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But What Will the WTO Disciplines Apply To - Distinguishing among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services

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I. INTRODUCTION:

In March 2003, the ABA Center for Professional Responsibility launched a new webpage devoted to the topic of the GATS and legal services.[1] This webpage should help make U.S. lawyers better aware of the fact that legal services are included within the ambit of the General Agreement on Trade in Services ["the GATS"]. The GATS is one of several agreements annexed to the 1994 Final Agreement Establishing the World Trade Organization [WTO].[2] Because the U.S. is a party to the GATS, it has agreed to be bound by the provisions of the GATS.[3]

One of the issues currently facing WTO Member States, including the U.S., is whether to extend to the legal profession and other service providers a document entitled ***Disciplines for Domestic Regulation in the Accountancy Sector [hereafter "Accountancy Disciplines"].***[4] If WTO Members agree to extend the provisions of the ***Accountancy Disciplines*** to the legal profession, this would mean that at least some U.S. lawyer regulatory provisions would be subject to the WTO's regulations or "disciplines."

During the past two years, I have spent significant time encouraging lawyers and bar associations in the U.S. and elsewhere to examine the WTO's ***Accountancy Disciplines*** and to consider whether these ***Accountancy Disciplines*** should be applied to the legal profession.[5] In these conversations, I often have been asked a seemingly very simple question—namely, to what kinds of lawyer regulatory provisions would these ***Accountancy Disciplines*** apply?

The answer to this seemingly simple question is, in fact, quite complex. In order to answer this question, one has to be familiar with the trade law concepts

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1. *See* ABA Center for Professional Responsibility, Materials about the GATS and Other International Agreements, *available at* http://www.abanet.org/cpr/gats/gats_home.html (last visited Dec. 12, 2003).

2. *See* 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/26-gats.doc (last visited Dec. 12, 2003).

3. *See* 140 Cong. Rec. H 11535-36 (daily ed., Nov. 29-30, 1994)(recording roll call vote of the House of Representatives in favor of the agreements that include the GATS); 140 Cong. Rec. S 15378-79 (daily ed. Dec. 1, 1994) (recording roll call vote of the Senate in favor of the agreements that include the GATS).

4. *See* WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector*, S/L/63 (15 Dec. 1998) and WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998* (17 Dec. 1998)[hereafter "Accountancy Disciplines"]. These Disciplines are available on the GATS webpage of the ABA Center for Professional Responsibility at http://www.abanet.org/cpr/gats/accounting.pdf.

5. *See, e.g.*, Testimony of Laurel S. Terry to the U.S. Trade Policy Staff Committee (October 28, 2003), *available at* http://www.abanet.org/cpr/gats/terry_ustr.pdf ("I would urge the USTR to request from the ABA and any other interested organization a report about the suitability of applying the *Disciplines for the Accountancy Sector* to the legal profession. At a minimum, the USTR could ask U.S. lawyers for their reactions to the reports of the Canadian Bar Association and the Federation of Law Societies of Canada.")

of market access, national treatment and GATS Article VI:4 measures.

Moreover, even if one is familiar with the trade law concepts of market access, national treatment and GATS Article VI:4 measures, it is *still* difficult to answer this seemingly simple question of what types of measures would be covered by an ***Accountancy Disciplines***-like document. Indeed, precisely because this issue is so difficult, several years ago, the WTO Secretariat assembled a document that provides examples of measures that WTO Member States believed would be subject to ***Disciplines***.[6] Unfortunately, the WTO's "Examples" paper is designated as a "JOB", which means that it has never been made publicly available by the WTO.[7] Although the WTO's "Examples" paper is not a public document, prior versions of it have been leaked and are in the public domain.[8]

In the second and third versions of the WTO's "Examples" paper, which are the versions that are publicly available, legal services regulatory measures are not separately addressed.[9] Moreover, I am not aware of any significant work that discusses – in the legal services context – what types of provision would constitute GATS Article VI:4 measures that might be subject to ***Disciplines***, on the one hand, and what types of provisions would constitute "market access" or "national treat-

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6. *See* "Examples of Measures to be Addressed by the Disciplines Under GATS Article VI:4". In its 2003 Annual Report, the WPDR referred to seventh version of this document. *See* Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2003), S/WPDR/6 (3 December, 2003) at ¶5 (citing JOB(02)/20/Rev.7 (22 Sept. 2003))[hereafter WPDR 2003 Annual Report].

For an explanation of the symbols used on WTO documents, see the ABA GATS webpage, http://www.abanet.org/cpr/gats/wto_docs.pdf (last visited Dec. 12, 2003). The "S" refers to GATS; the "WPDR" refers to the Working Party on Domestic Regulation; "M" refers to minutes, "W" refers to working documents, and the absence of "W" or "M" refers to an official action, including Annual Reports. Many of the relevant documents of the WTO Working Party on Domestic Regulation are included on the personal webpage of the author. *See* http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm (last visited Dec. 12, 2003).

7. *Compare* Working Party on Domestic Regulation - *Report on the Meeting Held on 2 October 2001 - Note by the Secretariat*, S/WPDR/M/13 (21 November, 2001) at ¶6 (referring to the original version of the Examples paper as a "JOB") and the 2003 WPDR Annual Report, *supra* note 6, which also refers to version 7 as a JOB. For an explanation of the fact that JOBS are not public, see Laurel S. Terry, *GATS= Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VANDERBILT J. TRANSNAT=L 989 (2001) as revised 35 VANDERBILT J. TRANSNAT=L 1387 (2002) at n. 154, *available at* http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm (last visited Dec. 12, 2003).

8. The second version of this "Examples" paper is available on the Internet on the Public Citizen website, among others. *See* http://www.citizen.org/documents/Measures_to_be_disciplined_under_GATS.pdf (last visited Dec. 12, 2003). The third version is included as an Annex in a book about the GATS and national regulation. *See* Dr. Markus Krajewski, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES – THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY, (Kluwer Law International, 2003) at Annex VI, at pp. 220-231.

In my view, classifying the "Examples" document as a "JOB" is both regrettable and inconsistent with the WTO's goal of transparency. I believe that it would be appropriate to make this document publicly available so that all academics and interested parties, rather than a select few, could see the Examples paper and participate in the resulting debate and emerging policy.

9. *See id.*

ment" measures that would not be subject to ***Disciplines***, on the other hand.

It is against this background that this Article is written. The purpose of this article is two-fold. First, this article introduces the lawyer regulatory community to the trade law principles that will be used to answer the question of which legal services regulatory measures might be subject to any ***Disciplines*** developed pursuant to GATS Article VI:4. Second, this article includes an Annex that identifies common legal services measures. This Annex can help educate the trade law community about the types of legal services measures that exist. Hopefully, the two parts of this article can provide a starting point for the later development of an "Examples" paper that is specific to the legal profession. In other words, in this paper, I hope to act as a "translator" or "bridge" from the trade law community to the lawyer regulatory community and from the lawyer regulatory community to the trade law community, with the ultimate goal that these two communities will have a dialogue and, with luck, reach a consensus about which lawyer regulatory measures would be subject to any ***Disciplines*** that are developed.

Although the topics addressed in this article may seem both boring and inaccessible to those in the lawyer regulatory community,[10] I believe that it is important for all lawyers, especially those in the lawyer regulatory community, to meaningfully discuss the issue of whether to extend the ***Accountancy Disciplines*** to the legal profession. In my view, it is much better for the lawyer regulatory community to participate *now* in the development of any ***Disciplines***, rather than complain about the results later, when it may be too late to change the results. And, in order to discuss the desirability and proper scope of any ***Disciplines***, lawyers will want to understand the type of lawyer regulations to which any ***Disciplines*** might apply. To state it differently, it would be extremely helpful to understand what type of legal services measure would be subject to any GATS Article VI:4 ***Disciplines*** that are adopted in the future by the WTO and applicable to the U.S.

Section II of this article explains how one can learn more about the GATS

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10 Although I cannot change the "boring" nature of these topics, I can, perhaps, offer assistance on the "accessibility" point. This article builds on my prior work on the GATS and legal services. For an easy introduction to the topic of the GATS and legal services, you can consult the very short articles that I have written for THE BAR EXAMINER. *See* Laurel S. Terry, *Latest Developments Regarding the GATS and Legal Services*, THE BAR EXAMINER 27 (Aug. 2003); Laurel S. Terry, *The GATS, Foreign Lawyers and Two Recent Developments: Could Your State's Actions Affect U.S. Trade Policy?*, THE BAR EXAMINER 20 (Nov. 2002); Laurel S. Terry, *GATS, Legal Services and Bar Examiners: Why Should You Care?*, THE BAR EXAMINER 25 (May 2002), all of which are available at http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2 (last visited Dec. 12, 2003). For a more in-depth analysis, see *GATS: A Handbook for International Bar Association Member Bars* (May 2002) available at http://www.ibanet.org/pdf/gats.pdf [hereafter IBA GATS Handbook] and Terry, *GATS= Applicability to Transnational Lawyering*, *supra* note 7. My first article on the GATS was also written for *The Professional Lawyer*. *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*, SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 63 (2001) also *available at* http://www.crossingthebar.com/monitoringgats.htm (last visited Dec. 12, 2003).

and legal services. It continues with a discussion of the current developments in the WTO that are relevant to legal services. Section III identifies the trade law principles that will be used to determine whether a particular measure is the type of measure to which ***Disciplines***—if adopted—might apply. Section IV provides the conclusion. The Annex of this paper is a list of examples that might – or might not—constitute domestic regulation measures within the meaning of GATS Article VI:4.

II. CURRENT DEVELOPMENTS IN THE WTO APPLICABLE TO LEGAL SERVICES

If one is first encountering the issue of the effect of the GATS on legal services, it may be useful to consult *GATS: A Handbook for International Bar Association Member Bars*, which is available on the websites of the International Bar Association and the GATS webpage of the ABA Center for Professional Responsibility.[11] As the *IBA GATS Handbook* explains, developments concerning the GATS and legal services currently are proceeding on two different "tracks."[12]

The reason why there are two different "tracks" is because the GATS itself mandates further action on two different issues. Article XIX of the GATS required WTO Member States to "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."[13] Article VI:4 of the GATS required that the WTO Council for Trade in Services "through appropriate bodies it may establish, develop any necessary disciplines."[14] Thus, the two different "tracks" of GATS activities involve different issues and are required by different sections of the GATS. Each of these "tracks" is discussed below.

A. The Doha Development Agenda and the "Track #1" Negotiations

In this article, the term "GATS Track #1" refers to those negotiations required by GATS Article XIX. One commentator has referred to this first track of events as the "horse-trading" track.[15] In November 2001, WTO Member States agreed on a set of deadlines for these negotiations, which technically are called

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11. *See* IBA GATS Handbook, *supra* note 10, *available at* the IBA webpage, *see* http://www.ibanet.org/pdf/gats.pdf (last visited Dec. 12, 2003), and as a link from the ABA GATS webpage, *see* http://www.abanet.org/cpr/gats/gats_home.html/ (last visited Dec. 12, 2003).

12. *See* IBA GATS Handbook, *supra* note 10, at pp. 3-5.

13. *See* GATS, *supra* note 2, at art. XIX.

14. *See* GATS, *supra* note 2, at art. VI:4.

15. I first heard this characterization from William P. Smith, III, former president of the National Organization of Bar Counsel and General Counsel, State Bar of Georgia. I have repeated his characterization of this track because it easy to remember and colorful.

