculture, one wonders if it is possible that an analogous compromise might be made during this round of trade talks. Is it possible—even if unlikely—that the U.S. position on legal services will be sacrificed in order to achieve concessions from other countries with respect to agriculture?[310]

If the GATS does have the potential to affect U.S. state regulation of lawyers, then I think it is very important for U.S. lawyers and regulators to participate in the development of U.S. policy. To date, virtually all U.S. experts in the law of lawyering have been unfamiliar with the GATS and have not participated in the development of GATS policy. This is in contrast, for example, to the extensive participation that has occurred during the development of the American Law Institute's Restatement of the Law (Third), The Law Governing Lawyers project, or the American Bar Association Ethics 2000 project to revise the ABA Model Rules of Professional Conduct. In order to motivate these experts to expend part of their limited resource of time to focus on the GATS, these experts must believe that the policy issues involved in the GATS are significant. One way to catch the attention of these experts is to assume that the

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309. *Id.* at 56.

310. For example, compared to legal services, agriculture may have much more political influence. Interview with Peter Ehrenhaft, Vice Chair of the Transnational Practice Committee of the ABA Section of International Law Practice, in San Diego, California (Feb. 16, 2001).

correct paradigm is the Peter and the Wolf scenario and imagine the "worst-case scenario," rather than assume that the U.S. negotiators will only agree to provisions that are acceptable to state regulators and industry representatives. By presenting this "worst-case scenario" view, I do not mean to suggest that I think such an approach is likely, nor am I intending to offer a normative judgment about whether it would be desirable for these state regulations to be challenged. I do, however, think it is important for lawyers to begin to consider these questions.

For these reasons, I believe that all U.S. regulators and lawyers should use paradigm 2. They should recognize that the GATS has the potential to directly affect regulations of foreign lawyers in the United States and the potential to indirectly affect U.S. regulation of U.S. lawyers. Accordingly, even lawyers and regulators without a global practice should be aware of the GATS and should monitor the ongoing developments in GATS 2000.

THE UNITED STATES OF AMERICA – SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply:	1) Cross-border supply	2) Consumption abroad	3) Commercial presence	4) Presence of natural persons
Sector or subsector	**Limitation on market access**		**Limitations on national treatment**	**Additional commitments**
I. HORIZONTAL COMMITMENTS				
ALL SECTORS COVERED BY THIS SCHEDULE: For the purpose of this schedule the "United States" is defined as encompassing the 50 states of the United States, plus the District of Columbia.				
All Sectors: Temporary Entry And Stay of Natural Persons[1]	4) Unbound, except for measures concerning temporary entry and stay of nationals of another member who fall into the categories listed below:		4) Unbound	

1 "Temporary entry" means entry without intent to establish permanent residence under immigration laws of the US and confers no rights with respect to citizenship. US commitments regarding entry and temporary stay in the US do not apply in cases of labour/management disputes.

THE UNITED STATES OF AMERICA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitation on market access	Limitations on national treatment	Additional commitments
II. SECTOR-SPECIFIC COMMITMENTS			
1. BUSINESS SERVICES A. PROFESSIONAL SERVICES			
a) 1) Legal Services: practice as or through a qualified US lawyer	For the following jurisdiction, the following commitments apply: in (all states)		
	1) Services must be supplied by a natural person An in-state office must be maintained for licensure in : District of Columbia, Indiana (or an affiliate with an office and with other attorneys in the state), Michigan, Minnesota (or maintain individual residency in Minnesota), Mississippi, New Jersey, Ohio, South Dakota and Tennessee.	1) In-state or US residency is required for licensure in: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota (or Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, Wyoming.	
	2) Services must be supplied by a natural person An in-state office must be maintained for licensure in: District of Columbia, Indiana (or an affiliate with an office and with other attorneys in the state), Michigan, Minnesota (or maintain individual residency in Minnesota), Mississippi, New Jersey, Ohio, South Dakota and Tennessee.	2) In-state or US residency is required for licensure in: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota (or Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, Wyoming.	

THE UNITED STATES OF AMERICA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitation on market access	Limitations on national treatment	Additional commitments
	3) Services must be supplied by a natural person Partnership in law firms is limited to persons licensed as lawyers US citizenship is required to practice before the US Patent and Trademark Office	3) None	
	4) Services must be supplied by a natural person An in-state office must be maintained for licensure in: District of Columbia, Indiana (or an affiliate with an office and with other attorneys in the state), Michigan, Minnesota (or maintain individual residency in Minnesota), Mississippi, New Jersey, Ohio, South Dakota and Tennessee. US Citizenship is required to practice before the US Patent and Trademark Office	4) In-state or US residency is required for licensure in: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota (or maintain an office in Minnesota), Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, Dakota, Vermont, Virginia, Wyoming	

THE UNITED STATES OF AMERICA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitation on market access	Limitations on national treatment	Additional commitments
	For the following jurisdiction, the following commitments apply: New York[1]		
a) 2) Legal Services: consultancy on law of jurisdiction where service supplier is qualified as a lawyer (such consultancy excludes the following: i) appearing for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state (other than upon admission pro hacc vice); ii) preparing any instrument effecting the transfer or registration of title to real estate located in the United States of America; iii) preparing any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or any instrument relating to the administration of a decedent's estate in the United States of America; and iv) preparing any instrument in respect of the material or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident.	1) None	1) None	a) Practice of international law permitted, provided by FLC is competent.

1 The following information is provided for transparency purposes only. A supplier regularly providing services in the jurisdiction is required to be licensed as a foreign legal consultant in New York. Licensure is subject to meeting requirements of registration, a minimum age of 26 years, an experience requirement (3 of the 5 years preceding registration must have been spent practicising law), certification of registration and good standing with home-country bar, meeting the professional liability insurance requirement, and agreement to be bound by the New York Code of Ethics. Professional privileges apply to all foreign lawyers.

THE UNITED STATES OF AMERICA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitation on market access	Limitations on national treatment	Additional commitments
	2) None	2) None	b) Practice of 3rd-country law: permitted, provided FLC is competent.
	3) In-state office required	3) None	c) Practice of host-county law: permitted to practice NY and federal law provided FLC relies on advice from a person duly qualified and entitled to render professional legal advice on NY or US law. Permitted to practice law of other US states, provided FLC is competent.
	4) Unbound, except as indicated in the horizontal section. Additionally, an in-state office is required.	4) None	d) Association with local lawyers: partnership with local lawyers permitted.

THE UNITED STATES OF AMERICA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitation on market access	Limitations on national treatment	Additional commitments
	For the following jurisdiction, the following commitments apply: Other States		
	1) None	1) None	
	2) None	2) None	
	3) Unbound for Alabama, Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, new Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhoda Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.	3) None	
	4) Unbound for Alabama, Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhoda Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming .	4) None	