

Lawyers, GATS, and the WTO *Accountancy Disciplines*: The History of the WTO's Consultation, the *IBA GATS Forum* and the September 2003 IBA Resolutions

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Abstract

This article addresses issues related to legal services and the General Agreement on Trade in Services or GATS. The article begins by focusing on "Track #2" of the GATS and the obligation under GATS Article VI:4 to develop "any necessary disciplines." In 1998, WTO Members implemented GATS Article VI:4 by adopting "Disciplines" that apply to the accountancy sector. WTO Members currently are in the process of deciding whether to extend the WTO Accountancy Disciplines, S/L/64, to other service sectors, including legal services. In December 2002, the WTO sent the International Bar Association (IBA) and other non-governmental organizations a "consultation letter" requesting their views about any changes that would be needed in the WTO Accountancy Disciplines if the Disciplines were to be applied to legal services. The IBA responded to this consultation with the May 2003 IBA GATS Forum held in Brussels. This day-long Forum addressed two issues, one of which was WTO's consultation about the WTO Accountancy Disciplines. (The Forum also addressed the issue of which classification system to use in the ongoing GATS negotiations.) Following the IBA GATS Forum, the IBA Council unanimously adopted two resolutions: one resolution specified the IBA's recommended changes to the Accountancy

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Disciplines; the second resolution recommended Terminology to use in GATS negotiations, but not go so far as to endorse a classification system. In December 2003, the IBA transmitted these resolutions to the WTO. This article describes the events before, during, and after the IBA GATS Forum. It provides a legislative history of the September 2003 adoption of the IBA Resolution Regarding the Suitability of Applying the WTO Accountancy Disciplines to the Legal Profession and the IBA Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations. This article includes as appendices to documents related to the IBA GATS Forum and subsequent IBA Resolutions.

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I. Introduction

This Symposium issue of the *Penn State International Law Review* is devoted to the topic of *Global Legal Practice*. When considering *Global Legal Practice*, one would be remiss if one omitted discussion of the General Agreement on Trade in Services (“GATS”), which was one of the agreements annexed to the Agreement Establishing the World Trade Organization (“WTO”).¹

When countries join the WTO, they agree to be bound by the GATS, which includes within its coverage trade in legal services. Because more than 145 countries are WTO Members,² an extremely large number of countries are now subject to at least some provisions of the GATS with respect to their regulation of the practice of law by foreign lawyers. Therefore, one cannot discuss the topic of *Global Legal Practice* without encountering the topic of the GATS.

Because the GATS includes legal services within its scope, global bar associations, as opposed to national or regional bar associations, have an increased opportunity to play an important policy role regarding legal services. These policy opportunities arise because WTO Member States have indicated their interest in receiving comments from organizations whose membership is open to bodies from all WTO Member States.³

1. See *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services*, 33 I.L.M. 1125, 1168 (1994) [hereinafter *GATS*], available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Oct. 1, 2004).

2. In January 2004, the World Trade Organization website indicated that it had 146 members, as of April 2003. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 1, 2004). Additional countries have joined since April 2003. See, e.g., Nepal Set to Join WTO at Cancun Ministerial Conference, available at http://www.wto.org/english/news_e/news03_e/acc_nepal_15aug_e.htm (last visited Oct. 1, 2004).

3. In some contexts, WTO Member States have indicated that they prefer to hear

The *Union Internationale des Avocats* (“UIA”)⁴ and the *International Bar Association* (“IBA”)⁵ are two general-purpose global bar

from organizations whose membership is open to bodies from all WTO Member States. *See, e.g.*, WTO Council for Trade in Services Working Party on Domestic Regulation—Report on the Meeting Held on 22 October 2002—Note by the Secretariat, S/WPDR/M/18 (Dec. 3, 2002) at para. 47 (discussing the international organizations to which the WTO planned to send its consultation.) This approach is consistent with some of the language of the GATS. *See, e.g.*, GATS, *supra* note 1, at art. VI(5)(b), which states: “In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.” The term “relevant international organizations” is defined in a footnote as “international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.”

All of these documents are available on the WTO’s webpage. *See infra* notes 15-17 for a discussion of how to access these documents and understand their citations. On the other hand, the WTO has given participation rights to organizations whose membership is not open to organizations from all WTO Member States. *See generally* Non-governmental Organizations (NGOs): material available on the WTO website, *available at* http://www.wto.org/english/forums_e/ngo_e/htm (last visited Sept. 29, 2004). The American Bar Association, for example, was one of the NGO’s eligible to attend the WTO’s Fifth Ministerial Conference in Cancun, Mexico in September 2003. *Id.*

4. The *Union Internationale des Avocats* or UIA is the world’s oldest international association of bars, bar associations, and law societies. It was established in 1927 by a “group of European lawyers, resolute in the conviction of the need for a mechanism to facilitate contact between the lawyers of the world.” *See* What is the UIA? (and subpages), *available at* <http://www.uianet.org/jsp/qquia/qquia.jsp?locale=en> (last visited Oct. 1, 2004). When it was originally founded in 1927, the UIA provided for collective members only. *See* Email Letter from Delos N. Lutton, UIA First Vice-President, to Laurel S. Terry (Feb. 23, 2004) (on file with author).

The UIA now consists of more than 250 collective members and several thousand individual lawyer members. Although the UIA has its roots as an organization of primarily civil law lawyers, the UIA is a multi-cultural and multi-lingual worldwide association of lawyers, with members from very different cultural and historical backgrounds. The UIA takes pride in the fact that it has seven official languages: English, French, Spanish, German, Italian, Arabic and Portuguese; and three working languages: English, French, and Spanish. The core objectives of the UIA include: 1) to promote the basic principles of the legal profession as defender of citizen’s rights; 2) to participate in the development of legal knowledge and practice in all fields of law all over the world; 3) to contribute towards the establishment of international legal order based on the principles of human rights and justice between nations, through the law, and in the cause of peace; 4) to cooperate in an organisation enjoying consultative status with national or international organisations with similar objectives; 5) to establish at an international level permanent relations and exchanges between Bars, Law Societies, and their members; and 6) to defend the interests of members of the legal profession and study the problems arising in the role and practice of the legal profession, particularly on an international level. *See* What is the UIA? (and subpages), *available at* <http://www.uianet.org/jsp/qquia/qquia.jsp?locale=en> (last visited Oct. 1, 2004).

5. The International Bar Association or IBA is the world’s largest organization of national Bar Associations and Law Societies and individual members. Founded in 1947, it is composed of over 16,000 individual lawyer and 190 Law Societies and Bar Associations. *See* International Bar Association, About the IBA, *available at* <http://www.ibanet.org/aboutiba/index.asp> (last visited Oct. 1, 2004). Its principal aims and objectives are: to promote an exchange of information between legal associations

associations. (Although both the UIA and the IBA permit bar associations from all WTO Member States to join, the structure and emphasis of these organizations historically has been different.⁶) In addition to the UIA and the IBA, there are a number of specialized, rather than general-purpose, global bar associations that also meet the WTO's definition of organizations open to bodies from all WTO Member States.⁷

worldwide; to support the independence of the judiciary and the right of lawyers to practise their profession without interference; and support of human rights for lawyers worldwide through its Human Rights Institute. See Introduction to the IBA, *available at* <http://www.ibanet.org/aboutiba/index.asp#obj> (last visited Oct. 1, 2004).

6. The IBA and UIA have somewhat different structures and emphases. The IBA Council is its governing body and speaks for the IBA on policy issues. It consists of representatives from over 150 countries and stresses the platform that it provides to bars from developing countries. The IBA as a Voice for its Member Organisations, *available at* <http://www.ibanet.org/MemberOrgs/Overview.asp> (last visited Oct. 1, 2004) ("When the IBA speaks, it does so as a truly international organisation which has given a fair hearing to all points of view from members representing small or developing bars countries as well as the larger ones so all organisations can find a voice on an international stage.")

The UIA's governing bodies are the General Assembly, the Governing Board and the Executive Committee. See UIA—Governing Bodies, *available at* http://www.uianet.org/jsp/qquia/qquia_struct.jsp?locale=en (last visited Oct. 1, 2004). UIA resolutions are adopted by the General Assembly, which is comprised of the members of the Governing Board and of the Executive Committee, as well as all members of the UIA whose dues are current. See *id.* Thus, in the UIA, individual lawyer members are given the right to vote on resolutions, although a weighting system preserves the influence of the collective members.

Probably because the UIA was founded by French-speaking European lawyers, has its headquarters in Paris, and operates in multiple languages, the UIA historically has been more civil-law oriented than has the IBA, which was founded in 1947 in New York by thirty-four National Bar Associations, has its headquarters in London, and operates primarily in English. See *id.*

7. One might argue that the International Law Association is also a major general purpose global bar association. Although the distinction is not entirely clear, I consider the ILA to be more of a special-purpose bar association rather than a general-purpose bar association. See, e.g., International Law Association—About Us, http://www.ila-hq.org/html/layout_about.htm (last visited Oct. 1, 2004) ("The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, include the 'study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill.' The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies."). Among other reasons, I don't consider the ILA to be a major general-purpose global bar association because it appears to have no committee or structure to address issues of the regulation of the profession. See ILA Webpage—Committees, *available at* http://www.ila-hq.org/html/layout_committee.htm (last visited Oct. 1, 2004). One might also argue that the American Bar Association (ABA) is a global bar association since it had more than 3500 foreign lawyer members in August 2003. See Email Letter from Kathleen Sullivan, Director, International Liaison Office, American Bar Association (Feb. 17, 2004). Because the ABA does not include foreign organizations as members, however, I have

In December 2002, the WTO contacted the IBA, the UIA and four specialized bar associations⁸ seeking advice on any changes that would be necessary before applying to the legal profession a 1998 WTO document entitled *Disciplines on Domestic Regulation in the Accountancy Sector* ["*Accountancy Disciplines*"].⁹

The IBA responded to the WTO's December 2002 letter by holding a day-long conference in Brussels, Belgium in May 2003 for representatives of its Member Bars.¹⁰ This Conference has been referred to at various times as the *IBA WTO Forum*, the *IBA GATS Forum* or the *IBA Brussels Forum*. For purposes of this article, it will be referred to as the "*IBA GATS Forum*." One of the two main issues considered at the

not included it in the list of global bar associations.

An example of an organization that is clearly a special purpose bar is the International Criminal Bar, founded in connection with the establishment of the International Criminal Court. See Webpage—International Criminal Bar, available at http://www.icb-bpi.org/new/index_en.html (last visited Oct. 1, 2004) (the ICB "acts as the representative of counsel before the International Criminal Court (ICC). Our objective is to ensure that counsel are able to practice in total independence before the ICC. We assist counsel to speak in a strong and unified voice regarding issues which affect their practice such as Ethics, Legal Aid and Training. Together, we defend one essential principle: to guarantee an equitable trial to victims and accused.").

8. See Letter from the WTO Secretariat to the IBA (Dec. 5, 2002), available at http://www.abanet.org/cpr/gats/iba_ltr.pdf (last visited Oct. 1, 2004) [hereinafter "WTO Consultation Letter"]. The IBA had received this letter by mid-December 2002. See December 16, 2002 fax from Bernard L. Greer to Laurel S. Terry, attaching a Dec. 12, 2002 fax from the IBA Secretariat, with the WTO letter attached (on file with author).

The last page of this letter lists the organizations to which it was sent. The legal services organizations to which this letter was sent include: 1) the IBA; 2) the UIA; 3) the International Association for the Protection of Industrial Property (AIPPI); 4) the International Federation of Industrial Property Attorneys (FICPI); 5) the International Law Association (ILA); and 6) the International Union of the Latin Body of Notaries (UINL). See WTO Consultation Letter, *supra*, at 13.

9. The formal citation for the *Accountancy Disciplines* is 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, S/L/64* (Dec. 17, 1998) [hereinafter *Accountancy Disciplines*].

The WTO adopted the *Accountancy Disciplines* in a *Decision*. The formal citation for this *Decision* is WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector, S/L/63* (Dec. 15, 1998). Among other locations, both of these documents are available on my website, see Selected WPDR Documents, available at <http://www.personal.psu.edu/faculty/l/s/lst3/wpdr-web.htm> (last visited Oct. 1, 2004).

For additional information on the development of the Accountancy Disciplines, see Laurel S. Terry, GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers, 34 VAND. J. TRANSNAT'L L. 989 (2001) as revised 35 VAND. J. TRANSNAT'L L. 1387, at 1029-1038 (2002), available at <http://www.personal.psu.edu/faculty/l/s/lst3/vanderbilt%20post%20wto%20edits.pdf> (last visited Oct. 1, 2004); GATS: A Handbook for International Bar Association Member Bars (2002) at 33-36, available at <http://www.ibanet.org/pdf/gats.pdf> (last visited Oct. 1, 2004) [hereinafter IBA GATS Handbook].

10. See IBA Press Release, WTO Forum, available at http://www.envoynews.com/iba/e_article000137910.cfm?x=a1yr3MJ,afSV0Pv (last visited Oct. 1, 2004).

IBA GATS Forum was the WTO's December 2002 question about what changes would be required in the *WTO Accountancy Disciplines* if that document were applied to lawyers.

