

FURTHER DEVELOPMENTS REGARDING THE GATS AND LEGAL SERVICES: EXTENDING THE ACCOUNTANCY DISCIPLINES TO LAWYERS

by Laurel S. Terry

This is an update on the General Agreement on Trade in Services (GATS) and how it affects legal services. Because the U.S. is a member of the World Trade Organization (WTO), it is bound by the provisions of the GATS. This article provides more detail about these IBA resolutions that were briefly mentioned in the February 2004 BAR EXAMINER GATS Update and discusses the March 2004 WTO Workshop at which the International Bar Association (IBA) presented its resolution. For background information about the GATS and legal services, see the author's previous BAR EXAMINER articles.¹

WTO Member States, including the U.S., currently are engaged in trade negotiations that apply to legal services; these negotiations are proceeding on two different “tracks.”² Track 1 includes the negotiations between and among countries about liberalizing rules that apply directly to foreign lawyers. For example, Track 1 negotiations address what promises, if any, a country wants to make regarding its willingness to provide foreign legal consultant rules or foreign lawyer temporary practice rules.

Track 2 of the GATS addresses the “Disciplines” issue. In December 1998, the WTO adopted a document called the “Disciplines for Domestic Regulation in the Accountancy Sector, S/L/64” (“the Accountancy Disciplines”).³ Since 1999, a WTO entity called the Working Party on Domestic Regulation has been studying the issue of whether to apply the Accountancy Disciplines to other service sectors, such as legal services.

In December 2002, the WTO sent a letter to a number of international organizations including the International Bar Association (IBA).⁴ The WTO's

December 2002 letter asked the IBA what changes, if any, would be needed in order to apply to the legal profession the Accountancy Disciplines. The WTO did not ask the IBA to opine on whether any Disciplines were required; nor did it invite the IBA to start from scratch. Instead, the WTO asked the IBA whether any provisions of the existing Accountancy Disciplines were unsuitable or needed to be supplemented.

The IBA responded to this letter by holding a daylong GATS Forum on May 30, 2003, in Brussels, Belgium. The purpose of this 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 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 consultation letter sent by the WTO to the IBA.

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.

On September 18, 2003, the IBA Council unanimously approved the two resolutions submitted to it by the IBA WTO Working Group. As mentioned, the first resolution addressed the proper "terminology" for countries to use when negotiating for legal services in Track 1.⁵ The second resolution recommended seven specific changes that should be made if the Accountancy Disciplines are applied to legal services.⁶ The changes recommended by the IBA are included in the unofficial, annotated version of the Accountancy Disciplines (see sidebar).

Although it is surprisingly difficult to articulate which legal profession regulations could be subject to future WTO Disciplines, I will attempt to do so.⁷ If adopted, subsequent Disciplines might apply to foreign lawyers who want to use the qualification and licensing requirements and procedures that a country applies to its domestic lawyers. For example, future WTO Disciplines might require that with respect to foreign lawyers who want to rely on our domestic licensing rules for U.S. lawyers, these domestic licensing rules must be publicly available.

In November and December 2003, the IBA submitted the final versions of its resolutions, together with supporting documentation, to the WTO Secretariat.⁸ Thereafter, the WTO invited the IBA to participate in a March 2004 "Workshop on Domestic Regulation" held in Geneva, Switzerland. The first session included background information about the GATS (now posted on its website), the WTO Accountancy Disciplines, and the concepts of necessity, equivalence and transparency, all of which appear in the Accountancy Disciplines.⁹ The second and third sessions included presentations by various

international organizations, including the IBA. The final session included summary remarks.

The IBA was the only legal services representative included in this two-day workshop; I presented and explained the IBA resolution on the Accountancy Disciplines and the IBA recommended changes. After attending this workshop, my subjective impression is that it may be worthwhile for lawyers, including U.S. lawyers, to discuss issues that were not included within the WTO's December 2002 consultation letter. In particular, lawyers around the world may want to discuss whether any additional Disciplines applicable to the legal profession are necessary or desirable. Based on some of the comments I heard, it is not clear to me that this question has been completely settled. If the U.S. legal profession wants to participate in this discussion and debate, it should begin to organize soon. The IBA Accountancy Disciplines Resolution could provide a useful starting point for that discussion. 