16. *See, e.g.*, Ministerial Declaration Adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001)) *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Dec. 12, 2003)[hereafter "Doha Ministerial Declaration"]. For further information on the Doha Development Agenda, see the WTO webpage at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#dohadeclaration (last visited Dec. 12, 2003). *See also* IBA GATS Handbook, *supra* note 10, at pp. 45-47.

the "Doha Development Agenda" but are sometimes referred to as the "DDA" or "Doha Round."[16] The Doha negotiations originally were scheduled to conclude on January 1, 2005.[17]

At the time these deadlines were set, WTO Member States agreed that, during the WTO's Fifth Ministerial Conference, they would engage in "stock-taking" regarding the status of these ongoing negotiations.[18] The Fifth Ministerial Conference took place in Cancun, Mexico on September 10-14, 2003. During this Conference, WTO Member States expressed significant differences about the direction of the Doha negotiations, especially with regard to issues involving agriculture and the so-called "Singapore Issues."[19] By the end of the Cancun Conference, the negotiations had broken down and there was no consensus.[20] Following the breakdown of negotiations at Cancun, the WTO Director General and General Council Chair jointly issued a statement announcing the suspension of various WTO negotiations; the suspended negotiations included the "Track #1" negotiations regarding the GATS and legal services.[21] Although the European Union recently issued a paper and press release calling for resumption of these Doha negotiations,[22] the Track #1 GATS negotiations had not yet resumed at the time this article was written.[23]

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17. *See* Doha Ministerial Declaration, *supra* n. 16, at ¶ 15 and 45.

18. *See* Doha Ministerial Declaration, *supra* note 16, at ¶ 45 ("The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary.")

19. The so-called "Singapore Issues" concern trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation *See, e.g.*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_11sept_e.htm (last visited Dec. 12, 2003); and http://commerce.nic.in/wtosep2003.htm#h1 (Government of India's summary of the Cancun breakdown.) (last visited Dec. 12, 2003).

20. *See WTO Cancun '03, Summary Of 14 September 2003, Day 5: Conference Ends Without Consensus*, *available at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited Dec. 12, 2003).

21. *See* WTO News, Oct. 14, 2003, *Statements by the Chairman of the General Council and the Director-General*, *available at* http://www.wto.org/english/news_e/news03_e/stat_gc_dg_14oct03_e.htm (last visited Dec. 12, 2003) ("As you know, we have decided to discontinue, for the moment, the work of the negotiating bodies (except the DSU negotiations, which are on a separate track). This is not a suspension sine die, since together with the DG, I will be taking up the key negotiating areas in the process I have described, and we will revert to addressing those matters in due course of time. Furthermore all other regular business in the WTO is continuing in line with existing mandates.")

22. *See Press Release: European Commission proposes to put Doha Round of trade talks back on track*, Nov. 26, 2003 *available at* http://www.esf.be/f_e_news.htm#top (last visited Dec. 12, 2003) and *Communication From The Commission To The Council, To The European Parliament, And To The Economic And Social Committee Reviving The DDA Negotiations – The EU Perspective*, Nov. 26, 2003 *available at* http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114259.pdf (last visited Dec. 12, 2003).

23. *See, e.g.*, Informal Heads of Delegation Meeting, Statement by the Chairman of the General Council (9 Dec. 2003) *available at* http://www.wto.org/english/news_e/news03_e/stat_gc_chair_9dec03_e.htm and Informal Heads of Delegation Meeting, Statement by the Director-General (9 Dec. 2003) *available at* http://www.wto.org/english/news_e/news03_e/stat_gc_dg_9dec03_e.htm (reporting on the status of consultations and plans for the upcoming December 13, 2003 meeting) (last visited Dec. 12, 2003).

Assuming the negotiations resume, the results of these Track #1 negotiations will be reflected in changes to each country's ***Schedule of Specific Commitments.*** Each WTO Member State submitted a ***Schedule of Specific Commitments*** in 1994 (or when it joined the WTO, if later than 1994). The "legal services" portion of the current ***U.S. Schedule of Specific Commitments*** presents the U.S. promises on a state-by-state basis; this ***Schedule*** is available on the GATS webpage of the ABA Center for Professional Responsibility, among other places.[24]

B. Track #2 – Development of Necessary "*Disciplines*"

The second "track" of GATS events has focused, to a large extent, on the ***Accountancy Disciplines***.[25] Although the ***Accountancy Disciplines*** document has not yet taken effect, WTO Member States, including the U.S., approved the adoption of this document in December 1998.[26] WTO Member States, including the U.S., currently are engaged in discussions about whether the principles contained in the ***Accountancy Disciplines*** document should be extended "horizontally" to cover other service sectors and whether separate ***Disciplines*** should exist for "professional services."[27] One commentator has referred to this second track of events as the "global regulation" track.[28] Thus, GATS Track #2 addresses different issues than does "Track 1" and is required by a different section of the GATS.

Despite the suspension of GATS Track #1 negotiations after Cancun, WTO Member States *have* continued to negotiate regarding Track #2 in the WTO Working Party on Domestic Regulation. Even after the Cancun Conference, the WTO Working Party on Domestic Regulation met and continued to study the issue of whether to apply the ***Accountancy Disciplines*** to other services, such as

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24. *See United States of America – Schedule of Specific Commitments,* GATS/SC/90 (15 April 1994) *available at* http://www.abanet.org/cpr/gats/legal_svcs.pdf (last visited Dec. 12, 2003)[hereafter U.S. Schedule of Specific Commitments."] For information on how to read WTO document symbols and locate documents on the WTO webpage, see http://www.abanet.org/cpr/gats/wto_docs.pdf (last visited Dec. 12, 2003).

25. The WTO Working Party on Domestic Regulation [WPDR] is responsible for work involving domestic regulation. This work has included consideration of the *Accountancy Disciplines* and whether and how to extend this document to other service sectors. See *infra* notes 53-54 and accompanying text for a discussion of the creation of the WPDR.

26. *See id.*

27. *See World Trade Organization, Report Of The Working Party On Domestic Regulation To The Council For Trade In Services (2002),* S/WPDR/4 (6 December 2002)(noting the work with respect to disciplines for professional services and horizontal disciplines); 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)("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."); *See Decision on Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999,* S/L/70 ¶ 2 (Apr. 28, 1999). *Accord* IBA GATS Handbook, *supra* note 10, at 36; Terry, GATS' Applicability to Transnational Lawyering, *supra* note 7, at pp. 1038-1040.

28. I coined this phrase as a counterpart to Bill Smith's "horse-trading" characterization, see note 15, *supra.*

legal services.[29] The sections that follow summarize some of the events that have occurred to date in the Working Party on Domestic Regulation.

1. WTO Member States Agree to Conduct Voluntary "Domestic Consultations"

Because WTO Member States currently are considering whether to extend the ***Accountancy Disciplines*** to other service providers, including lawyers, WTO Members agreed in 1999 to engage in voluntary "domestic consultations."[30] The purpose of these domestic consultations was to find out what the service providers in a particular country – for example, U.S. lawyers – would think about being subject to the ***Accountancy Disciplines***. Although WTO Member States set an original reporting deadline of March 31, 2000,[31] WTO Member States continue to report the results of their domestic consultations.[32]

2. No Formal "Domestic Consultations" Have Occurred in the U.S. Regarding Legal Services

Despite the WTO's decision that its members should engage in voluntary "domestic consultations," the U.S. has not had any formal consultation with the U.S. legal profession about the suitability of applying the ***Accountancy Disciplines*** to the legal profession. It is true that in the WTO Working Party on Domestic Regulation, the U.S. has referred briefly to its consultations with the legal profession.[33] To my knowledge, however, the U.S. report to the WTO was based on conversations with, among others, the American Bar Association (ABA) representative to the statutorily mandated Industry Sector Advisory Council-13 or ISAC-13.[34] The U.S. Government has never sent a letter to the American Bar Association (ABA) or the Conference of Chief Justices (CCJ) seeking their official views on the suitability of the Accountancy ***Disciplines*** nor has it received a formal response from the ABA, the CCJ or, to my knowledge, any other U.S.-

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29. *See, e.g., 2003 WPDR Annual Report, supra* note 6 (summarizing the activities of the year, including a meeting on September 30, 2003, after Cancun and announcing a meeting on December 3, 2003).

30. *See* Working Party on Domestic Regulation, *Report on the Meeting Held on 17 May 1999, Note by the Secretariat*, S/WPDR/M/1 (June 14, 1999) at ¶ 12.

31. *See* 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) at ¶ 9.

32. *See, e.g.*, Working Party on Domestic Regulation - *Report on the Meeting Held on 4 December 2002 - Note by the Secretariat*, S/WPDR/M/19 (29 January, 2003) at ¶ 23 (China reported on its domestic consultations, including a report about legal services) and ¶ 28 (Canada reported on domestic consultations with land surveyors.) In the most recent minutes that are publicly available, the Chair asked for additional domestic consultation reports, although none were received. *See* Working Party on Domestic Regulation – *Report on the Meeting Held on 1 July 2003 - Note by the Secretariat*, S/WPDR/M/22 (22 Sept. 2003) at ¶ 100.

33. *See* Working Party on Domestic Regulation – *Report on Meeting Held on 15 May 2003 – Revision*, S/WPDR/M/21/Rev.1 (25 June 2003) at ¶ 20 ("Based on domestic consultations, the U.S. delegation supported the development of disciplines, similar to the *Accountancy Disciplines* with perhaps some modifications, for architecture, engineering and legal services.").

34. *See Telephone Conference with Peter Ehrenhaft*, ABA Representative to ISAC-13 (Dec. 10, 2003). For information on ISAC-13, *see* Terry, *GATS' Applicability to Transnational, supra* n. 7, at 243.

based lawyer or judicial organization.[35]

The failure of the U.S. legal profession to comment on the ***Accountancy Disciplines*** may be remedied in the future, however. At the November 20, 2003 meeting of the ABA GATS Task Force, there was a suggestion that the ABA should provide comments on the ***Accountancy Disciplines*** to the U.S. Government.[36] Thus, in the future, the ABA may join the ranks of those who have commented on the suitability of the ***Accountancy Disciplines*** for legal services.[37]

3. The WTO's December 2002 Consultation of the International Bar Association (IBA)

In 2002, at the direction of WTO Member States,[38] the WTO Secretariat contacted the International Bar Association (IBA) and asked it three questions regarding GATS Track # 2 and the suitability of applying to lawyers the ***Accountancy Disciplines***.[39] (WTO Member States conducted several discussions about the international professional organizations from which such consultations should be solicited.[40]) The WTO's questions to the IBA were as follows:

> *To help advance the work on professional services, three questions were suggested regarding the potential applicability of elements of the Accountancy Disciplines to other professions:*

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35. *See Email Letter from David Rivkin, Chair, ABA GATS Task Force to Laurel S. Terry* (Dec. 10, 2003) and *Email Letter from Richard Van Duizend, Principal Court Management Consultant, National Center for State Courts, to Laurel S. Terry* (Dec. 10, 2003). The ABA GATS Task Force is charged with coordinating the ABA's activities regarding the GATS and legal services. Thus, if a letter had been sent from the U.S. Government to the ABA seeking its view on the Accountancy Disciplines, Mr. Rivkin would be aware of it. As of December 10, 2003, no such letter had been sent.

