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Laurel S. Terry  
lterry@psu.edu

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# A Challenge to the ABA and the U.S. Legal Professional to Monitor the GATS Negotiations: Why You Should Care

Laurel S. Terry\*

## I. INTRODUCTION

Until recently, most U.S. lawyers who specialize in the law of lawyering probably had never heard of the General Agreement on Trade in Services, also known as the GATS.<sup>1</sup> In the past eighteen months, however, references to the GATS and its possible effect on the law of lawyering have periodically appeared. For example, in its first Report to the ABA House of Delegates, the ABA Commission on Multidisciplinary Practice stated:

The Commission is aware that various international treaties, such as the North American Free Trade Agreement and the General Agreement on Trade in Services, and the work of the World Trade Organization, aimed at opening up commerce among nations, may have an impact on the delivery of legal services by MDPs. Nonetheless, the Commission does not believe that it is appropriate to alter its recommendations in anticipation of what that impact might be.<sup>2</sup>

Anthony Davis, a leading ethics commentator and an officer in the Association of Professional Responsibility Lawyers, similarly has cited the

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\* Professor at Penn State Dickinson School of Law. The author would like to thank the editors of the VANDERBILT JOURNAL OF TRANSNATIONAL LAW for permission to include portions of her forthcoming article on GATS' regulation of legal services. See *infra* note 5.

1. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: General Agreement on Trade in Services, 33 I.L.M. 44 (1994) [hereinafter GATS] also found at WORLD TRADE ORGANIZATION LEGAL TEXTS (visited Sept. 27, 1999) <http://www.wto.org/wto/lcgal/finalact.htm>.

The Uruguay Round of GATT negotiations produced a group of multilateral trade agreements. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9 [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.*

2. See <http://www.abanet.org/cpr/mdpreport.html> (visited March 27, 2001).

GATS' potential effect on the law of lawyering in some of his articles and comments.<sup>3</sup> Some of the witnesses who testified before the ABA Commission on Multijurisdictional Practice also have referred in passing to the GATS.<sup>4</sup>

Even though one now hears periodic references to the GATS, it appears that very few of the U.S. law of lawyering practitioners or scholars truly understand the GATS and its potential effect on lawyers. Nor, as a general matter, does this group appear to be aware of the ongoing GATS 2000 negotiations or the opportunity to provide comments. Moreover, information about the GATS' possible effect on the U.S. law of lawyering is not easily available from the traditional professional responsibility research sources. In my view, this is regrettable.

This paper contains three sections. It begins with the observations by various bar leaders and bar associations about the GATS' potential effect on U.S. professional responsibility issues.<sup>5</sup> The goal is to convince those of you who never will come near global legal ethics situations why you should nevertheless care about the paucity of information you are receiving. The second part of the paper offers specific details about the methods currently being used by bar associations to communicate with their members about the GATS and to solicit input about the ongoing GATS 2000 negotiations. The paper concludes by recommending steps the ABA could take to better educate lawyers about the GATS 2000 negotiations and the possible impact on the law of lawyering.

### *GATS' Potential Impact on U.S. State Regulation of Lawyers*

It is beyond the scope of this article to explain the provisions of the GATS and the developments that have occurred subsequent to the GATS' 1994 signing.<sup>6</sup> Two key points worth knowing, however, are: 1) that the GATS already exists as a signed agreement, ratified by U.S. federal legislation; and 2) that legal services are included within the coverage of the GATS.

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3. See, e.g., the paper Mr. Davis submitted at the conference on multijurisdictional practice that was jointly sponsored by Fordham University School of Law and the ABA Center for Professional Responsibility, among others: Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers—Why the Sky Really Is Falling*, available at <http://www.abanet.org/cpr/mjp-adavis.html> (visited March 27, 2001).

4. See, e.g., Executive Summary, Testimony of Daniel B. Magraw, Chair, Section of International Law and Practice to the ABA Commission on Multijurisdictional Practice, Feb. 16, 2001 San Diego, CA (on file with author.) This testimony should be appearing soon on the MJP Commission's website. See <http://www.abanet.org/cpr/mjp-home.html> (Visited April 3, 2001).