During the course of the *IBA GATS Forum*, the IBA attendees were able to reach a consensus on some issues but disagreed on other issues. In September 2003, following the preparation of additional documentation, the IBA Council unanimously adopted two resolutions related to the GATS and legal services;¹¹ the IBA Council is the IBA's governing body and speaks for the IBA on policy issues.¹² These IBA resolutions were subsequently transmitted to the WTO as the IBA's response to the WTO's December 2002 consultation letter.¹³

This article focuses on the May 2003 *IBA GATS Forum* and the resulting IBA resolutions. It is important for global legal practice developments, such as the IBA's resolutions, to be memorialized so that the information is available to the public and to lawyers, regulators and scholars around the world. Accordingly, I am very pleased that the IBA granted the *Penn State International Law Review* of Dickinson School of Law permission to publish these IBA documents. In making these documents widely available, the *Penn State International Law Review* is following the tradition set by its predecessor, the *Dickinson Journal of International Law*, when it published the papers from the 1998 *Paris Forum on Transnational Practice for the Legal Profession* ("The 1998 *Paris Forum*" or "*Paris Forum*").¹⁴

Section II of this article provides background information about the

11. See Minutes of the September 17, 2003 Meeting of the IBA Council, San Francisco, USA (on file with author).

12. The IBA Council is the governing body of the IBA. It consists of representatives from over 150 countries. See The IBA as a Voice for its Member Organisations, available at <http://www.ibanet.org/MemberOrgs/Overview.asp> (last visited Oct. 1, 2004).

13. The IBA sent two letters to the WTO. See Letter from Emilio Cárdenas, President of the IBA, to Dr. Supachai Panitchpakdi, Director General of the WTO, Nov. 7, 2003 (on file with author) [hereinafter "Nov. 7, 2003 Letter from the IBA to the WTO"] and Letter from Emilio Cárdenas, President of the IBA, to Dr. Supachai Panitchpakdi, Director General of the WTO (Dec. 29, 2003) (on file with author) [hereinafter "Dec. 29, 2003 Letter from the IBA to the WTO."] See *infra* notes 133-135 and accompanying text for a discussion of these letters. The IBA's two Sept. 2003 resolutions are on its website, but not the transmittal letters or accompanying documentation. See http://www.ibanet.org/pdf/WTO_Resolution_in_Support_of_System_of_Terminolog_for_Legal_Services.pdf (last visited Oct. 1, 2004) and http://www.ibanet.org/pdf/WTO_Resolution_on_Disciplines_for_the_Accountancy_Sect_or.pdf (last visited Oct. 1, 2004). See *supra* note 8 for the WTO's December 2002 "consultation" letter to the IBA.

14. See Symposium, *Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L LAW (1999) and Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L LAW 1 (1999), available at <http://www.personal.psu.edu/faculty/l/s/1st3/parisforumintro.pdf> (last visited Oct. 1, 2004).

GATS and legal services. Section III explains the IBA's work with respect to the GATS and legal services. Section III(A) reviews some of the IBA's prior resolutions and activities and Section III(B) introduces the IBA WTO Working Group. Section III(C) provides information about the May 30, 2003 *IBA GATS Forum*, including the pre-*Forum* and post-*Forum* events. Section III(D) addresses the September 2003 resolutions that were unanimously adopted by the IBA. Section IV is the conclusion. The Appendices to this article include:

- *IBA GATS Forum* Agenda (as distributed March, 2003)
- *IBA GATS Forum* Schedule
- IBA December 29, 2003 Transmittal Letter to the WTO
- IBA Terminology Resolution
- IBA November 7, 2003 Transmittal Letter to the WTO
- IBA Disciplines Resolution
- Executive Summary of the Disciplines Resolution
- Discussion Paper Supporting the Disciplines Resolution
- Unofficial Annotated Disciplines for Domestic Regulation in the Accountancy Sector, Showing the IBA's Recommended Changes
- WTO January 2004 Acknowledgement Letter

This article relies extensively on WTO documents with which many lawyers may not be familiar. All of these WTO documents are available on the WTO's website and may be located, among other ways, by inserting the document's symbol on the WTO search page.¹⁵ Many of these documents are also available on other websites.¹⁶ These websites

15. The WTO webpage includes several different types of "search" functions. When I already know the symbol of a particular document, I prefer to use the "Simple Search" function at the "WTO Documents Online Search Facility." Once at that webpage, I insert the document symbol into the "Document Symbol" drop-down menu. See http://docsonline.wto.org/gen_search.asp?searchmode=simple (last visited Oct. 1, 2004).

16. Many WTO and other GATS-related documents are available on my website and on the GATS website maintained by the ABA Center for Professional Responsibility. See generally Laurel S. Terry, Resources about the GATS and Legal Services, available at <http://www.personal.psu.edu/faculty/l/s/lst3/gats3.htm> (last visited Oct. 1, 2004) and ABA Center for Professional Responsibility, Materials About the GATS and Other

include information about how to read and understand the symbols or citation form used in WTO documents.¹⁷

II. Background—the GATS and Legal Services

The GATS is not a simple agreement. Accordingly, it is beyond the scope of this article to explain in detail the GATS' application to legal services. Several different articles, however, have addressed this topic.¹⁸ One of the most useful introductions to the GATS' application to legal services is the *IBA GATS Handbook*, which is available on the Internet.¹⁹ This Article provides only such background information as is necessary to understand the context of the IBA's recent resolutions.

A. Two Ongoing Obligations Required by the GATS

The GATS is an interesting agreement because it imposes two continuing obligations on WTO Member States. The first such obligation is found in Article XIX of the GATS which requires WTO Member States to engage in ongoing negotiations to further liberalize

International Agreements, available at http://www.abanet.org/cpr/gats/gats_home.html (last visited Oct. 1, 2004).

17. The citation form for WTO GATS-related documents generally begins with the letter S (for GATS), followed by forward slash "/" and the acronym for the WTO entity issuing the document (e.g., WPDR), followed by another forward slash "/" and possibly a letter indicating the type of document (e.g., "M" for minutes), followed by another forward slash "/" and a number. The number 6, for example, would indicate that it was the sixth set of minutes of the WPDR. The last item is the date. For a more complete discussion of this citation system, see Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 9, at 1023-25 (2002) and the *IBA GATS Handbook*, *supra* note 9, at 30, both available at <http://www.personal.psu.edu/faculty/l/s/lst3/vanderbilt%20post%20wto%20edits.pdf> (last visited Oct. 1, 2004).

18. See, e.g., Terry, *GATS Applicability to Transnational Lawyering*, *supra* note 9; 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 (2004), available at http://data1\lst3\MyFiles\articles—final\But_what_will_GATS_Disciplines_apply_to.pdf (last visited Oct. 1, 2004). See also GATS articles cited on the GATS webpage of the ABA Center for Professional Responsibility, available at http://www.abanet.org/cpr/gats/gats_home.html (last visited Oct. 1, 2004) and at Professor Terry's webpage, at <http://www.personal.psu.edu/faculty/l/s/lst3/> (last visited Oct. 1, 2004). The WTO also has a webpage devoted to the legal services sector and a webpage that includes links to the documents of the WTO Working Party on Domestic Regulation. See *WTO Services by Sector: Legal Services*, available at http://www.wto.org/english/tratop_e/serv_e/legal_e/legal_e.htm (last visited Oct. 1, 2004) and *WTO: The Services Council, its Committees and Subsidiary Bodies*, available at http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm last visited Oct. 1, 2004).

19. The Services negotiations required by Article XIX of the GATS initially were referred to as the GATS 2000 or "built-in agenda" negotiations. See Terry, *GATS Applicability to Transnational Lawyering*, *supra* note 9, at 1049-1057; *IBA GATS Handbook*, *supra* note 9, at 45.

trade in services.²⁰ The services negotiations required by GATS Article XIX have been underway for several years.²¹ In November 2001, these services negotiations were included within the ambit of the Doha Development Agenda (which is also referred to as the Doha or DDA negotiations).²² Although the Doha negotiations stalled following the WTO's Fifth Ministerial Conference in Cancun, Mexico, in September 2003, in late 2003 and early 2004, there were calls to revive these negotiations and an agreement was reached in July 2004 about ways to move forward.²³

20. See GATS, *supra* note 1, at art. XIX(1) ("In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.").

21. See IBA GATS Handbook, *supra* note 9, at 45-50.

22. The Doha Development Agenda was established during the WTO's Fourth Ministerial Conference in Doha, Qatar. See Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Ministerial Declaration], available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Oct. 1, 2004). This Ministerial Declaration specifies that the ongoing services negotiations should become part of the Doha Development Agenda. See *id.* at para. 15. For a brief discussion of the Doha Ministerial Declaration, see Laurel S. Terry, *GATS, Legal Services and Bar Examiners: Why Should You Care?*, *The Bar Examiner* 25, 28 (May 2002), available at <http://www.personal.psu.edu/faculty/l/s/lst3/bar%20examiner%205-02%20gats%20article.pdf> (last visited Oct. 1, 2004).

23. Compare WTO News, *Statements by the Chairman of the General Council and the Director-General* (Oct. 14, 2003), available at http://www.wto.org/english/news_e/news03_e/stat_gc_dg_14oct03_e.htm (last visited Oct. 1, 2004):

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.

with Informal Heads of Delegation Meeting, Statement by the Chairman of the General Council (Dec. 9, 2003) available at http://www.wto.org/english/news_e/news03_e/stat_gc_chair_9dec03_e.htm (noting willingness of some WTO Member States to resume some talks) and Press Release: European Commission proposes to put Doha Round of trade talks back on track (Nov. 26, 2003), available at http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114690.pdf (last visited Jan. 20, 2004); Office of the U.S. Trade Representative Trade Facts: A Common Sense Approach to Advance the Doha Development Agenda (Jan. 12, 2004), available at http://www.ustr.gov/wto/2004-01-12-doha_advance.pdf (last visited Oct. 1, 2004) (describing the letter from Robert Zoellick, U.S. Trade Representative, to WTO Member States). See WTO, Doha Work Programme Decision Adopted by the General Council on 1 Aug. 2004, WT/L/579 (Aug. 2, 2004), available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04.htm (last visited Sept. 29, 2004).

The second continuing obligation in the GATS is found in Article VI(4), which requires WTO Member States to develop “any necessary disciplines.” This provision, which is the basis for one of the IBA’s recent resolutions, states:

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

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.²⁴

B. *The Development of the Accountancy Disciplines*

The WTO began its Article VI(4) obligation to develop “any necessary disciplines” by looking at the accountancy sector.²⁵ The WTO body responsible for these efforts was the Working Party on Professional Services (“WPPS”).²⁶ The WPPS began its work in 1995.²⁷ In December 1998, the WPPS completed its work; within one week, the

24. See GATS, *supra* note 1, at art. VI(4).

25. For a fuller discussion of the WTO bodies involved and the development of the *Accountancy Disciplines*, see Terry, *GATS’ Applicability to Transnational Lawyering*, *supra* note 9, at 1029-45.

26. On March 1, 1995, approximately one year after the GATS was signed, the WTO Council on Trade in Services implemented the Ministers’ *Decision on Professional Services* and issued its own “Decision” that created the Working Party on Professional Services (WPPS). See Council for Trade in Services, *Decision on Professional Services*, S/L/3, at para.1 (Apr. 4, 1994) [hereinafter *Decision on Professional Services*]. In this *Decision*, the Council for Trade in Services gave the WPPS two primary assignments. First, it directed the WPPS “to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.” In addition to developing disciplines, the *Decision* instructed the WPPS to establish guidelines for the recognition of qualifications.

27. See WTO Working Party on Professional Services, REPORT OF THE MEETING HELD ON 7 JULY 1995—Note by the Secretariat, S/WPPS/M/1 (Aug. 15, 1995) (in its first meeting, the WPPS began its analysis of the accountancy sector).

WTO had adopted the *Accountancy Disciplines*.²⁸

C. *The WTO Entity Called the WPDR Considers the Issue of Further Disciplines*

Following the adoption of the *Accountancy Disciplines* in 1998, the WPPS was disbanded and a WTO body called the Working Party on Domestic Regulation (“WPDR”) was created and was directed to consider whether and how to extend the *Accountancy Disciplines* to other service sectors.²⁹ The WPDR’s work has now been ongoing for several years.³⁰ Indeed, the WPDR continued its work on the *Disciplines* issues even when other Doha negotiations had collapsed following the September 2003 Ministerial Conference in Cancun, Mexico.³¹

D. *The WTO’s Consultation to the IBA and other International Organizations*

Since the WPDR’s very first meeting in 1999, WTO Member States

28. See *Accountancy Disciplines Decision*, *supra* note 9. This Decision was adopted by the WTO Council for Trade in Services, which is the WTO’s policy-making body for issues related to the GATS. The Council for Trade in Services is open to representatives from all WTO Member States. See WTO: The Services Council, its Committees and Other Subsidiary Bodies, available at http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm (last visited Oct. 1, 2004). See generally Terry, *GATS’ Applicability to Transnational Lawyering*, *supra* note 9, at 1020-21 and 1029-34.

29. See WTO Council for Trade in Services, Decision On Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999, S/L/70 (Apr. 28, 1999). For an additional discussion of this Decision, see Terry, *GATS’ Applicability to Transnational Lawyering*, *supra* note 9, at 1038-45.