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ENDNOTES

1. *See* 71 BAR EXAMINER 2:25 (May 2002), 71 BAR EXAMINER 4:20 (Nov. 2002), 72 BAR EXAMINER 3:27 (Aug. 2003), 73 BAR EXAMINER 1:38 (Feb. 2004). These BAR EXAMINER articles are available at the GATS website of the ABA Center for Professional Responsibility; *see* http://www.abanet.org/cpr/gats/gats_home.html and at the author's website; *see* <http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2>.
2. Tracks 1 and 2 are discussed in the first BAR EXAMINER article. *See* 71 BAR EXAMINER 2:25, 26-27 (May 2002), also available at <http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2>.

3. The Accountancy Disciplines are available on the ABA GATS website; *see* <http://www.abanet.org/cpr/gats/accounting.pdf> and on the author's website at <http://www.personal.psu.edu/faculty/l/s/lst3/disciplinessl64.DOC>.
4. This letter is available at http://www.abanet.org/cpr/gats/iba_ltr.pdf.
5. The IBA "Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations," or "Terminology Resolution" is available at http://www.ibanet.org/pdf/WTO_Resolution_in_Support_of_System_of_Terminolog_for_Legal_Services.pdf. For additional information about this "Terminology Resolution," see Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN STATE INT'L L. REV. __ (2004) (forthcoming). (This article will also be available at <http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2>.)
6. *See Exhibit A: Changes the IBA Recommends Be Made to the WTO Accountancy Disciplines before Applying Them to the Legal Profession* to the IBA Resolution entitled *Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector* (Adopted September 2003). The resolution is available on the IBA website. *See* http://www.ibanet.org/pdf/WTO_Resolution_on_Disciplines_for_the_Accountancy_Sector.pdf (underscores in spaces). Exhibit A to the Resolution is available on the WTO Website at http://www.wto.org/english/tratop_e/serv_e/workshop-march04_e/sess3_exhibit_a_terry_e.doc (underscores in spaces) and on the author's website at [http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web_files/WPDR/Exhibit%20A%20Changes%20the%20IBA%20Recommends%20\(WTO\)%20-%20Final%20Nov%206%202003.DOC](http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web_files/WPDR/Exhibit%20A%20Changes%20the%20IBA%20Recommends%20(WTO)%20-%20Final%20Nov%206%202003.DOC).
7. Initially, I thought that this should be a very simple question. After all, how can one talk about whether to extend the Accountancy Disciplines unless one knows the provisions to which the Accountancy Discipline-successor would apply? I found this question to be surprisingly difficult, however. For my analysis of this question, see Laurel S. Terry, *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*, 2003 Symposium Issue, THE PROFESSIONAL LAWYER 83 (2003). I hope that this article will be available soon on my webpage at <http://www.personal.psu.edu/faculty/l/s/lst3/publications%20by%20pic.htm#2>.
8. *See* Terry, *supra* note 5, for a discussion of these events and a copy of the relevant documents.
9. Several speakers, in addition to the IBA representative, expressed concerns about the "necessity test." Some WTO Member State representatives also referred to this test. The WTO Secretariat recently issued a paper about the GATS' necessity tests. *See* Working Party on Domestic Regulation, "Necessity Tests" in the WTO, Note by the Secretariat, S/WPDR/W/27, (2 Dec. 2003) also available at http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web_files/WPDR/W27%20-%20secretariat%20note%20on%20necessity%2012-03.doc.

IBA PROPOSED CHANGES TO THE WTO ACCOUNTANCY DISCIPLINES

Editor's note: This document, which was prepared by Professor Laurel Terry, incorporates the contents of the Accountancy Disciplines Resolution unanimously adopted by the IBA on Sept. 18, 2003. The underlined and strike-through language shows the IBA's recommended changes to the WTO document entitled "Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 (17 Dec. 1998)." This annotation has not been officially adopted by the IBA or WTO.