5. This section of the article is substantially based on Laurel S. Terry, *GATS' Regulation of Transnational Lawyers & its Potential Impact on U.S. State Regulation of Lawyers*, 34 VANDERBILT J. TRANSNAT'L L. 989 (2001) (forthcoming) and is reprinted with permission [hereafter Terry, *GATS' Regulation of Transnational Lawyers*].

6. See generally Terry, *GATS' Regulation of Transnational Lawyers*, *supra* note 5.

In addition to the existing GATS agreement, the U.S. currently is participating in a new round of trade negotiations, part of which is commonly referred to as GATS 2000.<sup>7</sup> The current round of negotiations focuses, among other things, on agriculture and on services, the latter of which includes legal services.<sup>8</sup> The purpose of this round of negotiations is to develop further liberalization of trade in services and a further reduction of worldwide barriers to trade.<sup>9</sup>

The U.S. Trade Representative (USTR) and Department of Commerce have published and will continue to publish notices in the federal register inviting interested parties to comment on the upcoming GATS 2000 negotiations. One entity that offered comments to the USTR about legal services is the Coalition of Service Industries or CSI.<sup>10</sup> CSI is a trade group that includes in its membership five large U.S. law firms, each of which operates branch offices in foreign countries.<sup>11</sup> In my view, it would be useful to have a broader con-

7. This new round of negotiations originally was scheduled to begin at the WTO Third Ministerial Conference in Seattle, Washington in November 1999; instead, it was formally launched on February 25, 2000. See *Services Negotiations Formally Launched*, [http://www.wto.org/english/news\\_e/news00\\_e/servfe\\_e.htm](http://www.wto.org/english/news_e/news00_e/servfe_e.htm) (visited Feb. 5, 2001).

8. See, e.g., [http://www.wto.org/english/news\\_e/news\\_e.htm](http://www.wto.org/english/news_e/news_e.htm) (Visited April 3, 2001) (explaining that the services round of negotiations had entered phase 2); [http://www.wto.org/english/news\\_e/pres01\\_e/pr215\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr215_e.htm) (Visited April 3, 2001) (indicating that the agricultural negotiations had entered phase 2).

9. See GATS, *supra* note 1, at art. XIX (providing for further liberalization and new negotiations within five years of the adoption of the GATS).

10. See *Coalition of Service Industries Response to Federal Register Notice of March 28, 2000 [FR Doc. 00-7516] -November 27, 2000 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*, (visited Feb. 20, 2001) <http://www.uscsi.org/> [hereafter CSI Response].

The CSI webpage contains the following description of CSI:

What is CSI? 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 was formed in 1982 to ensure that US trade in services, once considered outside the system of world trade negotiations, would become a central goal of future trade liberalization efforts. It played a major role in shaping the General Agreement on Trade in Services (GATS) and in the advocacy effort leading to the 1997 WTO Telecommunications and Financial Services Agreements.

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.

See <http://www.uscsi.org/about/> (Visited Feb. 20, 2001).

11. Currently, CSI includes five U.S. law firms: White & Case; Baker & McKenzie; Wilmer, Cutler, Akin Gump and Cleary Gottlieb. See <http://www.uscsi.org/groups/legal.htm> (Visited April 13, 2001) and <http://www.uscsi.org/members/current.htm> (Visited April 3, 2001).

stituency offering comments to the USTR. These issues would benefit by having the USTR hear the perspectives of regulators, bar examiners, lawyers, clients, academics and others.<sup>12</sup>

In order to convince you of the relevance of the GATS 2000 negotiations to the constituencies present at this conference and perhaps motivate you to offer comments to the USTR, I offer the observations of various bar associations and lawyers from around the world.

Many U.S. regulators might be surprised to learn that the American Bar Association Section of International Law and Practice has suggested that the foreign legal consultant provisions in some U.S. states violate the GATS and are thus improper. In a Discussion Paper submitted to the *Paris Forum on Transnational Practice for the Legal Profession*,<sup>13</sup> the ABA Section of International Law stated:

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

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12. As far as I have discovered, the USTR has not received comments about legal services from any entity other than CSI and ISAC-13, which is the industry group that the USTR is statutorily required to consult and which includes one representative of legal services. See, e.g., <http://www.ustr.gov/outreach/advise.shtml> (visited Feb. 20, 2001) and <http://www.ita.doc.gov/td/lcp/Finalist13.html> (visited April 3, 2001).