30. The WPDR has summarized its work in its Annual Reports. See, e.g., Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/1 (Oct. 20, 1999); Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/2 (Nov. 24, 2000); Report of the Working Party on Domestic Regulation to the Council for Trade in Services—Corrigendum, S/WPDR/2Corr.1 (Dec. 1, 2000); Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/3 (Oct. 4, 2001); Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2002), S/WPDR/4 (Dec. 6, 2002); Update to the Annual Report of 2002 of the Working Party on Domestic Regulation to the Council for Trade in Services (2003), S/WPDR/5 (July 3, 2003); Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2003), S/WPDR/6 (Dec. 3, 2003). All of these reports are available on the WTO website and on a website maintained by this author (Professor Laurel Terry). See http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm and <http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web.htm> (last visited Oct. 1, 2004).

31. See, e.g., Working Party on Domestic Regulation, *Annual Report of The Working Party on Domestic Regulation To The Council For Trade In Services* (2003), S/WPDR/6 (Dec. 3, 2003) (summarizing the activities of the year, including a meeting on September 30, 2003, after Cancun and announcing a meeting on December 3, 2003).

have discussed whether the WPDR should consult various international professional organizations about the suitability of using the *Accountancy Disciplines* for other professions.³² Although WTO Member States generally were supportive of the idea of such a consultation, it took the WTO Member States over three years to agree on the contents of a consultation letter and the organizations to which such a letter should be sent.³³

32. See WTO Council for Trade in Services, *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), available at http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20annual%20web_files/WPDR/M1.DOC (last visited Oct. 1, 2004) (“The delegation of *Hong Kong, China* commented that it would seem logical to consult with all the professions listed in the Services Sectoral Classification List (W/120). Input from international organizations would be important. Members could decide which domestic organizations to contact, and would be responsible for collecting information and comments.”).

33. The consultation letter was approved by Members at the WPDR meeting held on October 22, 2002, more than three years after Hong Kong first suggested the idea. Compare *supra* with S/WPDR/M/18, *supra* note 3, at para. 47-48. The WPDR minutes reveal the history of this consultation. The original suggestion from the Hong Kong delegate was that the WTO Secretariat take responsibility for contacting various international organizations for their opinions of the use of the *Accountancy Disciplines*. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on May 17, 1999—Note by the Secretariat, S/WPDR/M/1*, at para. 12 (June 14, 1999). At a subsequent meeting, which was held on October 19, 1999, the Chairperson of the WPDR announced that the list of international organizations to be consulted would be “Member-driven.” WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on October 19, 1999—Note by the Secretariat, S/WPDR/M/3*, at para. 16 (Jan. 18, 2000). Members began submitting names of organizations in mid-February 2000. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on February 24, 2000—Note by the Secretariat, S/WPDR/M/4*, at para. 8, 10, (Apr. 6, 2000). Australia, Thailand, Hong Kong, China, and Canada all submitted names for the list. *Id.* The Secretariat circulated the first draft of the list of international organizations for consultation on April 6, 2000. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on April 13, 2000—Note by the Secretariat, S/WPDR/M/5*, at para. 10 (May 18, 2000). Uruguay submitted names of international organizations on May 17, 2000 and the Secretariat issued its second draft of the list on May 18, 2000. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on July 12, 2000—Note by the Secretariat, S/WPDR/M/7*, at para. 6 (Sept. 19, 2000). Poland submitted names of international organizations on June 6, 2000 and the Secretariat issued the third draft of the list on July 10, 2000. *Id.* During the meeting held on October 2, 2000, the Members agreed that the list would be “revised to remove regional organizations not open to all WTO members.” WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on October 2, 2000—Note by the Secretariat, S/WPDR/M/8*, at para. 11 (Nov. 17, 2000). The Secretariat circulated the fourth draft on November 29, 2000. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on November 29, 2000—Note by the Secretariat, S/WPDR/M/9*, at para. 32, (Mar. 12, 2001). During the meeting held on May 11, 2001, a few countries suggested the addition of the International Organization for Standardization (“ISO”) to the list. WTO Council for Trade in Services, *Working Party*

The minutes of the WPDR reveal some of the concerns that led to the three year delay before the consultation letters were mailed. Initially, a few countries expressed concern that “direct consultations with international professional organizations might cause misunderstandings over their participation in the development of future regulatory disciplines.”³⁴ Such concerns were not raised at subsequent meetings, however. During the WPDR’s third meeting, the United States and Canada expressed concerns over the length of the proposed list of international organizations.³⁵ After some discussion, WTO Member States agreed that the list of international organizations should be prepared on the basis of Member State suggestions.³⁶ Another issue that emerged was the type of organizations to consult. The U.S. and Hong Kong questioned whether international regulatory organizations should be consulted.³⁷ Canada suggested that professional organizations in engineering, architecture, law, land surveying, commercial appraisal and

on Domestic Regulation—Report on the Meeting Held on May 11, 2001—Note by the Secretariat, S/WPDR/M/11, at para. 37 (June 7, 2001). The fifth, and final, draft was first circulated for comments at the July 3, 2001 meeting. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on July 3, 2001—Note by the Secretariat, S/WPDR/M/12*, at para. 72 (Aug. 16, 2001).

It was not until one year later, in July 2002, however, that the Members instructed the Secretariat to draft a letter to these organizations. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on July 16, 2002—Note by the Secretariat, S/WPDR/M/17*, at para. 18 (Oct. 1, 2002). The fifth draft of the list was approved by all Members at the meeting held on October 22, 2002, but the list was to remain open so that other organizations could be added in the future. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on October 22, 2002—Note by the Secretariat, S/WPDR/M/18*, at para. 36-37, 47-48 (Dec. 3, 2002). By the December 4, 2002 meeting, the Secretariat was able to report that a consultation letter had been sent to all organizations on the approved list; the letter requested their input on the use of the *Accountancy Disciplines*. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on December 4, 2002—Note by the Secretariat, S/WPDR/M/19*, at para. 21 (Jan. 29, 2003).

34. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting held on May 17, 1999—Note by the Secretariat, S/WPDR/M/1*, at para.13 (June 14, 1999) (Canada, U.S., and, to a lesser degree, the European Community expressed such concerns.).

35. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting held on October 19, 1999—Note by the Secretariat, S/WPDR/M/3*, at para. 11-12 (Jan. 18, 2000); WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting Held on April 13, 2000—Note by the Secretariat, S/WPDR/M/5*, at para. 18 (May 18, 2000).

36. The U.S., Hong Kong, China, and Argentina all recommended that the list be composed of member suggestions. *S/WPDR/M/3, supra* note 35, at para. 12-14. The Chair responded to these concerns by confirming that the list of international organizations would be “Member-driven.” *Id.* at para. 16.

37. *Id.* at para. 12-13.

actuarial services be included.³⁸ There were also “some sensitivities about including health-related professionals.”³⁹ Another significant issue was whether to consult regional organizations.⁴⁰

After three years, WTO Member States were able to agree on both the consultation letter and the international organizations to which the consultation should be sent.⁴¹ Thus, in December 2002, the WTO Secretariat, on behalf of the WTO Member States, sent a consultation letter to various international organizations, including the IBA.⁴² The WTO’s consultation letter posed the following three questions:

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:

- 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.⁴³

It is against the background of this December 2002 WTO consultation letter that the IBA organized the *IBA GATS Forum* and

38. *Id.* at para. 15.

39. *Id.* at para. 15.

40. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting held on February 24, 2000—Note by the Secretariat*, S/WPDR/M/4, at para. 8-9 (Apr. 6, 2000). The debate appeared to dissipate at the meeting held on July 12, 2000 when the Chairman asserted his opinion that the opinion of regional organizations was not necessarily needed. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting held on July 12, 2000—Note by the Secretariat*, S/WPDR/M/7, at para. 8 (Sept. 19, 2000). During the next meeting, WTO Member States ultimately decided that regional organizations that were not open to all WTO members should be removed from the Secretariat’s list. WTO Council for Trade in Services, *Working Party on Domestic Regulation—Report on the Meeting held on October 2, 2000—Note by the Secretariat*, S/WPDR/M/8, at para. 11 (Nov. 17, 2000).

41. The Minutes of the WPDR meeting indicate that the list of organizations to which the consultation should be sent went through five revisions. *See* WPDR M/18, *supra* note 3, at para. 24.

42. *See supra* note 8.

43. *See* WTO Consultation Letter to the IBA, *supra* note 8.

thereafter adopted the two resolutions that are the subject of this article.

III. The IBA's Work Regarding the GATS and Legal Services

A. *Prior IBA Resolutions and GATS Activities*

The two resolutions adopted by the IBA in September 2003 do not represent the IBA's first efforts to address GATS issues. When the IBA sponsored the May 2003 *IBA GATS Forum* and thereafter adopted its September 2003 resolutions, it was building upon its prior work in the field and the discussions and consensus that had emerged in the IBA Council over a number of years. It is, therefore, useful to begin with a brief review of some of the IBA's work in the area of regulation of lawyers.

Although the IBA has adopted a number of resolutions and other documents related to the legal profession,⁴⁴ this section focuses on four IBA resolutions that are especially relevant to the GATS. The IBA Council adopted three of these resolutions during its meeting in Vienna, Austria, in June 1998. These resolutions are:

- a resolution that is referred to as either the Core Values Resolution or The Resolution on Deregulating the Legal Profession ["the Core Values Resolution"];⁴⁵
- the Resolution Adopting the Statement of General Principles for the Establishment and Regulation of Foreign Lawyers ["the

44. The IBA has issued other resolutions and statements that might also be viewed as relevant to the GATS negotiations. *See, e.g.*, Table of Contents of IBA Standards, Statements, Rules, Concordat and Resolutions (Oct. 2002), *available at* <http://www.ibanet.org/aboutiba/resolutions.asp> (last visited Oct. 1, 2004) (includes the following: IBA Minimum Standards of Judicial Independence; IBA Standard on International Code of Ethics; IBA Standards for the Independence of the Legal Profession; IBA Statement of General Principles for Ethics of Lawyers; IBA Resolution on Money Laundering; IBA Resolution on Continuing Professional Development; IBA Resolution on Bribery in International Business Transactions; IBA Resolution on Legal Aid; Resolution—Professionalism v. Commercialism).

45. The members of the IBA WTO Working Group, including this author, often refer to this resolution as the *Core Values Resolution*. When reproduced in the IBA's Compendium of Resolutions, however, the resolution's title is listed as *The Resolution on Deregulating the Legal Profession*. *See* IBA Resolutions at 14, *available at* <http://www.ibanet.org/aboutiba/resolutions.asp> (last visited Oct. 1, 2004). In the Compendium Index, however, there is a listing under "Standards and Statements" that states "World Trade Organisation and Organisations (WTO)—Organisation for Economic Cooperation and Development (OECD)" and has a question mark next to it. I believe this is a duplicate reference to the *Core Values resolution*. *See* <http://www.ibanet.org/pdf/resolutions/Resolution%20on%20Deregulating%20the%20Legal%20Profession%201998.pdf> (last visited Oct. 1, 2004).

Establishment Resolution”];⁴⁶ and

- the *Resolution on Multi Disciplinary Practices* [“the *MDP Resolution*.”] The 1998 *MDP Resolution* was amended in 2000, with an integrated version approved in 2001.⁴⁷

Three years later, in 2001, the IBA Council adopted a fourth resolution that is relevant to the GATS:

- the Resolution Adopting the Statement of Standards and Criteria for Recognition of the Professional Qualifications of Lawyers [the “Standards and Criteria for Recognition” and accompanying Resolution].⁴⁸

Both the 1998 *Core Values Resolution* and the 2001 *Standards and Criteria for Recognition Resolution* specifically state that they should be transmitted to the WTO.⁴⁹ Although these two resolutions are the only ones that include an explicit transmittal requirement, all four of these resolutions were, in fact, transmitted by the IBA to the WTO.⁵⁰ Indeed, both the 1998 *Establishment Resolution* and the 1998 *MDP Resolution* were cited in the WTO Secretariat’s⁵¹ July 1998 lengthy analysis of the

46. See *IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers (Adopted at IBA Council Meeting in Vienna, June 1998) (And Accompanying Resolution* [hereinafter *Establishment Resolution*]), available at IBA Website, Statements and Standards, at 11-14, available at <http://www.ibanet.org/pdf/resolutions/Statement%20of%20General%20Principles%20of%20Regulation%20of%20Foreign%20Lawyers%201998.pdf> (last visited Oct. 1, 2004).

47. The IBA website includes the original 1998 version of the MDP resolution and the resolution adopted in 2001 that integrated the 1998 and 2000 versions. See *IBA Resolutions* at 15-17 and 21-24, available at <http://www.ibanet.org/pdf/resolutions/Resolution%20on%20Multi-Disciplinary%20Practices%201998.pdf> (the 1998 version) and <http://www.ibanet.org/pdf/resolutions/Combined%20MDP%20Resolutions%20adopted%201998%20and%202000.pdf> (combined version) (last visited Oct. 1, 2004).

48. See *International Bar Association Resolution Adopting the Standards And Criteria For Recognition Of The Professional Qualifications of Lawyers (Agreed/Adopted at IBA Council Meeting in Istanbul, June 2001)* (on file with author).