36. *See* Minutes of the Nov. 20, 2003 Meeting of the ABA GATS Task Force (forthcoming).

37. The Working Party on Domestic Regulation maintains a summary of the reports it has received about professional services' consultations. Unfortunately, this summary is not publicly available. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 1 July 2003, Note by the Secretariat*, S/WPDR/M/22 (22 Sept. 2003) at ¶ 100 citing a confidential document entitled "*Synthesis of Results to Date of the Domestic Consultations in Professional Services*," JOB(02)/204/Rev. 1 (21 Feb. 2003).

I am personally aware of domestic consultations that have been provided by the Canadian Bar Association and the Federation of Law Societies of Canada. *See* 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) and Federation of Law Societies of Canada, *Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)*(Adopted by the Law Societies on Feb. 24, 2001). Both of these papers are available on ABA GATS webpage at http://www.abanet.org/cpr/gats/gats_home.html and at http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm (last visited Dec. 12, 2003). There may, of course, be other published reports of domestic consultations with lawyers of which I am unaware.

38. *See, e.g.*, WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 22 October 2002, Note by the Secretariat*, S/WPDR/M/18 (3 December 2002).

39. *See* Letter from Abdel-Hamid Mamdouh to Mark Ellis, Executive Director, International Bar Association (undated, but sent in December 2002) *available at* http://www.abanet.org/cpr/gats/iba_ltr.pdf (last visited Dec. 12, 2003).

40. *See, e.g.*, Working Party On Domestic Regulation, *Report On The Meeting Held On 22 October 2002, Note By The Secretariat*, S/WPDR/M/18 (3 December 2002) at ¶¶ 36-37.

- *Are there any elements of the disciplines which you consider are not appropriate for your profession? If so, please set out which and why you consider they are inappropriate. Please also suggest what changes would make them appropriate.*
- *Are there any points or areas which you consider are missing from the disciplines and which you feel should be included? If so, please indicate clearly what these are and why they should be included;*
- *Are there any elements of the disciplines which you feel need to be improved? If so, please set them out and why.*[41]

4. The IBA's Response to the WTO

On May 30, 2003, in Brussels, Belgium, the International Bar Association (IBA) held a day-long *WTO/GATS Forum*.[42] Approximately sixty people attended this *Forum*. The purpose of the *Forum* was to discover whether IBA representatives could reach a consensus on two issues related to the GATS and legal services. The first issue concerned Track #1 and the classifications or terminology that countries should use when negotiating legal services. The second issue concerned Track #2 and how the IBA should respond to the December 2002 letter sent by the WTO Secretariat to the IBA.

Those attending the *IBA GATS Forum* debated, and ultimately voted upon, proposed changes to the ***Accountancy Disciplines*** that had been circulated in advance by the IBA's WTO Working Group. The *Forum* attendees also discussed additional changes that had been suggested – both in advance and at the *Forum* - by representatives from individual IBA Member Bars. After the debate and votes at the *IBA GATS Forum*, the IBA WTO Working Group prepared a set of revised documents, including the final resolutions and supporting documentation. These documents were circulated to the IBA Council, which is the IBA's policy-making body and consists of representatives from more than 150 countries.[43]

On September 18, 2003, the IBA Council unanimously approved the two resolutions submitted to it by the IBA WTO Working Group. The first resolution addressed the proper "terminology" for countries to use when negotiating for legal services.[44] This second resolution responded to the WTO's December 2002 letter to the IBA. This second resolution recommended specific changes that should be made

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41. *See id.*

42. The IBA *WTO/GATS Forum* is the topic of a forthcoming article by Laurel S. Terry in the Winter 2004 issue of the Penn State International Law Review.

43. The IBA Council is the governing body of the IBA. It consists of representatives from over 150 countries. *See* http://www.ibanet.org/MemberOrgs/Overview.asp (last visited Dec. 12, 2003).

44. The "terminology" resolution that was approved by the IBA Council in September 2003 is significantly different than the "classification" resolution that was submitted to the May 30, 2003 *IBA WTO/GATS Forum*. The final resolution reflects developments that occurred after the preparation of materials for the *IBA GATS Forum*, including a discussion paper filed by the European Union.

45. *See* Letter from Emilio Cardenas, IBA President to Dr. Supachai Panitchpakdi, Director-General, WTO (Nov. 7, 2003)(on file with author). This letter was thereafter supplemented with an updated copy of the documents.

before the ***Accountancy Disciplines*** are applied to legal services. These proposed changes, which the IBA recommends, have been submitted to the WTO Secretariat.[45]

In sum, WTO Member States, including the U.S., currently are considering whether the ***Accountancy Disciplines*** should be extended to other service providers, including lawyers. WTO Member States have agreed that it is appropriate for each of them in engage in "domestic consultations" with the professions and service providers in their countries. The U.S. legal profession has not yet provided an official or formal response to this invitation. In my view, the U.S. legal profession should do so.

If and when U.S. lawyers address the suitability of applying to lawyers the ***Accountancy Disciplines***, they probably will want to know which legal services provisions would be subject to any ***Disciplines***. The section that follows identifies the principles that will be used to answer this seemingly simple, but in fact, quite difficult, question.

III. THE PRINCIPLES THAT DETERMINE WHETHER A LEGAL SERVICES RULE SHOULD BE CONSIDERED TO BE AN ARTICLE VI:4 MEASURE SUBJECT TO *DISCIPLINES*[46]

A. Introduction – The Obligation in Article VI:4 to Develop Any Necessary "Disciplines"

Article VI of the GATS, which is entitled "domestic regulation," is an interesting and complicated provision. One of the things that makes Article VI interesting and complicated is that parts of Article VI are immediately applicable to all WTO Member States, regardless of whether legal services are included on the WTO Member State's *Schedule of Specific Commitments*.[47] Other portions of Article VI, however, apply only to services that are "scheduled," *i.e.*, that are listed on a country's *Schedule of Specific Commitments*.[48] And for one portion of Article VI, namely Article VI:4, WTO Member States have disagreed about whether it applies only to services listed on a country's *Schedule of Specific Commitments*.[49] Thus, when one reads Article VI below, one must look for these differences.

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46. This section represents my current thinking about how the GATS operates. As a non-trade lawyer trying to understand the GATS, however, I find the learning curve very steep. Although I have learned a tremendous amount about how the GATS operates, I often feel that I have just scratched the surface. I would urge anyone who disagrees with my analysis to please contact me and put me back on track.

My current understanding reflects numerous conversations I've had over the last year with a wide range of people. Some of those with whom I have had conversations and whom I'd like to thank for their time and for useful comments and insights include Peter Ehrenhaft, Carlos Gimeno-Verdejo, Jonathan Goldsmith, Ben Greer, Dale Honeck, Alison Hook, Markus Jellito, John Knox, Delos Lutton, Hamid Mamdouh, Julia Nielson, Carole Silver, Bill Smith, and Philip von Mehren. I have also benefited from hearing conference presentations on these topics. *See, e.g., Legal Services and the WTO*, Feb. 14, 2003 London). Any errors, of course, are my own.

47. *See* GATS, *supra* note 2, at art.VI:2.

48. *See id.* at Art. VI:1, VI:3, VI:5, VI:6.

49. *See infra* at notes 72-75 and accompanying text for a fuller discussion of a *Schedule of Specific Commitment*. *See also Terry, GATS' Applicability to Transnational Lawyering*, *supra* note 7, at pp. 1004-1010.

Among its other provisions, Article VI of the GATS includes a direction to the Council on Trade in Services to develop any "necessary disciplines." As is explained below, this provision is the basis for the ***Accountancy Disciplines*** document that was the subject of the WTO's letter to the IBA. Article VI:4 states:

> 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.*[50]

In 1994, when the WTO Member States agreed upon the text of the GATS, they also agreed on a "Decision" that explained how Article VI:4 initially should be implemented. This Decision stated in part:

> 1. *The work programme foreseen in paragraph 4 of Article VI on Domestic Regulation should be put into effect immediately. To this end, 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.*
>
> 2. *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.*[51]

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50. *See* GATS, *supra* note 2. Even without the adoption of *Disciplines*, Article VI:5 of the GATS requires that WTO Member States, including the U.S., act consistently with Article VI:4 with respect to the sectors for which they have undertaken specific commitments. In light of the condition included in subsection a(ii), however, it probably is very unlikely that this provision would be invoked. Article VI:5 provides:

> 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 subparagraphs 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.

51. *See Decision on Professional Services, Annexed to the Agreement Creating the WTO*, 33 I.L.M. 1259 (1994) *available at* http://www.wto.org/english/tratop_e/serv_e/20-prof_e.htm (last visited Dec. 12, 2003).

In accordance with this "Decision," the WTO Council for Trade in Services issued its own "Decision" that created the Working Party on Professional Services and directed it to begin its work by looking at disciplines for the Accountancy Sector.[52] Three years later, in December 1998, the Council for Trade in Services issued a "Decision" adopting the ***Accountancy Disciplines*** prepared by the Working Party on Professional Services.[53]

Thus, GATS Article VI:4 is the basis for the ***Accountancy Disciplines*** document and for the WTO's ongoing efforts to develop Disciplines that might apply to the legal profession.

B. DEFINING ARTICLE VI:4'S MEASURES IN THE NEGATIVE – THEY ARE MEASURES THAT ARE NOT ALREADY COVERED BY THE "MARKET ACCESS," "NATIONAL TREATMENT" OR OTHER PROVISIONS IN THE GATS

Most WTO Member States probably have provisions or measures that regulate the lawyers in their country. Some regulations may apply only to the country's own domestically-trained lawyers, some regulations may apply only to "foreign" lawyers (e.g., a foreign legal consultant rule) and some regulations may apply equally to both domestically-trained and foreign-trained lawyers. All of these lawyer regulations might be characterized as "domestic regulations" in the sense that they are "regulations" and they were passed "domestically" by the WTO Member State. Thus, looked at from one perspective, EVERY regulation that a country applies to a lawyer is a "domestic regulation."

It is critical to realize, however, that Article VI:4 does not apply all legal services "domestic regulation" measures, if that term is defined broadly. In other words, not *every* lawyer regulation should be considered to be the type of "domestic regulation" that would be subject to ***Disciplines*** developed pursuant to GATS Article VI:4.

Article VI:4, by its terms, applies only to "*qualification requirements and procedures, technical standards and licensing requirements.*" Furthermore, the weight of authority seems to suggest that these kind of GATS Article VI:4 measures should be defined by using a multi-step process. The first step is to define Article VI:4 measures in the negative. Under this interpretation, Article VI:4 "domestic regulations" would consist of only those *qualification requirements and procedures, technical standards and licensing requirements* that are neither "market access" nor "national treatment" measures nor covered by any other provision in the GATS.

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52. *See* WTO Council for Trade in Services, *Decision on Professional Services Adopted 1 March, 1995*, S/L/3 (4 April 1995). This document is available at http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm (last visited Dec. 12, 2003).