The U.S. 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.

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.<sup>14</sup>

The former president of the Japanese Federation of National Bars has stated that "GATS 2000 will determine the global and legal framework of the legal profession, and will therefore greatly influence the role of lawyers in the 21<sup>st</sup> Century."<sup>15</sup>

The European bar association known as the CCBE<sup>16</sup> has expressed at least two different concerns about the GATS' potential impact on regulation of lawyers in the European Community. First, the CCBE expressed concern about whether the work undertaken pursuant to the GATS might somehow undermine the European

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13. For a discussion of the *Paris Forum on Transnational Practice for the Legal Profession*, see generally Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. OF INT'L L. 1 (1999) [hereinafter Terry, *Paris Forum Introduction*]. According to the Press Release that announced the *Paris Forum*, the two objectives of the Paris Forum were as follows:

to create a platform for meetings and dialogue between Bar representatives and to emphasise the specific characteristics of the legal profession. The *Forum* will in this respect supplement the admirable efforts that international associations are now pursuing. In addition it 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 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.

*Id.* at 11.

14. See Donald H. Rivkin, *Discussion Paper Presented by the American Bar Association Section for International Law and Practice to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. INT'L L. 55, 78 (1999) [hereinafter ABA Discussion Paper].

15. See *Remarks of Shigeru Kobori to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. INT'L L. 51, 51 (1999). The entire quote was as follows:

As all of you may already be aware, the World Trade Organization ("WTO") will next year start negotiations on liberalization of trade in services, especially in legal services. These negotiations will not only involve trade in services, but will determine the global and legal framework of the legal profession, and will therefore greatly influence the role of lawyers in the 21<sup>st</sup> Century.

16. For an explanation 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 GEORGETOWN J. OF LEGAL ETHICS 1 (1993) [hereinafter Terry, CCBE Code Part I]. The CCBE website is found at [www.ccbe.org](http://www.ccbe.org) and has many useful documents available in both English and French.

Community's twenty-year effort to develop an effective multi-jurisdictional practice scheme. In its discussion paper submitted for the *Paris Forum*, which was designed, in part, to help world bar leaders respond to the GATS,<sup>17</sup> the CCBE stated:

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 profession in Europe, to which one should add the CCBE Common Code of Conduct adopted on October 28, 1988.<sup>18</sup>

The second concern the CCBE expressed about the GATS' possible effect on lawyer regulation concerned the Multidisciplinary Practice [MDP] debate within Europe. In its Discussion Paper, the CCBE stated:

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17. See *supra* note 13.

18. See Carl Bevernage, *Discussion Paper Presented by the Council of the Bars and Law Societies of the European Community to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. INT'L L. 89, 91 (1999) [hereafter "CCBE Discussion Paper"].

For an overview of the European Community's multijurisdictional practice schemes, see Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000); see also 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) (substantially reprinted in the SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 17 (1998)) [hereafter "Terry, Cross Border Legal Practice"] (comparing the EC scheme of multijurisdictional practice with the other major global MJP schemes).

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.<sup>19</sup>

The CCBE's concerns about the GATS' possible effect on MDP regulation might have been prompted by comments such as those made during the third conference on professional services sponsored by the OECD after the signing of the GATS. At the conclusion of this conference, one of the Rapporteurs observed the following:

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 public interest. Case studies could illustrate *options* and reflect the advantages of flexibility in country responses.<sup>20</sup>

The American Antitrust Institute (AAI) recently echoed the view that MDP bans might constitute improper barriers to trade. The AAI filed a document with the European Commission in which it urged the Commission not to impede the development of multidisciplinary partnerships among lawyers and accountants.<sup>21</sup> Language such as that used by the AAI may contribute to the view of the CCBE and others that the GATS 2000 negotiations have the potential to affect a state's regulation of MDPs.

The Canadian Bar Association has also expressed concern about the GATS' potential effect. The Canadian Bar worried that any GATS rules [disciplines] may not provide proper deference to an individual jurisdiction's decision about how to regulate the lawyers practicing there. It elaborated its concern as follows:

[A]ny GATS rules for the legal profession should not be blindly copied from those applying to other professions. They must be tai-

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19. See *CCBE Discussion Paper*, *supra* note 18, at 96.