As of October, 2004, this 2001 resolution did not appear on the IBA’s website. See *IBA Resolutions*, available at <http://www.ibanet.org/aboutiba/resolutions.asp> (last visited Oct. 1, 2004). Although this resolution is not available on the IBA website, the *Standards and Criteria* document to which this resolution refers is available on the website. The *Standards and Criteria* are available at the IBA Website, *Standards and Statements*, at 15-24, available at <http://www.ibanet.org/pdf/resolutions/Standards%20and%20Criteria%20for%20Recognition%20of%20Qualifications%20of%20Lawyers%202001.pdf> (last visited Oct. 1, 2004).

49. See *IBA Core Values Resolution*, *supra* note 45 and the *IBA Standards and Criteria for Recognition*, *supra* note 48.

50. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004).

51. The WTO Secretariat is the administrative body of the WTO. It has no policy-

legal services sector.⁵²

Because the WTO Secretariat has received all four of these IBA resolutions cited above and because two of these resolutions were included in the WTO's analysis of the legal services sector, key portions of these resolutions are reproduced below. The 1998 *Core Values Resolution* is one page long and states in its entirety:

Having due regard to the public interest in deregulating the legal profession as presently under consideration by the World Trade Organisation (WTO) and the Organisation for Economic Co-operation and Development (OECD) with the aim of:

- amending regulations no longer consistent with a globalised economy and

- securing the provision of legal services in an efficient manner and at competitive and affordable prices, the Council of the International Bar Association, considering that the legal profession nevertheless fulfills a special function in society, distinguishing it from other service providers, in particular with regard to:
 - its role in facilitating the administration of and guaranteeing access to, justice and upholding the rule of law,
 - its duty to keep client matters confidential,
 - its duty to avoid conflicts of interest,
 - the upholding of general and specific ethical and professional standards,
 - its duty, in the public interest, of securing its independence, professionally, politically and economically, from any influence affecting its service,

making authority, but provides technical and professional support to the WTO bodies. See Overview of the WTO Secretariat, available at http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Oct. 1, 2004).

52. See WTO Council for Trade in Services, Legal Services, Background Note by the Secretariat, S/C/W/43 (July 6, 1998) at 18-19 [hereinafter WTO Secretariat's Legal Services Sectoral Analysis]. This thirty page report is available on the WTO website and the ABA GATS Webpage, see http://www.abanet.org/cpr/gats/bkground_note.pdf and on my own webpage at <http://www.personal.psu.edu/faculty/1/s/1st3/docs%20for%20secretariat%20reports/s-c-w-43%20secretariat%20note%20on%20legal%20services.doc> (last visited Oct. 1, 2004).

– its duty to the Courts

HEREBY RESOLVES

1. that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and
2. that any steps taken with a view to deregulating the legal profession should respect and observe the principles outlined above.⁵³

At the same time that it adopted the *Core Values Resolution*, the IBA Council adopted the *Establishment Resolution*. This resolution was the result of a multi-year, sometimes contentious process that involved vigorous discussions and addressed the practice rights of foreign lawyers.⁵⁴ The 1998 *Establishment Resolution* states in pertinent part:

[T]he IBA's Council hereby approves the 'Statement of General Principles for the Establishment and Regulation of Foreign Lawyers' set forth below as a statement which fairly describes the essential principles on which regulation of cross-border establishment of lawyers should be based; as one which emphasizes and promotes principles which are common to the legal profession worldwide; and encourages those of its member organizations in jurisdictions which have not addressed the issue of cross-border establishment of lawyers to adopt, or encourage the adoption of, appropriate amendments to their regulatory regimes which are consistent with the Common Regulatory Principles and at least one of the licensing approaches set forth therein.⁵⁵

The two licensing approaches referred to in this resolution and contained within the *Statement of General Principles for the Establishment and Regulation of Foreign Lawyers* are: 1) a *full-license approach*; and 2) a *limited-license approach*. Under a *full-license approach*, an established foreign lawyer must obtain the same qualification or license as a domestic lawyer in that country in order to practice law in that jurisdiction. Under a *limited-license approach*, an established foreign lawyer is permitted to practice using something less than the full license, such as a license to practice as a foreign legal consultant.

Initially, the IBA Council Members could not reach a consensus

53. See *Core Values Resolution*, *supra* note 45.

54. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004).

55. See *Establishment Resolution*, *supra* note 46.

about whether foreign lawyers must integrate into the local profession (i.e., should the Council endorse the *full-license* approach?).⁵⁶ Ultimately, they were able to agree on a compromise position that acknowledged both the *full-license* and *limited-license* approaches, but specified that both approaches should comply with certain specified *General Principles*.⁵⁷

The third IBA resolution adopted in 1998 addressed the issue of MDPs—which are multidisciplinary partnerships or practices between lawyers and non-lawyers.⁵⁸ The issue of MDPs has been a contentious issue within the legal profession.⁵⁹ The WTO's Legal Services paper cites the IBA's *MDP Resolution*, which suggests that the MDP issue may have GATS implications.⁶⁰

Three years after the IBA Council adopted the three resolutions discussed above, it adopted a one page resolution that endorsed the IBA's *Standards and Criteria for Recognition*. This *Resolution* states:

WHEREAS, central to the future development of the legal

56. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004).

57. See *id.* Accord Establishment Resolution, *supra* note 46.

58. The term "MDPs" has been used to refer to both multidisciplinary *practice* between lawyers and non-lawyers and multidisciplinary *partnerships* between lawyers and non-lawyers. See Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 9, at n.1. For purposes of this Article, these distinctions are not important and these terms can be used interchangeably.

59. For a discussion of MDPs, see generally *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000). The ABA Center for Professional Responsibility's MDP Webpage also lists a number of articles that have been written recently on MDPs. See http://www.abanet.org/cpr/mdp-add_md_papers.html (last visited Oct. 1, 2004). My writings on MDPs are found on my website at <http://www.personal.psu.edu/faculty/l/s/lst3/> (last visited Oct. 1, 2004).

60. WTO Legal Services Sectoral Analysis, *supra* note 52, at 19. Other commentators have raised the issue of the connection between MDPs and the GATS. See, e.g., Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 9, at 992. During the 1990's, the Organisation for Economic Cooperation and Development ("OECD") sponsored three conferences devoted to the topic of professional services. Both the GATS and MDPs were discussed during these conferences. See Rhonda Piggott, Report of the Rapporteur (for Member Governments), in Organisation for Economic Co-operation and Development, *International Trade in Professional Services: Advancing Liberalisation Through Regulatory Reform 2*, 235-36 (1997):

This range of circumstances emphasises the need to revisit presumptions on the desired regulatory responses. If less burdensome regulatory response[s] exist in some OECD members, without negative effects, but not in others, what lessons could this provide to all of us? The fact is globalisation is affecting traditional styles of supplying professional services. . . . We heard, for example, that 18 of 25 OECD members have prohibitions on incorporation in accountancy and law. It would be useful to learn how those countries without regulation have sustained protection of the public interest. Case studies could illustrate options and reflect the advantages of flexibility in country responses.

profession is the fact that international trade in legal services is now subject to the General Agreement on Trade in Services (“GATS”) and such development must be consistent with the basic concepts underlying GATS, which include transparency in regulation, non-discriminatory treatment of regulated parties, and the requirement that regulation should be no more burdensome than necessary to protect the public interest; and

WHEREAS, the IBA Council recognizes that the mutual recognition agreements (“MRAs”) contemplated by Article VII of GATS are a useful complement to the market access commitments of the Members of the World Trade Organization (“WTO”) and the general provisions of GATS mandating liberalization of trade and services, including legal services; and

WHEREAS, the IBA Council believes that all MRAs should be consistent with the principles common to all legal professions articulated in the Council’s resolution, dated June 6, 1998, addressed, inter alia, to the WTO, and should take into account the special considerations applicable to the legal profession which distinguish it from other professions and providers of business services;

NOW, THEREFORE, BE IT RESOLVED, that the IBA Council hereby approves the Statement of Standards and Criteria for Recognition of the Professional Qualifications of Lawyers and authorizes the IBA’s officers to submit the Statement to the WTO and to its Member organizations for their consideration.⁶¹

Although this *Resolution* was brief, the *Statement of Standards and Criteria for Recognition of the Professional Qualifications of Lawyers* to which this *Resolution* referred was a seven-page document that addressed a number of topics, including:

- Considerations unique to the legal profession (including the special role of the legal profession, heterogeneity of substantive knowledge, and the regulatory structure of the legal profession);
- Standards and criteria for recognition, including home jurisdiction regulation and discipline; character and fitness; education and/or practical training (which in turn included the level and duration of legal education, extent of practical training, similarity of legal systems, specialized education or training requirements, and professional experience); and

61. See Standards and Criteria Resolution, *supra* note 48.

- General considerations regarding the content of mutual recognition agreements, including scope of practice limitations, forms of association; regulatory and disciplinary matters; and the definition of competent authorities.⁶²

In addition to these resolutions, the IBA has undertaken several other activities related to the GATS and legal services. In February 2002, eight representatives of the IBA attended three days of meetings at the WTO Secretariat in Geneva.⁶³ The goals of this visit were for the IBA to learn more about the progress of the ongoing GATS negotiations and for the IBA to brief WTO and Member State officials about the work of the IBA.⁶⁴ The topics discussed at that meeting included: the timetable and procedure for the ongoing GATS negotiations; the importance of legal services; imparting knowledge about how lawyers crossed borders; the classification of terms to use when negotiating legal services; the relationship between GATS “requests” and “offers”; mutual recognition agreements; domestic regulation; the core values of the legal profession; the *Accountancy Disciplines*; the Australian papers on legal services, and the relationship between bars and their member governments.⁶⁵

During their visit, the IBA delegates also solicited feedback from WTO officials and Member State representatives about future work that the IBA might perform with respect to the GATS and legal services. The IBA delegates discussed the possibility of preparing a GATS Handbook

62. See Standards And Criteria For Recognition, *supra* note 48.

63. During its visit, the delegation discussed how the IBA could assist the WTO Secretariat and national delegations in the negotiations on legal services and the development of disciplines applicable to the legal profession. The IBA representatives attending included then IBA-President Dianna Kempe, Ben Greer, Steve Nelson, Akira Kawamura, Mark Ellis, Fernando Pombo, Jonathan Goldsmith and Laurel Terry. See News Release, February 27, 2002 IBA and WTO Discuss Trade in Legal Services, available at http://www.envoymessaging.com/eletra/mod_print_view.cfm?this_id=57769&u=iba&issue_id=000012703&show=F,T,T,T,F,Article,F,F,F,F,T,T,F,T,T&XXDESXXpower=F (last visited Oct. 1, 2004).

64. See Final Report, IBA VISIT TO THE WTO, GENEVA: 25-27 FEBRUARY 2002, prepared by Jonathan Goldsmith (on file with author.) During this visit, IBA representatives met with the following: Hamid Mamdouh, Peter Morrison and other members of the WTO Secretariat; Ann-Mary Redmond, European Community; Andrea Spear, Australia; Scott Gallacher, New Zealand, Chairman of the Working Party on Domestic Regulation; Mark Linscott, United States; Toshihiro Iijima, Japan; Mr. Dalela, India; David Usher, Canada; Ms. Fonny Shek & Thomas Chan, Hong Kong; Ms. Pimchanok Vonkhornporn, Thailand, Chairperson of the Committee on Specific Commitments; Sergio Santos, Brazil. *Id.*

65. See *id.* The Australian papers on legal services referred to include WTO Council for Trade in Services, Communication from Australia—Negotiating Proposal for Legal Services, Revision, S/CSS/W/67/Suppl.1/Rev.1 (10 July 2001) and WTO Council for Trade in Services, Communication from Australia—Negotiating Proposal for Legal Services, S/CSS/W/67 (Mar. 28, 2001).

that focused on legal services, conducting a seminar on legal services for WTO Member States; and doing additional work on the classifications or terms that countries should use when negotiating legal services.⁶⁶

Each of these ideas for further IBA activity later came to fruition. In May 2002, the IBA issued a GATS Handbook.⁶⁷ On July 19, 2002, the IBA held a day-long educational seminar in Geneva that was intended to educate the trade representatives of WTO Member States about the legal profession.⁶⁸ During the May 2003 *IBA GATS Forum*, the IBA considered the issue of the classification system to use for legal services negotiations.⁶⁹

B. *The IBA WTO Working Group*

Much of the work that led to the May 2003 *IBA GATS Forum* and resulting resolutions was done under the auspices of the *IBA WTO Working Group*, whose aim is to “monitor the work of the WTO

66. *See id.* The reason for the work on classification was because the WTO Secretariat’s Legal Services Sectoral Analysis, *supra* note 52, explicitly asked WTO Member States to comment on the classification system that should be used for legal services. *See id.* at 5.

67. *See* IBA News for Members, General Agreement on Trade in Services—IBA Handbook,, May 2002, *available at* <http://www.envoynews.com/iba/index000015793.cfm> (last visited Oct. 1, 2004). The link to the IBA GATS Handbook listed in this news release does not work any longer, but the IBA GATS Handbook is *available at* <http://www.ibanet.org/pdf/gats.pdf> (last visited Oct. 1, 2004). This Handbook was jointly prepared by Laurel Terry and Jonathan Goldsmith and is based in large part on Terry, *GATS’ Applicability to Transnational Lawyering*, *supra* note 9.