53. *See 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). This document is available at http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm (last visited Dec. 12, 2003)

This interpretation of the measures subject to Article VI:4 is supported by recent statements of the Chair of the WTO Working Party on Domestic Regulation. In October and December 2002, for example, the Chairman of the WTO Working Party on Domestic Regulation encouraged WTO Member States to employ four questions when deciding whether a particular measure would be subject to Disciplines. He stated:

> *The three questions Members had agreed to [ask] when looking at each measure individually were:*
> *(a) Is the measure already covered by Articles XVI and/or XVII?*
> *(b) If not, is it addressed by any other provisions of the Agreement (e.g., Articles II, III, VIII, IX)?*
> *(c) If not, does it fall clearly within the scope of Article VI, in particular VI:4 (licensing requirements, qualification requirements, technical standards, licensing procedures and qualification procedures)?*
> *While already implicitly mentioned in his previous Notes, the Chairperson suggested that the Working Party add the following question to the above examination:*
> *(d) If so, is the measure adequately addressed by the relevant provisions of the Accountancy Disciplines, or are modifications required?*[54]

The minutes of the July 2003 meeting confirmed that these four questions were the proper questions to ask when determining what measures are subject to Article VI:4 ***Disciplines***.[55] This interpretation – that Article VI:4 measures subject to ***Disciplines*** are those qualification and licensing measures that are neither "market access" nor "national treatment" measure – is supported by a number of experts on the GATS, including the former Chairperson of the previous Working Party on Professional Services.[56]

A review of the minutes of the WTO Working Party on Domestic Regulation, however, indicates that not all WTO Member States have shared this view at all times. For example, the minutes from June 2001 reveal a disagreement about precisely this point. Although some WTO Member States indicated that domestic regulation measures are those measures that are neither "market access" nor

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54. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 22 October 2002, Note by the Secretariat*, S/WPDR/M/18 (3 December 2002) at ¶ 8; *accord* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 4 December 2002, Note by the Secretariat*, S/WPDR/M/19 (29 January 2003) at ¶ 11.

55. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 1 July 2003, Note by the Secretariat*, S/WPDR/M/22 (22 Sept. 2003) at ¶ 71. These minutes were the most recently available minutes at the time this article was written.

56. *See "Discussion of matters relating to Articles XVI and XVII of the GATS in connection with the Disciplines on Domestic Regulation in the Accountancy Sector,"* annexed to S/WPPS/W/4, dated 10 December 1998 at p.9. This Informal Note by the Chairperson states: "It was observed that the new disciplines developed under Article VI:4 [the Accountancy Disciplines] must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty.")

"national treatment" measures, not all WTO Member States agreed with this point.[57] According to the Secretariat's summary of the discussion:

> *Some delegations said there should be no overlap between domestic regulatory measures under Article VI and measures under Articles XVI and XVII, and that there was a need to differentiate between these measures. Another delegation said there was no evidence in GATS for this interpretation, and that they believed scheduled measures should also be subject to VI:4 disciplines. A third delegation said there appeared to a certain overlap between Article VI and XVI/XVII measures, e.g. in the case of limits on the number of licenses granted. Another Member said they were examining the question of overlap. One delegation noted that it would be difficult to imagine that Article VI:5 would be applicable to measures scheduled under Articles XVI and XVII, and stated it was critical that the Working Party reach a consensus on these issues.*

By August 2001, the Secretariat had added several additional paragraphs to a document it had prepared that summarized the discussions to date. The last paragraph of the section on the "Relationship between GATS Article VI:4 and Articles XVI/XVII" indicated a growing consensus that Article VI:4 measures should be defined in the negative:

> *The Secretariat observed that the issues were being clarified as the discussion continued. Licensing systems could be composed of both Articles XVI and XVII and Article VI:4 measures. There was no overlap. In the GATS context, there needed to be distinction between a licensing system and its various components, in terms of their different requirements and different measures. Article VI:4 was not designed to handle measures scheduled under Articles XVI and XVII.*[58]

Although the prior paragraph suggests movement toward a consensus, subsequent minutes of the WTO Working Party on Domestic Regulation suggest that this dispute may not have been entirely ended. In December 2002, the WPDR Chair noted:

> *the re-emergence of an old discussion in the Working Party, i.e. the distinction between Article VI:4 measures and those under Articles XVI and XVII. Many delegations had made the point in the WPDR that the drafters of the GATS had very clearly visualized explicit definitions of the market access and national treatment measures that Members could impose, he stated. A separate distinction was made for all the other non-discriminatory, typically non-quantitative barriers that affected the*

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57. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 11 May 2001, Note by the Secretariat*, S/WPDR/M/11 (7 June 2001) at p. 9, ¶ 3 of the attached "Informal Summary of Discussions on the Checklist of Issues for WPDR."

58. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 3 July 2001, Note by the Secretariat*, S/WPDR/M/11 (16 August 2001) at p. 13, ¶ 3 of the attached "Informal Summary of Discussions on the Checklist of Issues for WPDR."

conditions of entry or operation of service suppliers.[59]

Despite the presence of some disagreement that is reflected in these minutes of the Working Party on Domestic Regulation, I have proceeded on the assumption that the four questions posed by the WPDR Chair reflect the current consensus among WTO Member States on the relationship between Article VI:4 on the one hand and Articles XVI and XVII on the other hand. Therefore, when trying to decide what legal services measures would be subject to any Disciplines, one should begin by defining them in the negative. Article VI:4 measures that might be the subject of **Disciplines** are those measures that are neither "market access" nor "national treatment" measures, nor subject to any other provision in the GATS, on the other hand.[60]

C. Defining Article VI:4 Measures in the Affirmative - They Are "Qualification Requirements and Procedures, Technical Standards And Licensing Requirements"

The direction in GATS Article VI:4 to develop "any necessary Disciplines" applies with respect to "qualification requirements and procedures, technical standards and licensing requirements" that create unnecessary barriers to trade. Therefore, in order to answer the seemingly simple question of "to what would the ***Accountancy Disciplines*** apply?" one must understand the meaning of the terms "qualification requirements and procedures, technical standards and licensing requirements."

The meaning of these terms, however, is not universally understood within the legal profession. For example, members of the IBA's WTO Working Group initially disagreed about the meaning of these terms.[61] The Discussion Paper prepared for the May 30, 2003 *IBA WTO/GATS Forum* observed that:

> there is no clear understanding or consensus in the world about the meaning of the terms "'licensing'" and "'qualification.'" To state it differently, for lawyers who are not trade law experts, the terms "licensing" and "qualification" do not necessarily have the meanings used in the WTO. Moreover, to non trade-law lawyers, the terms "'licensing'" and "'qualification'" mean different things in different jurisdictions in the area of legal services. In some jurisdictions, "'qualification'" means "'the route to access to the full local title of lawyer'" and "'licensing'" means "'the route to access to something less than the full local title of lawyer'". It is believed that, in some jurisdictions, exactly the opposite meanings to the two words apply. Furthermore, the IBA resolutions do not distinguish between "qualification" and "licensing," as do the GATS and the Accountancy Disciplines.

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59. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 4 December 2002, Note by the Secretariat*, S/WPDR/M/19 (29 January 2003) at p. 3, ¶ 16.

60. As the four questions summarized by the Chair suggest, one must also make sure that the provision in question is not covered by other provisions in the GATS. I recognize that this step must be undertaken, but have concentrated in this paper on Step 1 (item a in the Chair's list.) *See supra* note 54.

61. I am one of the members of this Working Group and engaged in vigorous debates with another Working Group member, Jonathan Goldsmith, about the meaning of these terms.

Because the terms "licensing" and "qualification" are not universally understood within the legal profession, the original *IBA WTO/GATS Forum* Discussion Paper suggested that a definition of these terms be added to any Disciplines applicable to the legal profession.[62]

Although the *IBA WTO/GATS Forum* Discussion Paper originally offered a different definition,[63] the IBA WTO Working Group ultimately recommended adoption of the definitions of these terms that had been used within the WTO. The WTO has never officially defined the terms "qualification requirements and procedures, technical standards and licensing requirements" that appear in GATS Article VI:4. Nevertheless, the WTO Secretariat has issued an influential paper that defined these terms. These definitions state:

> *Qualification requirements: these comprise substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a licence. They normally relate to matters such as education, examination requirements, practical training, experience or language requirements.*
>
> *Qualification procedures: these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers inter alia where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (e.g. distance learning), alternative routes to gain a qualification (e.g. through equivalences) and organizing of qualifying examinations, etc.*
>
> *Licensing requirements: these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service. They*

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62. *See Materials Distributed at the IBA WTO/GAT Forum, May 30, 2003*, Item 3, IBA WTO Working Group Discussion paper at p. 26 (on file with author).

63. The IBA WTO Working Group originally recommended that the following underlined language be added to Article IV(8) of the Accountancy Disciplines before they were extended to lawyers:

'In this and subsequent articles where the words 'qualification' and 'licensing' appear, they shall have the following meanings: 'qualification' shall mean the substantive requirements that a lawyer is required to fulfill to obtain a certification or license, such as education, examination requirements, practice training and experience or language requirements. Licensing requirements are those substantive requirements, other than qualification requirements, with which a lawyer must comply in order to obtain formal permission to supply legal services. Thus, a WTO Member State may have both qualification and licensing requirements and procedures for "full licensing" systems, which grant access to the full local title of lawyer and in "limited licensing" systems, should they exist, which grant access to something less than the full local title of lawyer, and for requirements (if any) that address temporary services provided under home title.'

See id. at p. 26.

include measures such as residency requirements, fees, establishment requirements, registration requirements, etc.

Licensing procedures: these are administrative procedures relating to the submission and processing of an application for a licence, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the application for a license.

Technical standards: these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor.[64]

The definitions listed above are used widely within the WTO and trade-law communities. Moreover, it is my view that, from a lawyer regulatory perspective, these definitions are acceptable. Although it may on occasion prove difficult to determine which definition best fits a particular provision, these definitions appear workable and no more likely to create confusion or ambiguity than other definitions. They also seem preferable to the definitions originally offered by members of the IBA WTO Working Group, in which distinctions were drawn between the terms "qualification" and "licensing" depending on whether the lawyer received a full license, such as the title "attorney at law" in the U.S., or a limited license, such as the titled "registered foreign legal consultant." Therefore, I recommend that when those in the lawyer regulatory community think about which legal services provisions would be subject to Article VI:4 Disciplines, they use the definitions listed above to define the terms "qualification requirements and procedures, technical standards and licensing requirements."

D. Identifying When Measures Are Covered by the Market Access or National Treatment Provisions and Thus Could Not be the Subject of and Article VI:4 *Disciplines*

As the discussion above noted, in order to determine whether a particular legal services provision would be subject to any *Disciplines* that are developed, one must begin by asking whether the legal services provision could be considered to be a "market access" or "national treatment" provision or covered by other aspects of the GATS. If so, then the legal services measure would NOT be subject

64. *See 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) at ¶ 4. This document is available, among other places, at http://www.personal.psu.edu/faculty/l/s/lst3/secretariat%20papers%20re%20accountancy.htm (last visited Dec 12, 2003). These definitions were repeated in the Secretariat's Paper Article VI:4 of the GATS: *Disciplines on Domestic Regulation Applicable to all Services, Note by the Secretariat*, S/C/W/ 96 (1 March 1999) at ¶ 4. Among other places, this document is available at http://www.personal.psu.edu/faculty/l/s/lst3/selected%20secretariat%20papers.htm (last visited Dec. 12, 2003).

to any *Disciplines*. Therefore, in order to answer the seemingly simple question of "to what lawyer rules would the Disciplines apply?" one must understand the meaning of the terms "market access" and "national treatment." Accordingly, a further examination of the "market access" and "national treatment" provisions in the GATS is now in order.