20. See Rhonda Piggott, *Report of the Rapporteur (for Member Governments)*, in OECD [Third] Conference Proceedings, *International Trade in Professional Services: Advancing Liberalisation Through Regulatory Reform* 235-236 (OECD Documents 1997).

21. See Stephen Muirenan, *US antitrust group lobbies EU governments in support of MDPs* (18 February 2001), <http://www.legalmediagroup.com/default.asp?Page=1&SID=5919&Type=News> (visited April 3, 2001) ("The president of the American Antitrust Institute (AAI), Albert Foer, has urged the governments of the member states of the European Union to support the development of multidisciplinary practices (MDPs) in Europe. In an open letter to regulators and competition authorities across Europe, Foer entreated them to ensure their vision of an open continent, and a single market, did not become 'diluted or erased through the actions of those with a vested interest in preserving outdated or anticompetitive practices that reflect neither the needs of clients nor the public interest.'")

lored to the unique characteristics of the legal profession and must accommodate differences in national regulatory regimes.

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Some of the WTO rules developed for the accounting profession can be incorporated into rules for the legal profession. These include rules which ensure that licensing and qualification procedures and requirements are pre-established, publicly available and objective and which ensure that administrative procedures are timely and reflect legitimate costs.

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.<sup>22</sup>

The Canadian Bar Association is not alone in its view that the WTO members should develop separate rules [disciplines] for the legal profession and not simply apply to lawyers the rules developed for other service providers. Indeed, the need to have separate rules for lawyers was a strong theme at the November 1998 *Paris Forum on Transnational Practice for the Legal Profession* and has been expressed by various bar associations in other contexts as well.<sup>23</sup>

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22. See *Canadian Bar Association: November 2000, Update - Multi-Disciplinary Practice and World Trade Organization*, <http://www.cba.org/EPIIgram/November2000/default.asp> (Visited March 2, 2001). See, e.g., *The World Trade Organization General Agreement on Trade in Services Negotiations: What it Means to Canadian Lawyers*, <http://www.cba.org/EPIIgram/February2000> (Visited March 3, 2001) (arguing for separate rules for lawyers).

23. On this point, the JFBA stated: "From a similar perspective, we believe that 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." See Shigeru Kobori, *Discussion Paper of the Japan Federation of Bar Associations to the Paris Forum on Transnational Practice for the Legal Profession*, 1 DICKINSON, J. INT'L L. 109, 111 (1999) [hereinafter JFBA Discussion Paper]; Ham Jung-Ho, *The Unique Characteristics of Korean Attorneys' System*, submitted to Paris Forum on Transnational Practice for the Legal Profession, 1 DICKINSON, J. INT'L L. 171, 172 (1999) [hereinafter Korean Bar Discussion Paper] ("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."). The CCBE reinforced this theme when it concluded that "[i]f we speak with a single voice and act together, our views will prevail with the authorities, more in particular the WPPS and the WTO." See CCBE Discussion Paper, *supra* note 18, at 107.

Regulators' concerns about the effect of the GATS on the law of lawyering may be understandable if one examines the broad language that is used to describe alleged barriers to trade. For example, in response to the U.S. Trade Representative's call for comments about the upcoming GATS 2000 negotiations, CSI filed a lengthy response.<sup>24</sup> In addition to the specific recommendations it made concerning how the USTR should handle negotiations about legal services,<sup>25</sup> CSI offered comments about professional services generally. Moreover, it appears that CSI intended its comments about the barriers to trade in professional services to also apply to legal services.<sup>26</sup> In this section of its report that addressed professional services generally, CSI asked the U.S. Trade Representative to attempt to reduce seventeen different barriers to trade:

*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

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24. See *supra* note 10.

25. See CSI Response, *supra* note 10, at 77. This document 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.

26. This is evident from the fact that CSI identified specific professional services, including legal services, at the beginning of the section of its report on professional services. See CSI Response, *supra* note 10, at p. 73 (the professional services listed were: legal services; accounting auditing and bookkeeping services; taxation services; architectural services; engineering services; and integrated engineering services.).