68. *See* CCBE GATS Round-Up, CCBE Info June 2002, No. 2, at 10 (“[T]he CCBE will be participating in an IBA WTO seminar for trade negotiators on the legal profession. This seminar will be held in Geneva in July 2002 and has a dual purpose of explaining the cross-border work of lawyers (including the core values) and the taking forward the discussion on classification of terms that the IBA recommends for usage in the new round.”), *available at* http://www.ccbe.org/doc/Archives/n_02_en.pdf (last visited Oct. 1, 2004).

Approximately eighty trade representatives attended the WTO/IBA Educational Seminar. The topics addressed included: the Role of the Legal Profession in Society and in Commerce (subtopics: Importance of the Rule of Law and The Fundamental Characteristics (Specificities) of the Legal Profession); Legal Services Under GATS (subtopics: Legal Services as an Element of International Trade and Legal services as a Complement to Other Elements of International Trade and Investment); Perspectives on the Current State of International Trade in Legal Services (Subtopics: Law Firms and Individual Lawyers, including Global Firms and Local Firms in Importing Jurisdictions, Bars and Law Societies, including Exporting Jurisdictions and Importing Jurisdictions); the View From Europe; and Prospects for Further Liberalization (subtopics: Multilateral and Unilateral.) The speakers included lawyers practicing in Brazil, England, France, Germany, Hong Kong, Japan and the U.S., and the Secretary-General of the CCBE. *See* Email Letter from Bernard L. Greer, Jr., Chair, IBA WTO Working Group, to Laurel S. Terry (Feb. 20, 2004).

69. *See infra* notes 111-114 and accompanying text.

globally.”⁷⁰ The IBA WTO Working Group is chaired by Ben Greer, a U.S. lawyer with the firm of Alston and Bird, based in Atlanta, Georgia.⁷¹ The IBA WTO Working Group is technically a subcommittee of the *Globalisation of the Legal Profession Committee*, which is chaired by Willem Calkoen (Netherlands) and Lord Daniel Brennan (England).⁷²

The IBA has made a concerted effort to include in its WTO Working Group lawyers from diverse geographic and private practice backgrounds.⁷³ The members of the IBA WTO Working Group include lawyers from the continents of Africa, Asia, Australia, Europe, North America, and South America. The group includes lawyers from very large firms (Freshfields), from mid-size firms (Negri Teijeiro & Incera), and from relatively small firms (e.g., Kimitoshi Yabuki), lawyers from countries that have been viewed as legal services exporters (e.g., the U.S. and the United Kingdom) and countries that have been viewed as legal services importers (e.g., Japan).⁷⁴ With two exceptions, the members of the IBA WTO Working Group are lawyers who practice in major

70. See List of IBA Standing Committees and their Members, 2003-2004, at 9, available at <http://www.ibanet.org/pdf/IBASTandingCommittees2003.pdf> (last visited Oct. 1, 2004). The IBA WTO Working Group did not draft the IBA resolutions discussed previously. Telephone Interview with Bernard L. Greer, Jr., IBA WTO Working Group Chair (Feb. 11, 2004).

71. See IBA Website—Standing Committees, Globalisation of the Legal Profession, available at <http://www.ibanet.org/aboutiba/standcom.asp#globalisation> (last visited Oct. 1, 2004).

72. See *id.*

73. I participated in discussions to diversify the committee. On the one hand, one could critique the lack of diversity in this group by noting that most committee members are in private practice with commercial law firms and, by definition as IBA members, have an interest in international law and practice. On the other hand, the IBA appears to have made a genuine effort to recruit Committee members who would represent a range of views.

74. In my view, it is increasingly difficult to draw a sharp distinction between countries that are “legal services exporters” and those that are “legal services importers.” Countries that traditionally have been viewed as exporters, such as the U.S., also “import” legal services, a trend which seems only to be increasing. See, e.g., United States Department of Commerce, Bureau of Economic Analysis, Table 1, Private Services Trade by Type, 1992-2003, available at <http://www.bea.doc.gov/bea/di/1001serv/1003serv/tab103.xls> (last visited Oct. 1, 2004) (This table shows that the U.S. exported \$3.27 billion in legal services 2002 and imported \$768 million.). See also Terry, *GATS’ Applicability to Transnational Lawyering*, *supra* note 9, at 995-997. Moreover, countries that traditionally have been viewed as importers of legal services increasingly export some legal services. For example, the Japanese law firm of Anderson Mori now has a branch office in China. Anderson Mori is the law firm in which IBA WTO Working Group Member Akira Kawamura is a partner. See <http://www.andersonmori.com/en/lawyer/index.html> (last visited Oct. 1, 2004). See Email Letter from Akira Kawamura, BIA WTO Working Group Member to Laurel S. Terry (Feb. 24, 2004) (on file with author) (“The JFBA and Akira Kawamura have been supportive of the globalization of legal profession and cross border practices within the frame work where the core value and independence of the profession is fully respected.”).

commercial law firms.⁷⁵ Those not in private practice include one academic (Laurel Terry, the author) and one bar executive (Jonathan Goldsmith, who is Secretary General of the Council of the Bars and Law Societies of the European Union (“CCBE”)).

In addition to the Working Group Chair, Ben Greer, the committee members include Michael Adcock (South Africa); Jonathan Goldsmith (Belgium); Hans-Jürgen Hellwig (Germany); Gunther Horvath (Austria); Akira Kawamura (Japan); Russell Miller (Australia); Toshiro Nishimura (Japan); Juan Javier Negri (Argentina); Steve Nelson (USA); Laurel Terry (USA); Claus von Wobeser (Mexico); Brian Wallace (Canada); and Kimitoshi Yabuki (Japan).⁷⁶

C. *The May 2003 IBA GATS Forum*⁷⁷

1. Pre-Forum Activities

A few days after the IBA’s July 19, 2002 education program for WTO Member States in Geneva, the WTO Working Group Chair sent an email note to the participants and to the IBA WTO Working Group in which he thanked the participants and noted that there was a continuing role for the IBA with respect to the GATS and legal services.⁷⁸ Less than a month later, at the American Bar Association (“ABA”) Annual Meeting in Washington, D.C., Ben Greer chaired a lunch meeting with a few members of the IBA WTO Working Group. The participants

75. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004).

76. See List of IBA Standing Committees and their Members, 2003-2004, at 9, available at <http://www.ibanet.org/pdf/IBASTandingCommittees2003.pdf> (last visited Oct. 1, 2004). Mr. Yabuki is not included on this list on the website because he joined the IBA WTO Working Group in September 2003, in San Francisco. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004). I first attended a meeting of this committee in October 2001 at the invitation of Ben Greer. I participated in its activities thereafter. In January 2003, I received a formal invitation to join the committee and was appointed for a term from 1 January 2003 until 31 December 2004.

77. I participated in most of the events described in this section of the article. I have cited supporting documentation where possible. Information without citation is based on my observations and involvement.

78. See Email from Bernard L. Greer, Chair, IBA WTO Working Group to Laurel S. Terry (and others) (July 22, 2002) (on file with author) (“The work of the IBA’s WTO Working Group is not finished. There is much to do. We must do our best to assist the IBA’s member bars and the legal profession in gaining a complete understanding of the importance of the GATS negotiations, and we must also ensure that—as the negotiations in Geneva proceed—the liberalization of trade in legal services is accomplished in a manner consistent with the core values of our profession. As these efforts continue, I hope that we can count on you for your assistance and support.”).

discussed the possibility of having the IBA sponsor a GATS conference and discussed possible conference topics, format, materials, and timing.⁷⁹ During this meeting, the IBA WTO Working Group members identified the issues of classification and the development of disciplines as issues for which the IBA might be able to contribute usefully and which might be suitable for a day-long meeting.

Following the August 2002 lunch meeting, there were a series of email exchanges among the members of the IBA WTO Working Group. After a number of drafts, the members of the IBA WTO Working Group agreed on an Agenda that addressed the purpose, method of operation, venue and conduct of the proposed *Forum*.⁸⁰ The IBA's Member Bars received this Agenda in January 2003, approximately five months before the *IBA GATS Forum*.⁸¹ The IBA Member Bars were encouraged to send to the *IBA GATS Forum* their bar president and the person responsible for monitoring GATS developments.⁸²

Although the original planning for the *IBA GATS Forum* predated the WTO's consultation to the IBA, the WTO's consultation arrived during the planning stages of the *IBA GATS Forum*. Accordingly, the final version of the *Agenda*, which was prepared in February 2003, explicitly referred to the WTO's consultation as one of the purposes of the *IBA GATS Forum*:

The purpose of the Forum is to convene representatives of a broad cross-section of the IBA's Member Organizations to examine specific issues arising from the impact of the General Agreement on Trade in Services ("GATS") on the legal profession. It is hoped that the Forum will facilitate development of a consensus among the IBA's Member Organizations on the issues under study. Where consensus exists, the Forum will make recommendations to the IBA's Council

79. Those attending this lunch included Ben Greer, Jonathan Goldsmith and Laurel Terry (this author). The summary that follows is based on my recollection of the meeting and subsequent events.

80. See IBA GATS FORUM, Brussels, Belgium, May 30, 2003, Program Agenda (on file with author). This Agenda is also reproduced, *infra*, as an Appendix [hereinafter IBA Final Agenda].

81. See Letter from Sibylle Duell, IBA Member Organisations Administrator, to the Presidents of the Bar Associations and Law Societies (Jan. 31, 2003) (on file with author) ("We look forward to welcoming you to the WTO Bar Leaders Forum on 30 May 2003 from 9:30 a.m. - 4:30 p.m. which will tackle many of the issues surrounding GATS and its affect on legal services. This meeting will take place just before the IBA Council meeting in Brussels and an agenda for the meeting is enclosed. Please let us know whether you will be able to attend by using the faxback sheet.") This Agenda further revised and mailed in March, 2003 with the other materials for the IBA GATS Forum. See *infra* note 95 and accompanying text.

82. See Telephone Interview with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Feb. 17, 2004).

on resolutions addressing the issues. If passed by the council, these resolutions would be communicated to the World Trade Organization (“WTO”) and other interested bodies. In seeking consensus, the Forum does not aspire to promote the position of an individual member organization or a particular WTO member government. Rather its goal is to develop consensus views that will facilitate the GATS negotiations by providing a conceptual framework for the conduct of the negotiations. The Forum will also seek to ensure that the consensus views of the worldwide legal profession are taken into account as the negotiations on legal services proceed.

The WTO recently has requested input from non-governmental organizations with respect to certain specified issues that are discussed in greater detail below. The IBA is one of the leading professional organizations in the world. Because of the breadth of its individual and organizational membership, its expertise regarding legal services and the prior resolutions of its Council regarding legal services, the IBA is uniquely situated to assist WTO Member States as they consider issues of trade in legal services.⁸³

The *Agenda* identified three issues to be addressed at the *IBA GATS Forum*:

- classification of terms;⁸⁴
- disciplines on legal services;⁸⁵ and

83. IBA Final Agenda, *supra* note 80.

84. *Id.* The Agenda stated in pertinent part:

Classification of Terms. During the Uruguay Round of trade negotiations, the WTO recommended that WTO Member States use the U.N. classifications for legal services when submitting market access “offers” and “requests.” As noted in the WTO Secretariat’s paper on legal services, very few countries used the U.N. classification system in the Uruguay Round because this classification system did not seem to match the manner in which legal services are regulated. The Secretariat thus invited WTO Member States to suggest alternative definitions of legal services that could be used when countries submit their “market access” “requests” and “offers.” Australia has responded to the WTO Secretariat’s invitation by submitting a paper that sets forth 12 different categories of legal services that countries could use to present their “requests” and “offers.”

The Forum will solicit reactions from its participants and from the IBA’s Member Organizations to Australia’s proposed classification system, including any suggested corrections, additions or alternatives. Ideally, the Forum would lead to a recommendation to the IBA’s Council. If the Forum’s recommendations were adopted, these recommendations would be transmitted to the WTO as the IBA’s recommendations about the proper terminology to use when making market access “requests” and “offers” concerning legal services.

- other GATS issues.⁸⁶

In designing the procedure for the *IBA GATS Forum*, the planners drew upon the IBA's experience in developing its prior resolutions. The members of the WTO Working Group had learned: 1) that there are a wide variety of views among the world's lawyers and bars on issues related to the regulation of legal practice; and 2) that consensus is possible only after extensive opportunity for discussion and an exchange of views. In addition to this IBA experience, some of the *IBA GATS Forum* planners drew upon lessons learned from the 1998 *Paris Forum*.⁸⁷

The 1998 *Paris Forum* was jointly sponsored by the ABA Section of International Law and Practice, the CCBE, and the Japan Federation of Bar Associations ("JFBA") and was attended by 105 lawyers from twenty-five countries.⁸⁸ Prior to the *Paris Forum*, the three sponsors distributed to all attendees *Discussion Papers* on certain agreed-upon

85. IBA Final Agenda, *supra* note 80. The Agenda stated in pertinent part: Discipline on Legal Services. In addition to covering "market access" issues, the GATS also addresses domestic regulation and requires WTO Member States to develop "disciplines" on domestic regulation. In 1998, WTO Member States agreed upon a discipline for the accountancy sector. WTO Member States are now considering whether the Disciplines for the Accountancy Sector can and should be extended to some or all other service sectors, including legal services.