1. GATS Article XVI – Market Access

Article XVI of the GATS, which is the market access provision, is an important provision both in its own right and because it is implicated when determining what provisions could be subject to *Disciplines* developed pursuant to GATS Article VI:4. It states:

Article XVI

Market Access

1. 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.[65]

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[66]

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly relat-

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65. The following footnote appears in the GATS at this location: "If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory."

66. The following footnote appears in the GATS at this location: "Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services."

ed to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.[67]

The language of Article XVI thus requires WTO Member States to take certain action, on the one hand, and prohibits WTO Member States from other action, on the other hand. Article XVI:1 requires Member States to honor, for all WTO Member States, those obligations that the country included in its *Schedule of Specific Commitments.*[68] Article XVI:2, on the other hand, prohibits certain actions. It identifies certain types of provisions or measures that are prohibited with respect to those service sectors included on a country's *Schedule of Specific Commitments.*

There is an important exception in Article XVI, however. A WTO Member State is permitted to have the type of restriction that is otherwise prohibited by Article XVI:2, provided that the otherwise offending measure was listed in the WTO Member State's *Schedule of Specific Commitments.* This exception is authorized by the language in Article XVI:2 that states: "*unless otherwise specified in its Schedule. . . .*" In other words, if a country (properly) listed a particular legal services measure in its *Schedule of Specific Commitments*, then the country is permitted to retain that measure, even though the legal services measure is the kind of "market access" measure that otherwise would be prohibited by Article XVI:2. Because of this exception in the GATS, one would not know whether a legal services "market access" measure contravened GATS Article XVI:2 unless one also checked the WTO Member State's *Schedule of Specific Commitments.*

There are some lawyer regulatory provisions that are easy to recognize as "market access" provisions. For example, even a non-trade law expert might recognize as a market access provision a rule that places restrictions on the employment of foreign lawyers by locally established foreign firms. It is certainly possible, however, that trade law experts would view some legal services measures as "market access" provisions, even though this label might not be immediately apparent to the non-trade law expert. The subsections that seem most likely to be implicated are:

- Article XVI:2(a): *limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service*

67. *See* GATS, *supra* note 2, at art. XVII.

68. For background information about *Schedules of Specific Commitments*, including information on how to read a Schedule, *see* Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 7, at pp. 1004-1012.

suppliers or the requirements of an economic needs test;

- Article XVI:2(e): *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;* and
- Article XVI:2(f): *limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.*

My conversations with trade law experts have convinced me that they are more likely than I am to view legal services measures as "market access" provisions. Accordingly, non-trade lawyers probably would be well-advised to consult with trade experts when considering whether to view a lawyer regulatory measure as a market access measure that is included within the list of measures in Article XVI:2. Thus, dialogue between the lawyer regulatory and trade law communities might help each of them better understand when a particular lawyer regulatory provision should be considered to be a "market access" provision.

2. National Treatment

Unlike the GATS' "market access" provision, cited above, the "national treatment" provision in Article XVII does not provide a specific list of prohibited actions. Instead, it simply states:

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.*[69]
>
> *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.*

As difficult as it is to know exactly how to apply the "market access" provision in the GATS to legal services, it is probably even more difficult to know how to apply the "national treatment" provision in Article XVII. This is because Article XVII prohibits both "formally identical" and "formally different" treat-

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69. The following footnote appears in the GATS at this location: "Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."

ment of foreign and domestic lawyers whenever the regulations modify the "conditions of competition in favour of services or services suppliers [of the Home State.]" Footnote 10 to the GATS adds an explanatory statement when it says:

> *Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.*[70]

Despite this explanatory footnote, I suspect that reasonable minds might sometimes differ about whether a lawyer regulatory measure constitutes an Article XVII "national treatment" measure. Although many lawyers probably could reach consensus about whether a legal services measure, on its face, constitutes *de jure* discrimination and treats foreign lawyers differently, it may be difficult to reach a consensus on whether a particular measure that appears to be neutral on its face constitutes *de facto* discrimination and alters the "conditions of competition" for the foreign lawyer. The jurisprudence of the U.S. Constitution Equal Protection Clause demonstrates the difficulties that courts have had, even within a single legal culture, to determine what constitutes *de facto* discrimination.

Finally, it is important to realize that that the GATS allows a country to "opt out" of the "national treatment" obligations in Article XVII, just as it allowed a country to "opt out" of the "market access" provisions in Article XVI. A country may limit its "national treatment" obligations, provided that any limitations are listed on the WTO Member State's ***Schedule of Specific Commitments***. This is because of the language in Article XVII:1 that states that Members must accord national treatment in the sectors inscribed in their ***Schedules,*** *"subject to any conditions and qualifications set out therein"*.

One of the most important points to understand about the GATS is that the effect of all of its provisions, taken together, is to PERMIT certain types of discriminatory treatment by a country towards foreign lawyers provided that the discrimination is disclosed. The GATS does not *prohibit* discrimination against foreign lawyers, but it *does* require that any such discrimination be "transparent," that is, that it be acknowledged by the WTO Member State and brought out into the open.

The method by which discriminatory treatment and other barriers against foreign lawyers are made "transparent" is through a document each WTO Member State files called its ***Schedule of Specific Commitments.***[71]

These ***Schedules*** are very difficult to read for non-experts, however. If a country lists a service sector in the first column of its ***Schedule***, it must thereafter comply with the "market access" and "national treatment" obligations for that ser-

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70. *See* GATS, *supra* note 2, at Article XVII, n. 10.

71. *See* GATS, *supra* note 2, at Article XVI:2 (*"unless otherwise specified in its Schedule..."*) and Article XVII:1 (*"In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein."*

vice sector, except as otherwise noted in its ***Schedule***.[72] ***The Schedule*** is made even more difficult to read, however, because the "market access" and "national treatment" exceptions are "scheduled" or listed according to four "Modes of Supply." These "Modes of Supply" are discussed in the IBA GATS Handbook and deal with the method by which the [legal] service reached the consumer. For example, in Mode 1, the service itself crosses the border, such as by fax. In Mode 4, the service-provider or lawyer crosses the border.[73]

For each of the four modes of supply, WTO Members are permitted to write "unbound" in the "market access" or "national treatment" columns. The term "unbound" means that no commitments are being undertaken for that mode. In other words, if a WTO Member State writes "unbound" in its *Schedule*, that means that the WTO Member retains full flexibility to introduce any measures that might limit market access or national treatment in that mode, *i.e.*, to act in a discriminatory fashion towards foreign lawyers.[74]

As this discussion shows, the GATS permits certain types of discriminatory treatment provided that such discrimination is disclosed or that no commitment is made for that particular service "sector." Regardless of what country chooses to do on its own *Schedule*, however, it is clear that *IF* a legal services regulatory measure can be described as covered by the "market access" or "national treatment" provision, then that legal services regulation will not be covered by any

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72. A WTO Member State is only subject to the market access and national treatment provisions for those service sectors that are listed on the Member's *Schedule of Specific Commitments*. These service sectors are listed in the first column of the Member's *Schedule*. The Member can limit the extent of market access it grants to foreigners by "scheduling" or listing these restrictions in the market access (Article XVI) column of its *Schedule of Specific Commitments*.). The market access column is the second column on the *Schedule*. It should be noted that market access restrictions can be either discriminatory (applying only to foreigners) or non-discriminatory (applying to both foreigners and nationals). Restrictions on national treatment (*i.e.*, measures which discriminate against foreigners) also can be "scheduled" or excepted by listing them under the national treatment (Article XVII) column, which is the third column on a Schedule. Read together, these two columns provide foreign suppliers (*i.e.* foreign lawyers and law firms) with information on the extent of access they will have to a market, such as the U.S. legal services market, and any special conditions that apply only to them as foreign suppliers.

Measures that are restrictions on both market access (Article XVI) and national treatment (Article XVII) need only be scheduled under the market access column. *See* GATS, *supra* note 2, at Article 20:2 ("Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well"). Unfortunately for novices, the WTO website "*Guide to reading a "Schedule"* does not mention this. *See [WTO] Guide to Reading the GATS Schedule of Specific Commitments and the List of Article II (MFN) Exemptions, available at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Dec. 12, 2003).

73. *See* IBA GATS Handbook, *supra* note 10, at pp. 23-25.

74. For example, a WTO Member can choose to place limits on market access and/or national treatment for mode 3 (commercial presence) while scheduling no restrictions for market access and/or national treatment on mode 1 (cross-border supply) and making no commitment at all ("Unbound") on market access and/or national treatment for mode 4 (movement of natural persons).

Disciplines developed pursuant to GATS Article VI:4.

3. Other Measures That Might Preclude Coverage in any *Disciplines*

In addition to excluding "market access" and "national treatment" measures, the Chair of the Working Party on Domestic Regulation has stated that a legal services measure would be excluded from GATS Article VI:4 ***Disciplines*** if it is addressed by other provisions of the GATS.[75] The other provisions in the GATS that have been explicitly noted are Articles II (Most-Favored Nation Treatment); III (Transparency); VII (Recognition) and IX (Business Practices.)[76] Although one clearly must engage in this part of the analysis, WTO Member States have tended to concentrate on issues related to the distinction between market access and national treatment on the one hand and ArticleVI:4 measures on the other hand. Accordingly, because it would make this article unmanageable to focus on all other provisions of the GATS and because Member States have focused on market access and national treatment, I have omitted the detailed analysis that would be required for this step in the reasoning process. If, however, a legal services provision were addressed by another GATS provision, then it would not be subject to Article VI:4 *Disciplines*.

E. WTO Efforts to Develop "Examples" of Domestic Regulation Measures

One might have expected that it would be easy for the trade law community, if not the lawyer regulatory community, to recognize when a particular measure, such as a legal services measure, is a "market access" or "national treatment" measure and thus not subject to Article VI:4 *Disciplines*. This turns out not to be the case, however. Even within the trade law community, experts have difficulty agreeing on the labels that should be attached to a particular measure.

Part of the difficulty, of course, lies in the fact that it is difficult to determine, in the abstract, whether a measure is discriminatory and violates the "market access" or "national treatment" provisions. It may be especially difficult to know whether "*formally identical treatment modifies the conditions of competition in favor of service suppliers of the Member*" without knowing the specific facts of the regulation in question, the country in question, the effects on the non-native service supplier and other fact-specific and context-specific information.

Thus, even for trade law experts, it may not be completely easy or straightforward to identify those legal services measures that would be subject to GATS Article VI:4 Disciplines. A review of the minutes of the WTO Working Party on Domestic Regulation reveals that WTO Member States have spent significant amounts of time discussing precisely the question of which measures would be subject to ***Disciplines***. For example, the minutes of the meeting of October 2,

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75. *See, e.g., See* Working Party on Domestic Regulation – *Report on the Meeting Held on 1 July 2003 - Note by the Secretariat*, S/WPDR/M/22 (22 Sept. 2003) at ¶ 71.