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.
- 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.<sup>27</sup>

Because some U.S. states arguably have similar provisions, U.S. state regulation of lawyers arguably is vulnerable to similar charges of improper "barriers to trade." While CSI's perspective may be correct, this debate undoubtedly would benefit from the voices of many different constituencies. In short, CSI's listing of these "barriers to trade" highlights why it is important that the GATS 2000 negotiators hear a wide range of perspectives before they settle on the U.S. negotiating position with respect to legal services.

Because the purpose of this section was to convince everyone at this conference that it is important to understand these issues, the following sections assume that you now agree and focus on the methods by which this might occur.

## II. BAR ASSOCIATION EFFORTS TO EDUCATION LAWYERS ABOUT THE ONGOING GATS 2000 NEGOTIATIONS

If the GATS 2000 negotiations have the potential to significantly affect the law of lawyering, then it is important to understand why so few lawyers have offered comments to the USTR and to contemplate how that situation might be changed. A useful starting point is to examine the efforts of various bar associ-

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27. See CSI Response, *supra* note 10, at 74-75.

ations to educate their members.

The Canadian Bar Association has done a superb job in its efforts to educate its members about the GATS and the GATS 2000 negotiations. When one logs onto the Canadian Bar Association English language Homepage, the links on the left hand side include "emerging professional issues."<sup>28</sup> 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)."<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> On the left hand side of this February 2000 document are links to the primary GATS resources. These include the GATS treaty<sup>32</sup> and some of the subsequent documents created under the auspices of the WTO, including the Disciplines for the Accountancy Sector<sup>33</sup> and the background paper on legal services prepared by the WTO Secretariat.<sup>34</sup> The links on the left-hand side of the page include a link to the "professional services" page maintained by the Canadian trade officials.<sup>35</sup> 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.<sup>36</sup> 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."<sup>37</sup> Last, but perhaps most importantly, the Canadian Bar

28. See *Canadian Bar Association*, <http://www.cba.org/Home.asp> (Visited April 3, 2001).

29. See *EPIIgram (Newsletter of the Emerging Professional Issues Initiative)*, <http://www.cba.org/advocacy/epil/EplIgrams.asp> (Visited April 3, 2001).

30. See <http://www.cba.org/EPIIgram/November2000/default.asp> (Visited April 3, 2001).

31. See *The World Trade Organization General Agreement on Trade in Services Negotiations: What It Means to Canadian Lawyers*, <http://www.cba.org/EPIIgram/February2000/> (Visited April 3, 2001).

32. See [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsintr.htm](http://www.wto.org/english/tratop_e/serv_e/gatsintr.htm) (Visited April 3, 2001).

33. See *WTO adopts disciplines on domestic regulation for the accountancy*, [http://www.wto.org/english/news\\_e/pres98\\_e/pr118\\_e.htm](http://www.wto.org/english/news_e/pres98_e/pr118_e.htm) (Visited April 3, 2001).

34. When one clicks on this link, one downloads a copy in Microsoft Word of WTO document S/C/W/43 (6 July 1998) entitled "LEGAL SERVICES: Background Note by the Secretariat."

35. See *Government of Canada, Services 2000, Professional Services*, <http://strategis.ic.gc.ca/SSG/sk00052e.html> (Visited April 3, 2001).

36. See *supra* note 35, "Negotiating Proposals from Other Countries, United States - Legal Services." When one clicks on this link, one brings up the U.S. negotiating position in an adobe acrobat document. For a discussion of the development of this document and its significance, see generally Terry, *GATS' Regulation of Transnational Lawyers*, *supra* note 5.

37. See *Canadian Legal Services*, [www.kawsic.org](http://www.kawsic.org) (Visited April 3, 2001).

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.<sup>38</sup> In short, through the Canadian Bar Association webpage, Canadian lawyers have an excellent opportunity to learn about the GATS and the GATS 2000 negotiations and to offer their viewpoints and perspectives as the Canadian negotiators develop their position about legal services.

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.<sup>39</sup> 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.