In December 2002, the WTO asked a number of professional organizations, including the IBA, to comment on the desirability of extending the Disciplines for the Accountancy Sector to legal services. The Forum will elicit the views of the participating bars on the issues raised by the WTO's letter to the IBA. In particular, the Forum will attempt to determine whether there is a consensus about problems that might exist in applying the Disciplines for the Accountancy Sector to legal services. The Forum will also address the desirability of a separate "discipline" or "annex" for legal services. If, in their view, that is desirable, the Forum will identify the specific issues to be covered in such a "discipline." Ideally, the Forum would lead to a recommendation to Council. If the Forum's recommendations are adopted, they would be transmitted to the WTO as the IBA's response to the WTO's December 2002 letter concerning the desirability of making the Accountancy Discipline applicable to legal services.

86. IBA Final Agenda, *supra* note 80. The Agenda stated in pertinent part: Other GATS Issues. The Forum will facilitate an exchange of views among participating bars on other issues of concern arising under GATS, for example relating to scope of practice of foreign lawyers or their vehicles for practice in a host jurisdiction. If the OECD has issued a "checklist" of issues for countries to consider concerning legal services, this checklist may be discussed. The goal of this section of the Forum is to allow bars to discuss issues directly with one another, outside of the context of government-to-government negotiations.

87. For example, I tried to think about ways to emulate the strengths of the *Paris Forum* and avoid its weaknesses.

88. Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1, nn.38-40 and n.87 and accompanying text (1999), available at <http://www.personal.psu.edu/faculty/l/s/1st3/parisforumintro.pdf> (last visited Oct. 1, 2004).

topics.⁸⁹ During the *Paris Forum*, the New York State Bar Association, the Law Council of Australia and the Korean Bar Association distributed additional papers.⁹⁰ One of several critiques of the *Paris Forum* was that it was not structured in such a way as to encourage the sponsors to comment on each others' papers or to develop a consensus on issues during the *Paris Forum*.⁹¹

Armed with this knowledge, the *IBA GATS Forum* planners attempted to create a format that would allow an opportunity to exchange views ahead of time and to develop a consensus. The *Agenda* therefore established a three-step process regarding the materials for the *IBA GATS Forum*.⁹² According to the *Agenda*, the IBA's WTO Working Group would circulate background information to participating bars three months before the *IBA GATA Forum*. As the second step, participating bars were asked to send the IBA any proposals, suggestions or contributions approximately six weeks before the *Forum*. Step three of the process was to have the IBA WTO Working Group distribute to *Forum* attendees a final version of the papers one month before the *Forum*.

Although the ultimate procedure did not occur exactly as set forth in the *Agenda*, the IBA WTO Working Group was able to maintain a three-step process. The first stage was the circulation of two Discussion Papers by the IBA WTO Working Group. The initial drafts of these Discussion Papers were prepared by IBA WTO Working Group members Ben Greer, Jonathan Goldsmith and Laurel Terry and drew, in large part, upon the resolutions that had previously been adopted by the IBA. On February 27, 2003, these drafts were circulated to the entire IBA WTO Working Group, with a request that the members respond with comments by March 13, 2003.⁹³ Several members of the Working Group provided comments, as did others to whom the drafters had circulated the papers.⁹⁴ By late March 2003, the *IBA GATS Forum* papers had been distributed by mail to IBA Council Members and those who had registered for the *IBA GATS Forum*, together with the agenda materials for the May 2003 IBA Council Meeting.⁹⁵ Materials included

89. *See id.* at 17.

90. *See generally*, Symposium: *The Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1 (1999) (includes the papers submitted by the Law Council of Australia, Korea, and the New York State Bar Association.).

91. *See* Terry, *Introduction to the Paris Forum*, *supra* note 88, at 25-26.

92. *See* IBA Final Agenda, *supra* note 80.

93. *See* Email Letter from Bernard L. Greer, Chair, IBA WTO Working Group to Members of the IBA WTO Working Group (Feb. 27, 2003) (on file with author).

94. *See, e.g.*, Email Letter from Juan Javier Negri, Member, IBA WTO Working Group to IBA WTO Working Group (Mar. 10, 2003) (on file with author).

95. *See* Letter to IBA Council Members.

in this first distribution consisted of:

- the Agenda;
- an eight-page Discussion Paper on Classification of Terminology in the Current GATS Round;
- a twenty-page Discussion Paper on What Changes Are Required to the WTO Accountancy Disciplines Before They Can Be Applied to the Legal Profession;
- Annex 1, which was the WTO Disciplines on Domestic Regulation in the Accountancy Sector, S/L.64 (17 Dec. 1998); and
- Annex 2, which summarized the Disciplines Discussion Paper and was entitled *Changes Required to the Disciplines for the Legal Profession*.

Next, IBA Member Bars were asked to comment on the materials received. Although the *Agenda* suggested that Bars submit their comments six weeks before the *Forum*, the *IBA GATS Forum* attendees were later asked to respond by May 9, 2003, which was approximately two weeks before the *IBA GATS Forum* convened.⁹⁶ The Bar Council of England and Wales submitted the most extensive comments that were received by the May 9, 2003 deadline.⁹⁷ Comments were also provided by the Capeverdean Bar Association,⁹⁸ the Law Council of Australia,⁹⁹ the JFBA,¹⁰⁰ and individual lawyers.¹⁰¹

96. See, e.g., Letter from Bernard L. Greer, Jr., IBA WTO Working Group Chair to Participants in the IBA Council Brussels Bar Forum (Apr. 22, 2003) (on file with author) (requesting comments by May 9, 2003); but see Cover Memorandum Regarding Comments Received by the WTO Working Group at p.1, which was emailed to everyone registered for the *IBA GATS Forum*. See Email Letter from Sibylle Duell, IBA to *IBA GATS Forum* Attendees (May 23, 2003) (both on file with author). The Cover Memorandum listed May 12, 2003 as the date by which comments were due.

97. See Email Letter from Christian Wisskirchen, International Relations Manager, Bar Council of England and Wales to Sibylle Duell, IBA (May 9, 2003) (on file with author).

98. See Faxed Letter from Vieira Lopes, IBA Councilor, Capeverdean Bar Association to Sibylle Duell (May 23, 2003) (on file with author).

99. See Email Letter from Bethan Timiney, Executive Assistant to Russell Miller, Member, IBA WTO Working Group to *IBA GATS Forum* Attendees (May 27, 2003) (on file with author) (attaching Classification of Terminology for the Purposes of Trade Negotiations within the GATS: A Discussion Paper prepared by the Law Council of Australia (LCA) for the IBA's WTO/GATS Forum, Brussels, May 30, 2003).

100. See Email Letter from Kimitoshi Yabuki, Director, Office of International Affairs, Japan Federation of Bar Associations to Sibylle Duell, IBA Secretariat (May 23, 2003) (on file with author).

101. See Email Letter from Scott Gallacher, Minter Ellison, Rudd, Watts to Laurel S.

The IBA took several steps to encourage IBA Member Bars to comment on the *Forum* Discussion Papers. For example, the IBA included an announcement about the *GATS Forum* in the April 2003 issue of its electronic newsletter that was distributed on March 26, 2003.¹⁰² The IBA also sent out a letter dated April 22, 2003 that included the *Forum* Final Programme and encouraged IBA Member Bars to submit comments by May 9, 2003.¹⁰³

In addition to soliciting comments from IBA Member Bars, in the month before the *IBA GATS Forum*, the primary drafters of the Discussion Papers sought out trade law experts in order to clarify certain issues.¹⁰⁴ During this period of time, the IBA WTO Working Group also took note of a new WTO discussion paper on legal services classifications that had been issued by the European Community after the preparation of the original IBA Classification Discussion Paper.¹⁰⁵

After the IBA WTO Working Group received the comments on the *IBA GATS Forum* Discussion Papers, it circulated another set of documents. On May 23, 2003, one week before the *IBA GATS Forum*, the IBA Secretariat distributed electronically to those registered for the *Forum* an additional set of materials that included the following:

- a document titled Cover Memorandum Regarding Comments Received by the WTO Working Group (includes Annex 3—a summary of comments and additional suggested changes);

Terry, Member, IBA WTO Working Group (May 20, 2003) (on file with author). Mr. Gallacher is the former chair of the WTO Working Party on Domestic Regulation and a colleague of IBA WTO Working Group member Russell Miller.

102. See WTO Forum, IBA News for Members, Apr. 2003, available at <http://www.envoynews.com/iba/index000029557.cfm> (last visited Oct. 1, 2004). This newsletter had a link to a larger article. See WTO Forum, available at http://www.envoynews.com/iba/e_article000137910.cfm?x=a1yr3MJ,afSV0Pv (last visited Oct. 1, 2004).

103. See, e.g., Letter from Bernard L. Greer, Jr., IBA WTO Working Group Chair to Participants in the IBA Council Brussels Bar Forum (April 22, 2003) (on file with author). This letter from Ben Greer was included in an April 29, 2003 mailing from the IBA to the *IBA GATS Forum* attendees. See Email letter from Sibylle Duell, IBA Secretariat, to *IBA GAT Forum* Attendees (April 29, 2003) (on file with author). The copy of the April 22, 2003 letter on my computer shows May 9, 2003, a Friday, as the requested date for comments. The May 23, 2003 Cover Memo, *infra* note 106, however, indicates that the deadline was Monday, May 12, 2003.

104. See, e.g., Email Letter from Scott Gallacher to Laurel Terry, May 20, 2003, *supra*; Email Letters from Laurel Terry, Member IBA WTO Working Group to Professor Joel Trachtman, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University (Apr. 29, 2003 and May 19, 2003) (on file with author).

105. See WTO Council for Trade in Services, Communication from the European Communities, Classification of Legal Services, S/CSC/W/39 (Mar. 24, 2003), available at http://www.abanet.org/cpr/gats/eu_paper.pdf (last visited Oct. 1, 2004).

- Comments Submitted by the Bar Council of England and Wales; and
- the Communication from the European Communities, Classification of Legal Services, S/CSC/W/29 (24 March 2003).¹⁰⁶

In sum, significant activity occurred before the May 30, 2003 *IBA GATS Forum*. The IBA WTO Working Group employed a three-stage process that allowed IBA Member Bars to exchange views even before the *Forum* began.

2. The May 30, 2003 IBA GATS Forum

The *IBA GATS Forum* was a day-long conference held May 30, 2003 in Brussels, Belgium for representatives of IBA Member Bars.¹⁰⁷ Unlike the *Paris Forum*, which was a stand-alone conference, the *IBA GATS Forum* was held on the day immediately preceding the IBA's Council meeting. As a result, for those bar representatives who already had planned to be in Brussels for the IBA Council meeting, there were minimal costs associated with attending the *IBA GATS Forum*.

Although the records are incomplete, the *IBA GATS Forum* was attended by at least sixty people and may have been attended by as many as ninety people, from six continents, with representation from sixty bar associations.¹⁰⁸ It began at 9:30 a.m. in a formal courtroom at the Palais

106. See Email Letter from Sibylle Duell to *IBA GATS Forum* Attendees (May 23, 2003) (on file with author).

107. The Schedule for the *IBA GATS Forum* was included in a document called "Program Outline." See IBA WTO Working Group Brussels Bar Forum May 30, 2003 Program Outline (Undated Copy) (attached to May 7, 2003 email from Bernard L. Greer, IBA WTO Working Group Chair to Working Group Members) (on file with author). This copy was also circulated to the *IBA GATS Forum* Attendees in the May 23, 2003 email letter referred to *supra* note 106.

108. The Sign-in Sheet from the *IBA GATS Forum* showed 58 people attending, from six continents, including representatives from 39 bar associations. See Sign-Up Sheet for WTO Forum, 30 May 2003, attached to Email Letter from Sibylle Duell, IBA Secretariat, to author, Dec. 5, 2003 (on file with author). This Sign-In Sheet is incomplete, however. For example, it does not include WTO Working Group Member Laurel Terry or Christian Wisskirchen and Matthias Kelly, Q.C. from the Bar Council of England and Wales, who had pre-registered and were present, but were not listed on the Sign-In sheet. See Email Letter from Christian Wisskirchen to Laurel S. Terry (Feb. 20, 2004) (confirming that he and Matthias Kelly were present at the *IBA GATS Forum*.) Thus, there were at least sixty-one people who attended. Furthermore, the Sign-In Sheet includes 21 people, including representatives from 11 Bar Associations, who had not been on the pre-registration list.

The Final Registration List before the *IBA GATS Forum* showed a pre-registration of 68 individuals from six continents, representing 49 bar associations, although two individuals had "question marks" next to their "yes." See Registration List attached to Email Letter from Sibylle Duell, IBA Secretariat, to IBA WTO Working Group (May 28, 2003) (on file with author).

Accordingly, there could have been ninety people at the *IBA GATS Forum* if one counts this author, together with the 68 pre-registrants and the 21 people on the Sign-In list who had not pre-registered. These ninety people could have been included representatives from the 49 pre-registered bar associations, together with the 11 additional bar associations listed on the Sign-In sheet.