76. *See id.*

2000 meeting attach, for the first time, a ***"Summary of the Informal Discussion on the Checklist of Issues for WPDR."*** [77] Item 1 on this summary indicated that:

> *Members agreed to have the Secretariat list examples of the kinds of measures that would be addressed by disciplines under GATS Article VI:4, based on contributions by Members and a review of the Working Party on Professional Services accountancy materials by the Secretariat. The Chairman noted that the elaboration of this list would not preclude parallel discussions among Members on the same issue.*[78]

Acting upon the instructions received at this meeting, the WTO Secretariat presented an "Examples" paper at the May 11, 2001 meeting of the Working Party on Domestic Regulation.[79] The minutes of this meeting indicate that "[m]any delegations supported the *Examples* paper, but said it needed to be expanded and the examples made more precise."[80] During their October 2, 2001 meeting, Members continued their discussion of the "Examples" paper, but the WPDR Chairperson urged them to consider the issues further before asking the Secretariat to revise the Examples paper.[81] WTO Member States continued to debate the issue of what constitutes measures subject to ***Disciplines*** during their meeting in November 2001.[82] In June 2002, the WTO Member States discussed the issue further, focus-

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77. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 2 October 2000, Note by the Secretariat*, S/WPDR/M/8 (17 Nov. 2000).

78. *See id.* at p. 4.

79. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 11 May 2001, Note by the Secretariat*, S/WPDR/M/11 (7 June 2001).

80. *See id.* at p. 12, ¶ 1 of the attached "Informal Summary of Discussions on the Checklist of Issues for WPDR.".

81. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 2 October 2001, Note by the Secretariat*, S/WPDR/M/13 (21 November 2001) at p. 8, ¶ 1 of the attached "Informal Summary of Discussions on the Checklist of Issues for WPDR." Unfortunately, the October 2001 Minutes are the last minutes that contain as an appendix the "Informal Summary of Discussions on the Checklist of Issues for WPDR." During the March 2002 meeting, the Chairman of the Working Party on Domestic Regulation noted that in accordance with a request made during the November 2001 meeting, the "Informal Summary of Discussions on the Checklist of Issues for WPDR" would not be attached to the minutes, but would be circulated separately as a "Job." *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 12 March 2002, Note by the Secretariat*, S/WPDR/M/15 (10 April 2002) at p. 1, ¶ 3. The consequence of this action is that the "Informal Summary" is no longer publicly available since WPDR Minutes are public documents, but "Jobs" are non-public documents. *See* Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 7, at n. 154 (citing an E-mail from John Dickson to Laurel S. Terry, (June 26, 2001) that stated 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.) The issue of "derestriction" of informal documents was considered in October 2002, but no action was taken. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 16 July 2002, Note by the Secretariat*, S/WPDR/M/17 (1 October 2002) at p. 4, ¶ 21.

82. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 29 November 2001, Note by the Secretariat*, S/WPDR/M/14 (29 January 2002) at pp. 1-2.

ing on, among other things, additional examples that had been submitted by Thailand.[83] During the July 2002 meeting, WTO Member States discussed the revised version of the "Examples" paper that the Secretariat had circulated after the prior meeting.[84] The "Examples" paper was again revised and circulated in connection with the October 2002 meeting.[85] This second revision included an additional annex, which consisted of a summary of the discussions. A third revision of the "Examples" paper was issued on December 2, 2002.[86] At the time this article was written, WTO Member States had considered the seventh revision of this "Examples" paper.[87]

Although these "Examples" papers have not yet been made publicly available by the WTO,[88] some of the recent minutes of the Working Party on Domestic Regulation suggest vigorous discussion about the types of measures that should be considered to be "domestic regulation" measures subject to Article VI:4. Japan, for example, submitted an informal paper (and thus not publicly available). According to the Minutes of the meeting:

> *The paper highlighted two issues regarding the factual analysis of existing GATS disciplines. The first was a factual analysis of the relationship between the existing disciplines or obligations under the GATS, and the types of measures, laws or regulations to which such disciplines or obligations applied. A diagram on the third page of the paper illustrated the relationship. Japan's preliminary observations were contained in sub-paragraph (c) of para 1 of the paper, and showed how some disciplines and obligations applied across the board, and how others only applied to sectors where specific commitments had been made. Although such observations were already known, Japan believed a structured analysis was useful. The second part of Japan's paper highlighted the relationship between any future disciplines and measures falling under GATS exceptions provisions. The delegation stressed that*

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83. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 4 and 7 June 2002, Note by the Secretariat*, S/WPDR/M/16 (8 July 2002) at p. 6, ¶¶ 41-45.

84 *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 16 July 2002, Note by the Secretariat*, S/WPDR/M/17 (1 October 2002) at p. 3, ¶¶ 4-8. The revised Examples paper is "(Examples of Measures to be Addressed by Disciplines under GATS Article VI:4, JOB(02)/20/Rev.1, also dated 12 July 2002). *See id.* at ¶ 2.

85. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 22 October 2002, Note by the Secretariat*, S/WPDR/M/18 (3 December 2002) at p. 1, ¶5. The revised Examples paper is "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", JOB(02)/20/Rev.2 dated 18 October 2002. *See id.* at ¶ 5.

86. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 4 December 2002, Note by the Secretariat*, S/WPDR/M/19 (29 January 2003) at pp 1-2, ¶ 7. The revised Examples paper is "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", JOB(02)/20/Rev.3 dated 3 December 2002. *See id.* at ¶ 7.

87. *See 2003 Annual Report of the Working Party on Domestic Regulation, supra* note 6.

88. *See supra* note 8.

disciplines under Article VI:4 should not prevent measures under the exceptions provisions. The paper contained Japan's preliminary observations, and they wished to hear the views of other Members.[89]

Several months later, China also submitted a paper.[90] The Working Party on Domestic Regulation also has recently considered papers submitted by the European Union and Singapore and a revised paper by Japan.[91] Thus, there continues to be a wealth of discussion on these issues in the Working Party on Domestic Regulation.

In my view, these minutes of the Working Party on Domestic Regulation support the conclusions that:

1) even when there is agreement on the governing principles, it is not necessarily easy to apply those principles in order to determine what types of measures constitute Article VI:4 measures subject to Disciplines; and

2) the WTO Secretariat has produced several documents that summarize the discussions of WTO Member States that would be useful to have publicly available as the world's legal professions perform their domestic consultations about the suitability of using the Accountancy Disciplines.

F. The Need For a Legal Services-Specific "Examples" Paper

As the above discussion shows, those in the lawyer regulatory community, myself included, clearly need assistance and guidance in determining which legal services regulatory measures would be subject to Article VI:4 *Disciplines*. What may be less obvious from that discussion, however, is that those in the trade law community could use information and guidance to understand what kinds of lawyer regulatory measures exist. Both as a general matter and in the course of preparing this paper, I have had numerous conversations with trade law experts who are not familiar with lawyer regulatory measures. Some of those with whom I have spoken are not lawyers and some of the lawyers with whom I have spoken are not from the legal tradition as I am. As a result of my conversations, I became convinced that: 1) some trade law experts were not particularly familiar with lawyer regulatory issues; and 2) many thought it would be helpful to know more about the different types of legal services regulations. As a result, these conversa-

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89. *See* WTO Working Party on Domestic Regulation, *Report on the Meeting Held on 4 December 2002, Note by the Secretariat*, S/WPDR/M/19 (29 January 2003) at p.3, ¶ 12. This paper was JOB(03)45.

90. *See id.* at p.2, ¶ 10. This paper, like Japan's paper, was an informal paper and is not publicly available. Its citation is JOB (02)/203 dates 2 December 2002. *See id.*

91. *See, e.g.*, Working Party on Domestic Regulation – *Report on the Meeting Held on 1 July 2003 - Note by the Secretariat*, S/WPDR/M/22 (22 Sept. 2003) at ¶¶ 25-28 (discussing Singapore's paper JOB(03)/1113 11 June 2003); ¶¶ 49-66 (discussing the European Community's paper, *Communication From The European Community And Its Member States, Proposal For Disciplines On Licensing Procedures*, S/WPDR/W/25 (10 July 2003)) and ¶¶ 68-73 (discussing the Chinese Taipei paper entitled *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4)*. At this meeting, the WPDR members also discussed a revised version of Japan's paper, JOB(03)45/Rev.1 (30 April 2003). *See id.* at ¶¶ 17-31.

tions convinced me that those in the lawyer regulatory community can serve as useful a role for the trade law experts as the trade law experts can serve for the lawyer regulatory community.

Accordingly, Annex 1 to this article provides specific examples of lawyer regulatory measures. These examples are drawn from several jurisdictions and can provide the basis for a dialogue among all interested persons in an effort to develop a better understanding about which legal services measures would be subject to any resulting *Disciplines.*

IV. Conclusion

In sum, the question posed by this article is—in fact—quite a difficult. It turns out that it is not very easy to respond to the seemingly simple question that asks: "which U.S. legal services provisions would be governed by any new WTO *Disciplines*?" Despite the difficulty of answering this seemingly simple question, I continue to believe that it is important for all lawyers, but especially those in the lawyer regulatory community, to consider the suitability of applying the *WTO's Accountancy Disciplines* to lawyers. It is quite possible that the WTO developments referred to in this paper will turn out to be a tempest in a teapot and not affect in the least U.S. regulation of lawyers. It is a much safer course of action, however, for lawyers to monitor these developments and contribute to the emerging discussion, debate and policy.

My one-sentence response to the question posed by this article is that I recommend that lawyers use the methodology developed in the WTO when thinking about whether a particular legal services measure would be subject to any GATS Article VI:4 *Disciplines.* This multi-step methodology requires one to first determine whether a particular measure is excluded from coverage by the *Disciplines.* Only after this analysis has been done should one determine whether the legal services measure is included among the measures that are subject to Article VI:4 *Disciplines.*

Using this methodology, one would first consider whether the legal services measure in question is a "market access" or "national treatment" measure. If so, the legal service provision would not be subject to any GATS *Disciplines.* A legal services measure is a "market access" provision if it can be characterized as the type of measure set forth in GATS Article XVI:2. Thus, a legal services measure would NOT be subject to *Disciplines* if it involves, among other things:

- *limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;*
- *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; or*
- *limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.*

In addition, a legal services measure would not be subject to *Disciplines* if

that legal services measure treats foreign lawyers less favorably than the WTO Member State treats its own lawyers. A measure that treats foreign lawyers less favorably is governed by the *National Treatment* provision of the GATS; such legal services measures would not subject to *Disciplines*. Both *formally identical treatment* and *formally different treatment* can be considered less favorable if the treatment *modifies the conditions of competition in favor of domestic, U.S. lawyers*. Finally, one must ask if the legal services measure is subject to any other provision of the GATS. If so, the legal services measure will NOT be subject to Article VI:4 *Disciplines*.

Having completed this first step of the analysis and determined whether the legal services measure in question is excluded from scope of the *Disciplines*, one may then consider whether the particular legal services measure in question is included among the types of measures that would be subject to any *Disciplines* developed pursuant to GATS Article VI:4. Thus, *Disciplines* could only apply to legal services measures that can be characterized as *"qualification requirements and procedures, technical standards and licensing requirements."*

As noted above, I recommend that in affirmatively defining these terms, one should use the definitions developed by the WTO Secretariat. These definitions are as follows:

> ***Qualification requirements**: these comprise substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a licence. They normally relate to matters such as education, examination requirements, practical training, experience or language requirements.*
>
> ***Qualification procedures**: these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers inter alia where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (e.g. distance learning), alternative routes to gain a qualification (e.g. through equivalences) and organizing of qualifying examinations, etc.*
>
> ***Licensing requirements**: these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service. They include measures such as residency requirements, fees, establishment requirements, registration requirements, etc.*
>
> ***Licensing procedures**: these are administrative procedures relating to the submission and processing of an application for a licence, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the*

application for a license.