I. OBJECTIVES

1. Having regard to the Ministerial Decision on Professional Services, Members have agreed to the following disciplines elaborating upon the provisions of the GATS relating to domestic regulation of the sector. The purpose of these disciplines is to facilitate trade in ~~accountancy~~ services by ensuring that domestic regulations affecting trade in ~~accountancy~~ services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

II. GENERAL PROVISIONS

2. Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,¹ relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers

to trade in ~~accountancy~~ services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfill a legitimate objective ***For the purpose of defining what is "necessary" in the context of legal services, it is recognised that in many Member States, lawyers play an essential role in protecting individual, political, civil and economic rights and that the rule of law and integrity of the legal system, promoted by lawyers, is vital and important to the highest degree. Therefore, it is recognised that those entities involved in the regulation of lawyers have an area of reasonable discretion in making decisions which involve the protection of those core values of the profession which fall within legitimate objectives.*** Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of ~~accounting~~ **legal** services and the public generally), the quality of the service, professional competence, the protection of the independence of the profession, ***the protection of confidentiality and the professional secret, the avoidance of conflicts of interest, and the integrity of the profession***

III. TRANSPARENCY

3. Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e., governmental or non-governmental entities responsible for the licensing and/or disciplining of professionals or firms, ~~or accounting regulations~~).
4. Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:
 - (a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards, ***including ethical rules and rules of professional conduct***,

- (b) requirements and procedures to obtain, renew or retain any licenses or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;
 - (c) information on technical standards, ***including ethical rules and rules of professional conduct***, and
 - (d) upon request, confirmation that a particular professional or firm is licensed to practice within their jurisdiction.
5. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the ~~accountancy~~ sector, in relation to legitimate objectives as referred to in paragraph 2.
 6. When introducing measures that significantly affect trade in ~~accountancy~~ services, Members shall endeavor to provide opportunity for comment, and give consideration to such comments, before adoption.
 7. Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time limits, if any, for requesting such a review.

IV. LICENSING REQUIREMENTS

8. Licensing requirements (i.e., the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, ***and*** publicly available ~~and~~ objective, ***including licensing requirements in relation to temporary services provided under home title, and in relation to permanent establishment under home title and shall consider any disciplinary sanctions imposed on applicant lawyers by the relevant professional bodies in their home countries. 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: (i) 'full licensing' systems, which grant access to the full local title of lawyer; (ii) 'limited licensing' systems which grant access to something less than the full local title of lawyer; and (iii) requirements that address temporary services provided under home title.

9. Where residency requirements not subject to scheduling under Article XVII of the GATS exist, Members shall consider whether less trade-restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions.
10. Where membership of a professional organization is required, in order to fulfill a legitimate objective in accordance with paragraph 2, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfillment of such an objective. Where membership of a professional organization is required as a prior condition for application for a license (i.e., an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.
11. Members shall ensure that the use of firm names are not restricted, save in fulfillment of a legitimate objective.
12. Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member, ***subject to Members' being permitted to put the burden,***

including the costs of the exercise, onto foreign applicants to show the extent of their existing insurance, and the solvency and security of the company providing such insurance. The same principles shall apply to any existing pension or social security arrangements or fidelity fund for which Members have requirements covering foreign applicants.

13. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practicing the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.
- V. LICENSING PROCEDURES**
14. Licensing procedures (i.e., the procedures to be followed for the submission and processing of an application for an authorization to practice) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.
 15. Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfill qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.
 16. Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are

informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

17. On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.
14. A license, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

VI. QUALIFICATION REQUIREMENTS

19. A Member shall ensure that, *whether or not the Member adopts the 'full licensing' system or the 'limited licensing' system*, its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

~~20. The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.~~

~~2120.~~ Members note the role that mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

VII. QUALIFICATION PROCEDURES

~~2221.~~ Verification of an applicant's qualifications acquired in the territory of another Member shall take place within a reasonable time-frame, in principle within six months and, where applicants' qualifications fall short of requirements, shall result in a decision which

identifies additional qualifications, if any, to be acquired by the applicant.

~~2322.~~ Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applicants, including foreign and foreign-qualified applicants. Applicants shall be allowed a reasonable period for the submission of applications. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practicing the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

~~2423.~~ Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.

VIII. TECHNICAL STANDARDS

~~2524.~~ Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfill legitimate objectives. *In the context of legal services, the term 'technical standards' refers not only to technical standards in the narrow sense, but also ethical rules and rules of professional conduct.*

~~2625.~~ In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of *any* internationally recognized standards *(such term to mean not only technical standards in the narrow sense, but also ethical rules and rules of professional conduct)* of relevant international organizations² applied by that Member.

ENDNOTES

1. The original document attached the text of GATS Articles XVI and XVII; they are omitted here.
2. The term 'relevant international organizations' refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.