The pre-registration list included the following individuals: Michael Clancy, Law Society of Scotland; Kadim Lami, Iraqi Bar Association; Ip Shing Hing, Hong Kong Law Society; Lalit Bhasin, Bar Association of India; Abdulrahman Humaidan Al-humaidan, Kuwait Bar Association; Stanislaw Rymar, Polish Bar Council; Alejandro Ogarrio, Mexican Bar Association; Roser Rafols, Ilustre Colegio d'Avocats de Barcelona; Akira Kawamura, Japan Federation of Bar Associations; Gazi Mostafa Kamal, Bangladesh; Noorul Azhar, Bangladesh; Lucy Dupong, Luxembourg; Chief Wole Olanipekun, Nigerian Bar Association; Colin Campbell, Faculty of Advocates; Bill O'Shea, Law Institute of Victoria; Dominique Voillemot, Confederation Nationale des Avocats; James Brumm, Association of the Bar of the City of New York; Diane Bourque, Federation of Law Societies of Canada; Trudi L. Brown, Federation of Law Societies of Canada; Heinz Weil, German Federal Bar (Bundesrechtsanwaltskammer); Robert Benjamin, Law Society of New South Wales; Milos Barutciski, Canadian Bar Association; Iqbal Ganie, Law Society of South Africa (question mark); Andrew Corlett, Isle of Man Law Society (question mark); Manuel Campos Galvan, Association of the Bar of the City of New York; Roderick Woo, Law Society of Hong Kong; Silvia Tsorlinis, Austrian Federal Bar Association; Rupert Wolff, Austrian Federal Bar Association; Hans-Juergen Hellwig, Deutscher Anwaltsverein; Tae Hee Lee, Korean Bar Association; Marijan Hanzekovic, Croatian Bar Association; Pinto Monteiro, Capeverdean Bar Association; John Morrisson, Capeverdean Bar Association; Kamal Hossain, National Bar Association of Bangladesh; Shah Khasruzzaman, National Bar Association of Bangladesh; Robin Healey, Law Society of England & Wales; Bruce Slane, New Zealand Law Society; Henrik Rothe, The Danish Bar & Law Society; Melba D. Ayala Ortiz, Colegio de Abogados de Puerto Rico; Rosa I. Falcon Diaz, Colegio de Abogados de Puerto Rico; V Lakshmikumuran, Society of Indian Law Firms; R Parthasarathy, Society of Indian Law Firms; Yvon Martinet, Paris Bar (Ordre des Avocats a la Cour de Paris); Paul Adu Gyamfi Esq., Ghana Bar Association; Ron Heinrich, Law Council of Australia; Ray Martin QC, The Faculty of Advocates; Horacio Bernardes Neto, Brazilian Bar Association; Anne Ramberg, Swedish Bar Association; Nooman Ben Ameer, Ordre National des Avocats; Yabuki Kimitoshi, Japan Federation of Bar Associations; Toyama Futoshi, Japan Federation of Bar Associations; Shimojo Masahiro, Japan Federation of Bar Associations; Ohara Nozomu, Japan Federation of Bar Associations; Yazawa Shoji, Japan Federation of Bar Associations; Hans-Bruno Gerdes, Law Society of Namibia; Piotr Sendeci, The Polish Bar Council; Fikret Aydin, Ankara Bar Association; Özgü Yücel, Ankara Bar Association; Shlomo Cohen, Israel Bar Association; Rachel Levitan, Israel Bar Association; Abdurahman Shuaib, Libyan Bar Association; Christian Wisskirchen, Bar Council of England and Wales; Mathias Kelly, Bar Council of England and Wales; Bertrand Asscherickx, Nederlandse Orde van Advocaten Brussel; Michael Kutschera, Austrian Bar Association; Russell Miller, Minter Ellison; Peter Maynard, Bahamas Bar Association; Herman Verbist, Belgium Bar (Dutch Section).

Individuals on the Sign-In list who were not on the Pre-registration list include: Dr. S. Mahmoud Kashani, Iranian Bar Association; Karel van Alsenoy, Brussels Bar (Dutch section); Alison Hook, Law Society of England & Wales; Tomas Lindholm, Finnish Bar Association; Philip von Mehren, American Bar Association; Ward Bower, Chair, IBA MDP Working Group; Giuseppe Scassellati-Sforzolini, Italian member of the CCBE GATS Committee; Arturo Alessandri, Chilean Bar Association; Peter Maynard, Bahamas Bar Association, Caribbean Bars; Jonathan Goldsmith, CCBE, Member, WTO Working Group; Ashwin Trikamjee, Law Society of South Africa; Fred Chilton, Law Council of Australia; Toshiro Nishimura, Japan Federation of Bar Associations; Emilio J Cárdenas,

du Justice.¹⁰⁹ The materials available at the Forum included a green binder that reproduced some of the previously-emailed materials, including the *Forum Agenda*, the twelve-page Classification Discussion Paper and the forty-page *Accountancy Disciplines Discussion Paper*; the participants also received a very small print version of the PowerPoint slides for the *Accountancy Disciplines* introductory talk.¹¹⁰

The *IBA GATS Forum* began with a greeting from IBA President Emilio J Cárdenas. Ben Greer, the Chair of the IBA WTO Working Group, explained the history, purpose and goals of the *Forum*. Abdel-Hamid Mamdouh, the Director of Trade in Services at the WTO was to have spoken next, but he was unable to attend because of airplane connection difficulties. At that point, IBA WTO Working Group Member Jonathan Goldsmith introduced the *Classification Discussion Paper* and explained the various options. IBA WTO Working Group Member Akira Kawamura introduced the vigorous discussion and debate that followed and co-facilitated the discussion with Steve Nelson.¹¹¹ At the conclusion of the discussion, the *IBA GATS Forum* attendees voted in favor of the proposition that even though disagreements had been expressed, it was worthwhile to have the IBA speak on the issue of classification.¹¹² With respect to the issue of which classification approach to use, facilitator Steve Nelson observed that there seemed to be an emerging consensus for the Australian-Japanese proposal, rather than the U.N. approach or the novel approach suggested (but not endorsed) by the IBA WTO Working Group.¹¹³ The attendees voted to

International Bar Association; Ben Greer, Chair, WTO Working Group; Steven C. Nelson, Member, WTO Working Group; Brian J. Wallace, Member, WTO Working Group; Glenn Martin, Australian Bar Association; Frank Clarke, Bar Council of Ireland; Jannie Eksteen, General Council of the Bar of South Africa; Toshiro Veyanagi, Japan Federation of Bar Associations.

109. The *IBA GATS Forum* was held in the "Salle d'audiences solennelles- Zaal voor plechtige zittingen" (Courtroom for solemn court sessions) of the Belgian Supreme Court (Cour de Cassation). See Email Letter from Karel van Alsenoy, IBA Member, to Laurel S. Terry (Feb. 17, 2004) (on file with author).

110. These items are on file with author.

111. Some of those who offered comments included: Steve Nelson from the U.S., Russell Miller from Australia; Masahiro Shiumjo from Japan; Hans-Jürgen Hellwig from Germany; Heinz Weil from Germany; Milos Barutciski from the Canadian Bar Association; Roderick B Woo from the Law Society of Hong Kong; Brian Wallace, an IBA WTO Working Group Member from Canada; Kadhim Lami from the Iraqi Bar Association; Ron Heinrich from the Law Council of Australia; Giuseppe Scassellati-Sforzolini, an Italian member of the CCBE GATS Committee; Dr. Rupert Wolff from the Austrian Bar Association. See Notes of the *IBA GATS Forum* Prepared by Laurel S. Terry, May 30, 2003 (on file with author).

112. See *id.*

113. See *infra* notes 164-170 and accompanying text for additional information about these other classification schemes.

authorize the IBA WTO Working Group to prepare a paper along those lines.¹¹⁴

After this discussion, at approximately 12:00, IBA WTO Working Group Member Laurel Terry (this author) provided an introduction to the *Accountancy Disciplines Discussion Paper*, explained the changes recommended by the WTO Working Group and summarized the comments that had been received.¹¹⁵ After this introduction to the *Accountancy Disciplines Discussion Paper*, the attendees took a lunch break in another room at the Palais du Justice.

When the group reconvened following lunch, IBA WTO Working Group Member Brian Wallace facilitated the vigorous discussion and debate that followed.¹¹⁶ During this discussion, votes were taken on various proposed changes, some of which were accepted and some of which were rejected. The IBA WTO Working Group was also directed to obtain additional information on several points, such as the meaning of the terms *qualification*, *licensing* and *technical standards*, all of which are used in both the GATS and the *Accountancy Disciplines*.

After some concluding remarks and a brief discussion led by Ben Greer regarding the future direction for the IBA in its WTO work, the IBA Council members were invited to attend a reception sponsored by the Brussels Bars.¹¹⁷

114. *See id.*

115. I originally had planned on giving a 34-slide powerpoint talk to introduce this topic and explain the proposed changes and comments that had been received. The room that we were using, however, was not set up for powerpoint. As a result, *Forum* Attendees were given a very small-print version of my slides and I gave my talk without the slides.

116. Some of those who offered comments included: Horacio Bernardes-Neto from Brazil; Heinz Weil from Germany; Ben Greer; Hans-Jürgen Hellwig from Germany; Brian Wallace from Canada; Russell Miller from Australia; various representatives from the JFBA; Milos Barutciski from the Canadian Bar Association; representatives from the Brussels Bar; Christian Wisskirchen from the Bar Council of England and Wales; Akira Kawamura from the JFBA; Dr. Rupert Wolff from the Austrian Bar Association; Giuseppe Scassellati-Sforzolini from Italy and a member of the CCBE GATS Committee; Henrik Rothe from the Danish Bar and Law Society; Trudi Brown from the Federation of Law Societies of Canada; Ward Bower from the U.S; and Bruce Slane from the New Zealand Bar Association. The attendees were invited to vote on each of the proposed changes. *See* Notes of the *IBA GATS Forum*, *supra* note 111.

117. Brussels has both a Dutch-language Bar and a French-language Bar. For additional information on these Bars, *see generally* Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *FORDHAM INT'L L.J.* 1382 (1998), available at <http://www.personal.psu.edu/faculty/l/s/1st3/publications%20by%20topic.htm#1> (last visited Oct. 1, 2004).

3. Post-Forum Activities

Almost immediately after the *IBA GATS Forum*, the IBA WTO Working Group began the necessary follow-up action. On June 6, 2003, the principal drafters of the *IBA GATS Forum* materials participated in a conference call with an official from the WTO. As directed by the *GATS Forum* attendees, the Working Group representatives clarified the meaning of the GATS terms *qualification*, *licensing* and *technical standards*.¹¹⁸ In mid-June, the principal drafters of the IBA materials were able to meet in person and begin the revisions to the Discussion Papers.¹¹⁹

Immediately after the *IBA GATS Forum*, the IBA WTO Working Group received some additional comments and suggestions. For example, Masahiro Shimojo sent an email clarifying some of his remarks and the views of the JFBA regarding the definitions of *licensing* and *qualification*.¹²⁰ Akira Kawamura, a member of the IBA WTO Working Group, wrote to suggest that the IBA not borrow the instrument that was drafted and prepared for the accountancy profession, but instead draft a new and comprehensive set of disciplines for the legal profession.¹²¹ Hans-Jürgen Hellwig responded to Mr. Kawamura by suggesting that the IBA probably had the greatest chance (if any chance at all) to influence the WTO if it stayed within the timeframe set by WTO and within the structural frame set by the *Accountancy Disciplines* and the IBA's consultation.¹²²

118. See Telephone Conference Among IBA WTO Working Group Members Ben Greer, Jonathan Goldsmith and Laurel Terry and Dale Honeck, Counsellor, WTO Trade in Services Division (June 6, 2003).

One of the most difficult issues facing those who regulate the legal profession is the question of which regulations would be governed by any *Disciplines* that are developed pursuant to GATS Article VI(4). Among other things, this issue turns on the meaning of the terms "qualification" and "licensing" in the GATS. Thus, at approximately the same time that the *IBA GATS Forum* occurred and that I participated in this conference call with Dale Honeck, I was drafting a paper related to this issue for the American Bar Association Center for Professional Responsibility's 29th National Conference on Professional Responsibility. In order to prepare my paper for the 29th National Conference, I had also had extensive telephone discussions with Dale Honeck and Markus Jelitto from the WTO and with Julia Nielson from the OECD. The paper that I prepared for the 29th National Conference was later published as *But What Will the WTO Disciplines Apply To?*, *supra* note 18. This research overlapped with my work on the *IBA GATS Forum* issues.

119. Laurel Terry and Jonathan Goldsmith met at the IBA Eastern European Forum held in Vilnius, Lithuania on June 17, 2003, where both were speaking.

120. See Email Letter from Masahiro Shimojo, JFBA Representative, to Laurel S. Terry, IBA WTO Working Group Member (June 2, 2003) (on file with author).

121. See Email Letter from Akira Kawamura, IBA WTO Working Group Member, to Bernard L. Greer, Jr., Chair (June 3, 2003) (on file with author).

122. See Email Letter from Hans-Jürgen Hellwig, IBA WTO Working Group

After conducting this further research and after considering the comments it had received, the WTO Working Group prepared a set of documents to be mailed to the IBA Council for its consideration at the September 2003 annual meeting. The drafting team prepared:

- two resolutions for consideration and adoption by the IBA Council (one on the *Accountancy Disciplines* issue and one on the classification issue);
- an executive summary; and
- revised versions of the *Accountancy Disciplines* and classification discussion papers that had been prepared for the *IBA GATS Forum*.