Technical standards: *these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor.*

In conclusion, the question posed by this article is – in fact – quite a difficult question to answer. My short-term goal for this article was not to cover new ground, but to act as a bridge from the trade law community to the lawyer regulatory community so that the lawyer regulatory community can better understand the difficult question of which legal services measures might be subject to *Disciplines*[92]. My long-term goal is to encourage ensuring greater participation and dialogue on these issues by all lawyers.

92. As noted in the text, my goals for this article were *very* modest. I do not purport to be breaking any new ground in this article when analyzing the measures subject to Article VI:4 nor do I purport to review the wealth of existing literature on this topic. *See, e.g.*, Dr. Markus Krajewski, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES – THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY, (Kluwer Law International, 2003); Joel Trachtman, *Lessons for GATS Article VI from SPS, TBT and GATT Treatment of Domestic Regulation*, Paper Presented at the OECD Experts Meeting (2002) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=298760 (last visited Dec. 12, 2003).

Annex: Examples of Legal Services Regulations

The purpose of this article was to respond to the following question: *to what kind of legal services provisions would any WTO Disciplines apply?* As this article has explained, this seemingly simple question is, in fact, quite difficult and requires a multi-part analysis. In order to answer this question, one should begin the analysis by asking whether the legal services measure in question is a "market access" measure. "Market access" measures are set forth in GATS Article XVI:2. If a legal services provision IS determined to be a "market access" provision, then it would NOT be subject to any GATS *Disciplines*.

The second step of the analysis is to ask whether a legal services provision is addressed by the "national treatment" provision in the GATS, which is Article XVII. There are two subparts to this analysis. The first subpart asks whether the legal services measure, on its face, distinguishes between foreign and domestic lawyers in a way that provides less favorable treatment for foreigner lawyers. The second subpart asks whether a legal services provision that is facially neutral nevertheless treats foreign lawyers less favorably because it modifies the conditions of competition in favor of domestic lawyers. If the answer to either of these subpart questions is "Yes," then the legal services provision is subject to the national treatment provision in the GATS (Article XVII). Such a legal services measure would NOT be subject to any *Disciplines* developed pursuant to GATS Article VI:4.

The third step of the analysis is to ask whether a legal services provision is addressed by any other provision of the GATS. Possible GATS provisions that might apply are: Articles II (Most-Favored Nation Treatment)); III (Transparency); VII (Recognition) and IX (Business Practices). If the legal services provision IS governed by another provision of the GATS, then it would NOT be subject to any GATS *Disciplines*.

The final step of the analysis asks whether the legal services measure could be characterized as *"qualification requirements and procedures, technical standards and licensing requirement."* According to the WTO Secretariat's definition, *qualification requirements* include the substantive requirements that a lawyer would have to fulfill in order to be licensed. These requirements normally relate to matters such as education, examination requirements, practical training, experience or language requirements. *Licensing requirements* include substantive requirements, other than qualification requirements, with which a lawyer must comply in order to obtain formal permission to supply a service. They include measures such as residency requirements, fees, establishment requirements, registration requirements, and all other substantive requirements that are not qualification requirements. *Technical standards* include rules of ethics. If the legal services measures falls within these definitions and the answers to the prior questions about market access, national treatment and other GATS provision was "no", then the legal services measure could be subject to any *Disciplines* developed pursuant to Article VI:4.

This Annex includes examples of legal services qualification and licensing rules. My reason for providing an annex of legal services measures is so that experts from the trade law and lawyer regulatory community can have a common and concrete basis for discussion about which legal services measures would be subject to any *Disciplines*. I hope that this Annex can provide the starting point for developing a legal services-specific list of "Examples" that can supplement the "Examples" paper developed in the WTO Working Party on Domestic Regulation.

One analytical weakness of this effort to develop "Legal Services Examples" is that it may be difficult and perhaps impossible to engage in a meaningful dialogue without examining the specific language of specific measures. Ultimately, however, I hope the benefits of such a list outweigh its weaknesses. In my view, lawyers around the world cannot respond thoroughly to the WTO Member States' requests for domestic consultations about whether to recommend adoption of the Accountancy Disciplines unless they have some notion of the types of legal services measures to which such Disciplines might apply. Accordingly, while there may be no final answers, I hope that this list of *Examples* will be a useful tool in generating discussion about these issues.

This Annex contains six columns; these columns correspond to the steps of the analysis described above. The first column identifies a particular type of legal services measure and includes both U.S. and non-U.S. legal services measures. The measures listed in the first column are sub-divided into four groups of measures. The first group of items includes requirements that have been imposed on domestic and foreign lawyers to obtain the qualification from the jurisdiction to practice law. The second group of items includes measures that sometimes are imposed on lawyers in order to retain or maintain their license. The third section identifies measures that have been applied to foreign lawyers seeking a limited type of law license, often referred to as an "FLC or foreign legal consultant license. The fourth section of the chart provides a series of questions that jurisdictions might ask themselves with respect to the procedural aspects of all of their measures. These procedural questions are based on the provisions of the Accountancy Disciplines.

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
I. Possible Admission [Qualification] Requirements					
A. Substantive Requirements					
• Good moral character requirements[1]					
• Attend law school for specific number of years and meet specified education requirements (3 in US)[2]					
• Law school must be accredited by ABA or other entity[3]					
• Must take a bar exam[4]					
• Must take an ethics exam[5]					
• Many topics included on the bar exam[6]					
• Reciprocity recognized[7]					
• Apprenticeship may be required[8]					
• Must attend a bar-administered course after law school[9]					
• Must maintain an office in the state[10]					
Citizenship required[11]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• State residency required[12]					
• For those licensed elsewhere, take into account experience and examination and education[13]					
• Minimum age requirement (e.g., 21 or 26)[14]					
• Provide person/address for service of process[15]					
• Requirements regarding physical-mental health[16]					
• Limits on the number of licenses issued[17]					
• Pay the required application fee[18]					
• Certificates or proof showing compliance with various admission requirements[19]					
• For pro hac vice admission (temporary admission to appear before a court in one case), association of local counsel or introduction to the court[20]					
• For pro hac vice admission (temporary admission to appear before a court in one case), agree to abide by the state [Host] ethics rules[21]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
II. Conditions for Maintaining A Law License					
A. Substantive Requirements – Forms of Association					
• Limits on who you can partner with [only L's from your country][32]					
• Limits on who you can partner with [only L's and not nonlawyers – i.e., no MDPs][33]					
• Limits on the Names under which a firm may operate[34]					
• In what legal form may a lawyer practice? Partnership? Corporation? Limited liability partnership?					
B. Substantive Requirements – Scope of Practice					
• Limits on scope of practice [e.g., only the state where licensed][35]					
C. Substantive Requirements – Ethics and Discipline					
• Lawyers must follow state ethics rules[36]					
• Home State must agree to reciprocal discipline[37]					
• Mandatory Malpractice Insurance required[38]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• Malpractice requirements must take into account other insurance (disciplines)[29]					
• Continuing legal education (CLE) requirements[30]					
D. Substantive Requirements – Registration-Misc.					
• Must pay annual fee[31] (must be reasonable per disciplines)					
• Bar Membership required[32]					
• Mandatory Contributions to Pension Fund[33]					
• Mandatory Contributions to unemployment, illness or disability funds[34]					
Lawyer must agree to submit to personal jurisdiction					
III. LIMITED LICENSE [FLC] REGIMES					
A. Substantive Requirements – Forms of Association					
• Does the lawyer have the ability to employ or be employed by local lawyers?[35]					
Must the FLC practice in association with a local law firm or lawyers?[36]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• Are there limits on who you can partner with [only L's and not non-lawyers – i.e., no MDPs]?[36]					
• Are there requirements that firms be majority-owned by jurisdiction's lawyers?[37]					
• Are there limits on the names under which a firm may operate? (e.g. may they use the firm name used in the Home State?)[38]					
• In what legal form may the FLC practice? LLP? LLC? Partnership? Corporation, etc.?					
B. Substantive Requirements – Scope of Practice					
• Limits on scope of practice [Home, Int'l, 3rd Country, Host?][39]					
• Must provide Host State law under supervision of a Host Lawyer[40]					
• Additional Exceptions (real estate, court, domestic, etc.)[41]					
C. Substantive Requirements – Ethics and Discipline					
• Follow Ethics Rules in Host[42]					
• Subject to discipline in Host State[43]					
• Host notifies Home State of any ethics violations[44]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• Home State must agree to reciprocal discipline[45]					
• Mandatory Malpractice Insurance[46]					
• Malpractice requirements may take into account other insurance in Home State[47]					
D. Substantive Requirements – Registration-Misc.					
• FLC is a member of a recognized legal profession in a foreign country that is subject to effective regulation and discipline by a professional body or public authority[48]					
• Host jurisdiction may require FLC to have a certain number of years of prior practice as a lawyer (and may require different numbers of years for the head lawyer in the FLC office and others) [49]					
•Host State may require the years of prior practice to have taken place in the Home State, rather than in a different location[50]					
• Host State can consider whether its own lawyers have a similar opportunity in the FLC's country[51]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• Application requires translated document attesting to good standing in Home State[52]					
• Good standing certificate by "fresh", e.g., less than 3 months old[53]					
• Requirement that prior practice was IN the Home State[54]					
• Rules requiring originals of Home State documents[55]					
• Rules about acceptable translations of Home State documents[56]					
• Proof of physical or mental health[57]					
• Lawyer must agree to submit to personal jurisdiction[58]					
• May require proof of good moral character, including back-up documentation[59]					
• Membership in the Host State bar[60]					
• Must notify Host State of any disciplinary action or change of status in the Home State[61]					
• Maintain office in the Host Jurisdiction[62]					
• Mandatory Contributions to Pension Fund[63]					

Examples of Legal Services Measures that Might be Subject to GATS Article VI:4 Disciplines	Is this measure a market access provision covered by Article XVI:2 of the GATS?	Does this measure treat foreign and domestic lawyers in a formally different way? If so, is this measure a national treatment provision covered by Article XVII of the GATS?	If this measure treats foreign and domestic lawyers in a formally identical way, is it a national treatment provision covered by Article XVII because it alters the conditions of competition in favor of the domestic lawyer?	Is this measure covered by another provision in the GATS? (e.g., Art. II, III, VI, IX)	Is this legal services measure covered by Article VI:4? (qualification licensing or technical standards)
• Do FLCs get legal privilege?[64]					
• Minimum age requirement (e.g., 26)[65]					
• Provide person/address for service of process, etc.[66]					

IV. Process Issues

The following questions are based on the provisions related to process found in the **Accountancy Disciplines**. It is useful for the legal profession to consider the extent to which these practices are already being undertaken and whether it would be desirable to develop multilateral disciplines requiring them in the context of legal services.

- Are rules setting forth admission requirements and description of regulated activities transparent?
- Are the names and addresses of competent authorities regulating lawyers transparent?
- Is information about who is already licensed transparent?
- Is there an opportunity for comment before adopting rules?
- Are comments considered?
- Are there frequent and regular consideration of applications and tests?
- Does jurisdiction explain the rationale for the substantive requirements and their relationship to legitimate objectives?
- Is the review process, including procedures and time limits, if any, transparent?
- If a candidate fails, do you identify additional qualifications to provide?
- Can one appeal or review decision process?