Moreover, in 2001, the CCBE began a new newsletter entitled the "CCBE Gazette" which it posts on its website. One of the front-page stories in the premier edition of this newsletter was devoted to the GATS 2000 negotiations and the position taken by the European Union negotiators.<sup>40</sup>

When compared to the efforts of the Canadian Bar Association and even the CCBE, the American Bar Association's efforts fall woefully short. There is no link on the ABA general homepage to the ongoing GATS 2000 negotiations or their potential impact of the GATS on the regulation of lawyers.<sup>41</sup> Surprisingly, there is no reference or general link to the GATS or GATS 2000 on the webpage of the ABA Section of International Law and Practice.<sup>42</sup> Perhaps most significantly for this audience, there is no general link or reference to the GATS or the GATS 2000 negotiations on the webpage of the ABA Center for Professional Responsibility.<sup>43</sup> If one performs a search for "GATS" on the

38. The November 2000 EPIIGRAM invites Canadian Bar members to click a button at the bottom of the screen in order to provide feedback. See *WTO Initiative Feedback*, <http://www.cba.org/EPIIgram/November2000/wtofeedback.asp> (Visited April 3, 2001) stating "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/> (Visited April 3, 2001).

39. See <http://www.ccbe.org/uk/homeuk.htm> (Visited April 3, 2001).

40. See *CCBE Works to Achieve A Consensus Within the Framework of Negotiations Within WTO*, CCBE Gazette, Issue 1 (2001) at page 1 [available in adobe acrobat by clicking on the CCBE Newsletter 1 link from the Publications (N) link from the English language webpage.] See <http://www.ccbe.org/uk/homeuk.htm> (Visited).

41. See generally <http://www.abanet.org/> (Visited April 3, 2001).

42. See generally <http://www.abanet.org/Intlaw/home.html> (Visited April 3, 2001). Even the webpage of the Transnational Legal Practice Committee has no references or links to the GATS. See generally <http://www.abanet.org/Intlaw/divisions/comparative/transnational.html> (visited April 3, 2001).

43. See generally <http://www.abanet.org/cpr/> (Visited April 3, 2001).

ABA webpage, twenty-seven documents appear.<sup>44</sup> None of these references, however, focuses on the GATS' possible effect on the regulation of the legal profession. Rather, the documents consist of archived conference material, CLE references and similar material.

None of the other major resources used by law of lawyering specialists contains the type of GATS information maintained by the Canadian Bar Association. GATS and GATS 2000 are simply missing from the webpages of the Association of Professional Responsibility Lawyers (APRL),<sup>45</sup> "legalethics.com",<sup>46</sup> the Legal Information Institute library maintained by Cornell,<sup>47</sup> and "hg.org".<sup>48</sup> In short, the ABA and professional responsibility community has fallen woefully short in educating lawyers about the potential effect on lawyer regulation of the GATS and GATS 2000.

### III. A CHALLENGE TO THE AMERICAN BAR ASSOCIATION

Although the American Bar Association has faced and continues to face challenges in its efforts to speak for U.S. lawyers,<sup>49</sup> I am aware of no other organization that is better-situated to educate U.S. lawyers about issues related to the legal profession. The ABA also is in an excellent position to solicit a broad range of views on important policy issues that affect lawyers. Therefore, my challenge to the ABA is to undertake the first of these tasks by beginning efforts to educate U.S. lawyers about the GATS and the GATS 2000 negotiations. Ultimately, the ABA may want to consider whether it would be a worthwhile investment of time, energy and money for the ABA to collect a broad range of views on the GATS 2000 negotiations and attempt to coordinate the provision of comments and advice to the USTR. Even if the ABA does not want to perform this second task, however, it has a very important role with respect to the first task. Moreover, I suspect that it would take relatively little time, money or effort for the ABA Center for Professional Responsibility to serve as an information clearinghouse and inter-