- Is the number of documents required not burdensome?
- Is there an opportunity to correct minor errors?
- Do the rules explain the rationale for the substantive requirements and their relationship to legitimate objectives?
- Is the authenticity process not too burdensome?
- Is there transparency regarding the review process, including prompt acknowledgement?
- Is there the ability to be informed of the basis for denial?
- Is there an ability to resubmit an application?

Chart Notes

1. *See, e.g*, New York Court of Appeals, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, § 520.12 *available at* http://www.courts.state.ny.us/ctapps/520rules.htm (last visited Dec. 12, 2003).

2. *See id.* at § 520.3(c). The New York Court of Appeals rules would also permit an applicant to qualify to take the bar exam by studying in a law office. See § 520.4.

3. *See id.* at § 520.3(b)(2).

4. *See id.* at § 520.8.

5. *See id.* at § 520.9.

6. *See* New York Board of Bar Examiners, The Bar Exam, *available at* http://www.nybarexam.org/barexam.htm (last visited Dec. 12, 2003)(describing the format and also stating that "The New York portion is based on both procedural and substantive law. It may deal with the six subject matters covered on the Multistate Bar Examination (MBE)—Contracts, Constitutional Law, Criminal Law, Evidence, Real Property, and Torts (including statutory no-fault insurance provisions). In addition, the questions may deal with Business Relationships, Conflict of Laws, New York Constitutional Law, Criminal Procedure, Family Law, Remedies, New York and Federal Civil Jurisdiction and Procedure, Professional Responsibility, Trusts, Wills and Estates including Estate Taxation, and UCC Articles 2, 3, and 9. More than one subject is tested in a single essay question. Except for questions involving federal law, the New York essay and multiple choice questions are based on the law of New York").

7. *See* Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at § 520.10.

8. The Law Society of Upper Canada, for example, requires students to "article" before they may become licensed as a lawyer. The amount of time of such an "apprenticeship" varies by jurisdiction, from several months to several years. For information on the articling rules in the Law Society of Upper Canada, see http://education.lsuc.on.ca/ess/apo/apoHome.jsp and http://education.lsuc.on.ca/Assets/PDF/apo/memFilingReq.pdf (last visited Dec. 12, 2003)

9. The Law Society of Upper Canada, for example, requires students to attend a Bar Admission Course (BAC) before they may become licensed as a lawyer. The amount of time required in such a bar course may vary from several months to more than a year. For information on the Bar Admission Course in the Law Society of Upper Canada, see http://education.lsuc.on.ca/ess/apo/apoHome.jsp

10. *See, e.g.*, New Jersey Supreme Court, Rules of General Application, Rule 1:21-1(a) *available at* http://www.judiciary.state.nj.us/rules/r1-21.htm (last visited Dec. 12, 2003).

11. In 1973, the U.S. Supreme Court ruled that Connecticut's citizenship requirement violated the

U.S.Constitution's Equal Protection clause. *See In Re* Griffiths, 413 U.S. 717 (1973). However, U.S. citizenship is still required to practice before the U.S. Patent and Trademark Office. *See* 37 C.F.R. §10.6(a) summarized at http://www.uspto.gov/go/oed/grb15oct03.pdf (last visited Dec. 12, 2003).

12. No U.S. state currently requires residency. *See* National Conference of Bar Examiners and ABA Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2002, Chart 1 also available athttp://www.abanet.org/legaled/publications/compguide/chart1.pdf (last visited Dec. 12, 2003). Several U.S. states previously had residency requirements, but they have been ruled unconstitutional by the U.S. Supreme Court. *See, e.g.*, New Hampshire v. Piper, 470 U.S. 274 (1985); Frazier v. Heebe, 482 U.S. 641 (1987); Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988); Barnard v. Thorstenn, 489 U.S. 546 (1989).

13. *See, e.g.*, Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at § 520.5 (attorneys licensed in other U.S. states); § 520.6 (applicants who studied in foreign countries); and § 520.10 (recognition or reciprocity provisions).

14. *See id.* at § 520.2(1) (requirement that applicant be over 21) and § 520.10(a)(4)(attorneys whose license from other U.S. states is "recognized" must be over 26)..

15. *See id.* at § 520.13.

16. *See id.* at § 520.12 (requirement of "general fitness").

17. None of the U.S. states has a "quote" per se on the number of law licenses issued. In almost all states, however, most applicants must take a bar exam. Anecdotally, it appears that the bar passage rates for a state often are relatively consistent over the years.

18. *See, e.g.*, Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at § 520.8(d). For additional information about bar examination fees in the U.S., *see* Bar Admission Requirements, *supra* note 1, at Chart XI, *available at* http://www.abanet.org/legaled/publications/compguide/chart11.pdf (last visited Dec. 12, 2003).

19. *See, e.g.*, Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at §§ 520.4(c); 520.4(g); 520.5(b); 520.6(c); 520.10(b)&(c); 520.12(d).

20. *See, e.g.*, Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at § 520.11(c). *See also* COUNCIL DIRECTIVE of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC)[*available at* O.J.L. 78/17 (1977)] at art. 5 (requires the EU lawyer to be introduced to the court.)

21. *See, e.g.*, Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, *supra* note a, at § 520.11(d).

22. *See, e.g.*, American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.4 (2002) (prohibiting partnerships between lawyers and nonlawyers). This rule is available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Dec. 12, 2003). The ABA Ethics Committee, however, has opined that Rule 5.4 does not prohibit partnerships between U.S.-licensed lawyers and foreign, non-U.S. lawyers. See ABA Formal Opinion 01-423 (Sept. 22, 2001).

23. *See, e.g.*, American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.4 (2002) (prohibiting partnerships between lawyers and nonlawyers). This rule is available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Dec. 12, 2003).

24. *See id.* at Rule 7.5.

25. *See id.* at Rule 5.5.

26. *See id.* at Rule 8.5.

27. *See, e.g.*, American Bar Association Commission on Multijurisdictional Practice, Report 201D, recommending amendments to the ABA Model Rules for Disciplinary Enforcement regarding reciprocal discipline, *available at* http://www.abanet org/cpr/mjp/201d.doc (last visited Dec. 12, 2003). The Recommendation was adopted by the ABA in August 2002

28. *See, e.g.*, CCBE Code of Conduct, art. 3.9, *available at* http://www.ccbe.org/doc/En/code_en.pdf (last visited Dec. 12, 2003).

29. *See id.*

30. *See, e.g.*, Joint Order of the Appellate Divisions, New York, Part 1500, Mandatory Continuing

Legal Education Program For Attorneys In The State Of New York, http://www.courts.state.ny.us/mcle.htm (last visited Dec. 12, 2003). For a summary of mandatory continuing legal education requirements in the U.S., see Bar Admission Requirements, *supra* note l, Chart XIII *available at* http://www.abanet.org/legaled/publications/compguide/chart13.pdf (last visited Dec. 12, 2003).

31. *See, e.g.*, Oregon State Bar Act. Oregon Revised Statutes (ORS) 9.191 *available at* http://www.osbar.org/_docs/rulesregs/orsSched9.pdf (last visited Dec. 12, 2003).

32. *See, e.g., id.*

33. This is not required in U.S. states, but is required in some European countries.

34. This is not required in U.S. states, but is required in some European countries.

35. *See, e.g.*, Rules of the [New York] Court of Appeals for the Licensing of Legal Consultants, § 521.4(b)(1) *available at* http://www.courts.state.ny.us/ctapps/521rules.htm (last visited Dec. 12, 2003)[hereinafter New York FLC rules].

36. *See, e.g., id.* at § 521.5(a)(2)(agreeing to be bound by New York's ethics rules, which prohibit partnerships between lawyers and nonlawyers).

37. This is not a requirement in the U.S. Historically, it has been a requirement in some other jurisdictions.

38. *See* New York FLC Rules, *supra* note ii, at § 521.3(g) and § 521.5(a)(2)(agreeing to be bound by New York's ethics rules, which prohibit misleading firm names.)

39. *See* New York FLC Rules, *supra* note ii, at § 521.3.

40. *See, e.g.*, Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J.L. 77/36 (1998) at article 5(3) available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_077/l_07719980314en00360043.pdf (last visited Dec. 12, 2003). (EC Directive 98/5 isn't actually a "foreign legal consultant" provision, but it does provide an example of this type of requirement. (It requires that a lawyer who appears in court works "in conjunction with" a local lawyer); New York FLC Rule, *supra* note ii, at § 521.3(e)(can only render New York advice "on the basis of advice from a person duly qualified [as a New York lawyer].")

41. *See, e.g.*, New York FLC Rule, *supra* note ii, at § 521.3(a-e).

42. *See id.* at § 521.4(a).

43. *See id.* at § 521.5.

44. *See* Agreement Between the American Bar Association and Brussels Bars, article 7(2) *available at* http://www.abanet.org/intlaw/divisions/comparative/aba_brussels.pdf (last visited Dec. 12, 2003).

45. *See, e.g.*, Testimony of the National Organization of Bar Counsel to the U.S. Trade Representative *available at* http://www.abanet.org/cpr/gats/nobc.pdf (last visited Dec. 12, 2003)

46. *See, e.g.*, New York FLC Rules, *supra* note ii, at § 521.5(a)(2)(ii).

47. *See, e.g.*, EC Directive 98/5, *supra* note nn. Although this doesn't address "foreign legal consultants," it provides an example of what such a provision might look like.

48. *See, e.g.*, New York FLC Rules, *supra* note ii, at § 521.1(a)(1).

49. *See, e.g.*, New York FLC Rules, *supra* note ii, at § 521.1(a)(2)(the applicant must have practiced for three of the preceding five years).

50. *Compare id.* at § 521.1(a)(2). When the American Bar Association adopted its Model Rule Respecting Legal Consultants, it noted several U.S. jurisdictions that required the prior practice to have occurred in the Host [foreign] State. *See* 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 (1994) *available at* http://www.abanet.org/intlaw/divisions/comparative/flc_rule.pdf (last visited Dec. 12, 2003).

51. *See, e.g., id.* at § 521.1(b).

52. *See id.* at § 521.2(a).

53. *See, e.g.*, EC Directive 98/5, *supra* note nn, at article 3(2)(requiring a certificate no more than three months old for registration.)

54. *Compare* New York FLC Rule, *supra* note ii, at § 521.1(a)(2), which permits the FLC to have

practice his or her Home State's law in that country or "elsewhere.") Some states, however, might require that the FLC have practiced his or her Home State law while physically located IN the Home State.

55. *See, e.g., id.* at § 521.2(a & b). The rules provide that this provision may be waived in the event of hardship. *See, e.g., id.* at § 521.2(e).

56. *See, e.g., id.* at § 521.2(c).

57. *See, e.g., id.* at § 521.2(d).

58. *See, e.g., id.* at § 521.5(b).

59. *See id.*

60. *See, e.g., id.* at § 521.4(a).

61. *See, e.g., id.* at § 521.5(a)(2)(iii).

62. *See, e.g., id* at § 521.1(a)(5).

63. U.S. states do not have such a requirement, although some European countries may have similar types of provisions.

64. *See, e.g.,* New York FLC Rules, *supra* note ii, at § 521.4(b)(2).

65. *See, e.g., id.* at § 521.1(a)(4).

66. *See, e.g., id.* at § 521.5(a)(2)(iv).