44. See <http://www.abanet.org/scripts/searchmore.asp> (Visited April 3, 2001).

45. See generally <http://www.aprl.net/default.htm> (Visited April 3, 2001).

46. See generally <http://www.legalethics.com/> (Visited April 3, 2001) (search for "GATS" revealed no documents.).

47. See generally <http://WWW.LAW.CORNELL.EDU/ethics/> (Visited April 3, 2001).

48. See generally <http://www.hg.org> (Visited April 3, 2001) (search for "GATS" revealed 3 documents).

49. See, e.g., Statement of Martha W. Barnett, President, American Bar Association March 22, 2001 [Regarding President's Bush's Decision to Stop the ABA's Pre-Nomination Notification of Federal Judicial Candidates], <http://www.abanet.org/media/statement2.html> (visited April 3, 2001) and *ABA President Anderson Responds to Newspaper Editorials*, [http://www.abanet.org/legaled/accreditation/aba\\_president\\_anderson\\_responds\\_.html](http://www.abanet.org/legaled/accreditation/aba_president_anderson_responds_.html) (April 3, 2001) (regarding the ABA role in accreditation process; on October 1, 1998, the ABA sent the following text drafted by ABA President Anderson to 163 newspapers around the country in response to recent editorials published about the ABA and its role in the accreditation of law schools).

mediary. In my view, the potential benefits of such efforts clearly justify the costs.

Therefore, I would like to propose that the ABA Center for Professional Responsibility add a "GATS 2000 Negotiations" link to its HOMEPAGE. I recommend that this link be connected to a "GATS 2000 and Legal Services" Homepage. If nothing else, this GATS 2000 Homepage could provide a link to the Canadian Bar Association webpage and direct interested readers to examine the documents that are available on the Canadian Bar Associate site.

If the ABA Center for Professional Responsibility were more ambitious, it might include on its "GATS 2000" Homepage, the text of some of the key GATS documents. For example, I suspect that very few U.S. lawyers know that the USTR filed a negotiating position on legal services with the WTO on December 15, 2000.<sup>50</sup> While this document is easily accessible from the USTR webpage (and numerous others), I suspect that most people in this room did not know this document existed, have not read the document, or didn't understand what the document was even if they did read it.

Having documents such as the U.S. negotiating position on legal services and GATS 2000 directly available on the CPR webpage would be useful for two reasons. First, it would avoid the necessity of having to constantly monitor the Canadian Bar Association webpage to make sure that this webpage has not changed the location or web address of these materials. Second, it would be useful to have the key GATS texts about the legal profession easily available because the process of reading them on the WTO website became significantly more cumbersome in 2001.<sup>51</sup>

If the ABA Center for Professional Responsibility were willing to be even more ambitious, then the next step I would recommend is that the ABA use the leverage of its 400,000 plus members to facilitate better communication between the USTR and the legal profession. For example, since many professional responsibility experts may not be familiar with trade law research or be accustomed to working closely with federal register notices, it would be extremely useful if the ABA could post on its website any federal register notices about deadlines for sub-

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50. See USTR Fact Sheet, WTO SERVICES \_ U.S. NEGOTIATING PROPOSALS, 12/14/00, <<http://www.ustr.gov/releases/2000/12/factsheet.html>> (visited Feb. 5, 2001) and Legal Services, <http://www.ustr.gov/sectors/services/legal.html> (visited Feb. 5, 2001) [hereafter U.S. Legal Services Proposal].

51. As of November 2000, for example, one could simply log onto the WTO website, conduct a general search by topic such as "legal services" or search for a specific document by its document number, and then click and read that document. Now, however, the documents must be "unzipped" and downloaded. This has made it much more time consuming for someone with my level of computer skills. To date, I have had to open the documents in Microsoft Explorer rather than a word processing program such as Microsoft Word. I then have to save them as a word document, but the WTO seems to have assigned a set of files so that they are difficult to find after saved and must then be renamed. At least for me, reading documents on the web is no longer a simple process of clicking on the documents I want, but a 5-10 minute procedure per document.

mitting comments to the USTR. And, in an ideal world, the ABA website would also include all comments submitted to the USTR about legal services.

In conclusion, I realize that my modest proposal may not, in fact, be quite so effortless as this paper suggests. The recent delays in posting documents submitted to the ABA Commission on Multijurisdictional Practice suggests that it may indeed require tremendous time, effort and money to create the virtual resources at which the Center for Professional Responsibility has excelled. Even if this is true, however, I think the time and energy would be well spent. And if this paper has convinced you that GATS 2000 is something you should know more about, then I urge you to share those views with the ABA Center for Professional Responsibility and urge it to act as a clearinghouse for information in this matter.