In addition, the Working Group Chair, Ben Greer, prepared a transmittal memo to the IBA Council. Shortly after July 8, 2003, these materials were distributed in hard copy to the IBA Council Members, together with their agenda materials for the September 2003 annual meeting. In addition, on July 22, 2003, all of these materials were transmitted electronically to those who had attended the *IBA GATS Forum*.¹²³

This July mailing was not the final version of materials that the IBA Council received. On August 22, 2003, Chair Ben Greer sent an email to the IBA WTO Working Group indicating that the group had received comments on its two Discussion Papers from the JFBA, Brian Wallace and Hans-Jürgen Hellwig. The Working Group also received a paper on classification from the Law Council of Australia that cited with approval the IBA action and requested that the paper be transmitted to the IBA Council. The Chair proposed the following actions in response to the additional comments:

1. That the Working Group incorporate into the Discipline Paper the various changes suggested by the JFBA, Brian Wallace and Hans-Jürgen Hellwig's and that the Working Group also incorporate Hans-Jürgen Hellwig's suggestion regarding the meaning of "technical standards";
2. That the revised papers be circulated to all IBA Councillors with changes marked to show the nature and extent of the comments;

Member (via Sabine Muller) to the Members of the IBA WTO Working Group (June 4, 2004) (on file with author).

123. See Email Letter from Sibylle Duell, IBA Secretariat to WTO Forum Attendees (July 22, 2003) (on file with author).

3. That the revised papers include the Discussion Paper explaining the various approaches to classification that were used in the *IBA GATS Forum*;
4. That the package also include a copy of the Australian proposal; and
5. That the package of materials to the IBA Council include an explanatory cover memorandum from the Chair.¹²⁴

None of the WTO Working Group Members objected to this proposed course of action. Thus, on August 27, 2003, the revised set of materials was sent electronically to the IBA Council and to the members of the IBA WTO Working Group.¹²⁵

The August 27, 2003 materials, however, turned out not to be the final version voted upon by the IBA Council. Several members of the IBA WTO Working Group met in San Francisco at the IBA Annual Meeting before the IBA Council meeting. During this meeting, some WTO Working Group members expressed concerns about the proposed classification resolution.¹²⁶ One concern was that the proposed classification resolution might not be truly “neutral.” The members of the IBA WTO Working Group present negotiated a substitute resolution that was satisfactory to all present and that addressed the concerns that had been expressed. This substitute resolution was labeled a *Terminology Resolution*, rather than a *Classification Resolution*. The IBA WTO Working Group members further agreed that the substitute *Terminology Resolution* should be presented to the IBA Council on the following day and that adoption should be subject to subsequent technical revisions.

124. See Email Letter from Bernard L. Greer, Chair, IBA WTO Working Group, to Members, IBA WTO Working Group (Aug. 22, 2003) (on file with author).

125. See Email Letter from Sibylle Duell, IBA Secretariat to IBA Council Members, August 27, 2003 (on file with author) and Email Letter from Bernard L. Greer, Chair, IBA WTO Working Group, to Members, IBA WTO Working Group (Aug. 27, 2003) (on file with author).

126. I did not attend the San Francisco IBA meeting and thus have no personal knowledge of these events. This recitation of events is based on conversations I had with Ben Greer and others following the San Francisco meeting. The change from a “Classification Resolution” to a “Terminology Resolution” is discussed in greater detail *infra* in notes 159-170 and accompanying text.

D. *The September 2003 IBA Resolutions*

1. The IBA Council Vote

On September 17, 2003, during its regularly scheduled meeting, the IBA Council considered the two GATS resolutions that had emerged from the May 30, 2003 *IBA GATS Forum* and subsequent discussions.¹²⁷ After Ben Greer introduced the proposed resolutions to the IBA Council and explained their background and development, the IBA Council voted to approve each of these resolutions. As agreed upon by the members of the IBA WTO Working Group, the IBA Council was notified before it voted that the *Terminology Resolution* might be revised following the Council meeting, but that the revised version would be circulated to the IBA Council.¹²⁸ The IBA Council voted unanimously in favor of each of the resolutions.¹²⁹

Following the September 17th Council meeting, several members of the IBA WTO Working Group circulated additional comments to the group about possible changes in the *Terminology Resolution*.¹³⁰ On

127. On September 17, 2003, I listened by telephone to the entire portion of the IBA Council meeting in which the GATS resolutions were discussed. The statements in this paragraph are based on my observations.

128. See Minutes of Meeting of the IBA Council, Thursday, Sept. 18, 2003, Marriott Hotel, San Francisco at 10-11 (minutes not yet approved) (on file with author).

129. See Letter from Emilio Cárdenas, President of the IBA, to Dr. Supachai Panitchpakdi, Director General of the WTO (Nov. 7, 2003) (on file with author) (noting the unanimous adoption of two IBA resolutions). The IBA resolutions that were adopted are commonly referred to as the *IBA Accountancy Disciplines Resolution* and the *IBA Terminology Resolution*. The full title of the "IBA Terminology Resolution" is *Resolution In Support Of A System Of Terminology For Legal Services For The Purposes Of International Trade Negotiations*, Adopted at the IBA Council Meeting, San Francisco, Sept. 2003 [hereinafter *Terminology Resolution*]. The Terminology Resolution is available on the IBA website at http://www.ibanet.org/pdf/WTO_Resolution_in_Support_of_System_of_Terminolog_for_Legal_Services.pdf (last visited Oct. 1, 2004). It also is reprinted as Appendix 5 to this article. The full title of the *Accountancy Disciplines Resolution* is *Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for The Accountancy Sector*, Adopted at the IBA Council Meeting, San Francisco, Sept. 2003, available at http://www.ibanet.org/pdf/WTO_Resolution_on_Disciplines_for_the_Accountancy_Sector.pdf (last visited Oct. 1, 2004). It also is reprinted as Appendix 7 to this article.

130. WTO Working Group Members Brian Wallace, Steven Nelson, Hans-Jürgen Hellwig, and Laurel Terry all raised questions about the terminology resolution. (Laurel Terry included comments she had solicited from Professor Stephen Gillers). See, e.g., Email from Laurel Terry, WTO Working Group Member to IBA WTO Working Group Members (Oct. 8, 2003) (on file with author) (summarizing comments offered by Brian Wallace, Steven Nelson, Hans-Jürgen Hellwig, and Stephen Gillers); Email from Steven Nelson, IBA WTO Working Group Member to IBA WTO Working Group (Oct. 10, 2003) (on file with author).

October 8 and 9, 2003, the IBA WTO Working Group received additional revised drafts.¹³¹ One week later, on October 16, 2003, Ben Greer circulated a final version of the *Terminology Resolution* and asked whether there were objections to circulating that draft to the IBA Council the following week. There were no such objections from the members of the IBA WTO Working Group.

2. Transmittal of the IBA Resolutions to the WTO

On November 7, 2003, Emilio Cárdenas, the President of the IBA sent a letter to Dr. Supachai Panitchpakdi, Director General of the WTO.¹³² The two-page cover letter was accompanied by several additional documents, including:

- the IBA Accountancy Disciplines Resolution;
- an Executive Summary of the Accountancy Disciplines Resolution;
- Exhibit A to that resolution, which was a document entitled Changes the IBA Recommends be Made To the WTO Accountancy Disciplines Before Applying Them to the Legal Profession;
- Exhibit B to the Accountancy Disciplines resolution, which was the Explanatory Memorandum Accompanying the IBA's Suggested Changes to the WTO Accountancy Disciplines Before They Can Be Applied to the Legal Profession; and
- the IBA's Terminology Resolution.¹³³

In his cover letter to the WTO, President Cárdenas indicated that there might be some changes to the terminology resolution; the reason for this sentence in the cover letter was to allow for any changes required by the IBA Council.¹³⁴ On December 29, 2003, the IBA sent a corrected version of the terminology resolution to the WTO.¹³⁵

131. See Email Letter from Laurel S. Terry, IBA WTO Working Group Member (acting in Ben Greer's stead while he was recovering from surgery) to IBA WTO Working Group Members (Oct. 8, 2003) (on file with author).

132. See *supra* note 13.

133. See Letter from Emilio Cárdenas, the President of the IBA to Supachai Panitchpakdi, WTO Director General (Nov. 7, 2003) (on file with author).

134. See *id.* (explaining the reason for the sentence in the cover letter).

135. See Emilio Cárdenas, President of the IBA, to Supachai Panitchpakdi, WTO Director General (Dec. 29, 2003) (on file with author). The IBA circulated the documents to the IBA Council; none of the IBA Council members objected to the mailings. See Email Letter Elaine Owen, IBA Secretariat to Laurel S. Terry, IBA WTO Working Group Member (Feb. 25, 2004) (on file with author). The reason for the second

On January 28, 2004, WTO Director General Supachai Panitchpakdi sent a letter to the IBA thanking it for its submissions.¹³⁶ This letter stated in pertinent part:

The WTO Secretariat has benefited from the close cooperation with the International Bar Association over the last years. I recall in this context the very informative visit from the IBA WTO Working Group to Geneva in the fall 2001, as well as the information seminar for WTO Members on 19 July 2002.

WTO Members have repeatedly stressed the importance of a clear and harmonized usage of terms in schedules of commitments. The "Resolution in Support of A System of Terminology for Legal Services" will provide valuable input to Members' deliberations in this regard.

In this context, I should also like to thank you for the thorough reply to the request by the Working Party on Domestic Regulation on the suitability of applying the WTO Disciplines for the Accountancy Sector to the legal profession. This contribution by the IBA has been made available to WTO Members, and will be discussed at a forthcoming meeting of the Working Party.¹³⁷

The appendices to this article include the two resolutions transmitted to the WTO and the Discussion Paper that explains the basis for the IBA's recommended changes to the *Accountancy Disciplines*. Because the Discussion Paper explains the rationales for the recommended changes, the sections that follow only briefly describe the content of these resolutions.

3. The IBA Accountancy Disciplines Resolution and Supporting Materials

The final version of the *IBA Accountancy Disciplines Resolution* was relatively short. After reciting fourteen "Whereas" paragraphs,¹³⁸

mailing to the WTO was because the wrong version of the terminology resolution inadvertently had been sent to the WTO. The correct version was sent in the second mailing.

136. See Letter from Supachai Panitchpakdi, WTO Director General to Emilio Cárdenas, the President of the IBA (Jan. 28, 2004) (on file with author).

137. See *id.*

138. These "Whereas" paragraphs were the subject of some of the final edits among the IBA WTO Working Group members. The final version stated:

WHEREAS, the phenomenon known as globalization has resulted in a dramatic increase in the movement of people, capital, goods and services across national borders; and

WHEREAS, central to the future development of the legal profession is the fact

that international trade in legal services is now subject to the General Agreement on Trade in Services ("GATS") and such development must be consistent with the basic concepts underlying GATS, which include transparency in regulation, non-discriminatory treatment of regulated parties, and the requirement that regulation should be no more burdensome than necessary to protect the public interest; and

WHEREAS, Article VI:4 of the GATS states that "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;" and

WHEREAS, pursuant to Article VI:4 of the GATS, WTO Member States have developed "Disciplines on Domestic Regulation in the Accountancy Sector" [document S/L/64, 17 December 1998]; and

WHEREAS, the WTO Working Party on Domestic Regulation currently is considering whether and how to develop "disciplines" for other service sectors, including legal services; and

WHEREAS, the WTO Member States agreed to solicit the opinion of the IBA concerning the suitability of applying to the legal profession the "Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64)"; and

WHEREAS, the WTO Secretariat sent the IBA a letter in December 2002, in which it sought input by February 2003 on three questions:

- "- 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;" and

WHEREAS, the IBA believes that it is desirable and in the public interest for its member organizations to participate in the developments at the WTO by responding to this letter directed to the IBA; and

WHEREAS, the IBA recognizes and acknowledges that in connection with such review and consideration, the legal profession in each of its member jurisdictions may take into account its own characteristics, influenced, inter alia, by its system of laws, historical factors and level of economic development; and

WHEREAS, the IBA affirms that, while the legal profession performs a unique and valuable service in each of their societies, lawyers from all over the world share common core values of the profession which must be given due respect when we negotiate the trade in legal services among the WTO member States; and

WHEREAS, IBA Member Bars were invited to participate in the GATS Forum in Brussels, Belgium on May 30, 2003; and

WHEREAS, the IBA WTO Working Group circulated drafts of its papers

the resolution continued with one short paragraph that authorized transmittal to the WTO of Exhibits A and B:

NOW, THEREFORE, BE IT RESOLVED, that the IBA Council hereby approves Exhibits A (Suggested Changes to the WTO Disciplines for the Accountancy Sector) and B (Explanatory Memorandum to Accompany the “Suggested Changes to the WTO Disciplines for the Accountancy Sector”) and authorizes transmission of these documents to the WTO and its Member organizations for their consideration.¹³⁹

Exhibit B, which is attached as an appendix to this article, was the revised version of the *Accountancy Disciplines* Discussion Paper originally prepared for the May 30, 2003 *IBA GATS Forum*. Its final form was thirty-nine pages, twenty-five of which were an explanation of the IBA’s recommended changes and the remainder of which were attachments, including the WTO’s December 2002 consultation to the IBA and the *Accountancy Disciplines*. In accordance with the original consultation sent to the IBA by the WTO, the IBA did not address the questions of: 1) whether it was, in fact, “necessary” for the WTO to develop any disciplines that would apply to legal services;¹⁴⁰ or 2) what disciplines for the legal profession would look like if the legal profession were to begin drafting such disciplines from scratch.¹⁴¹

Exhibit A to the *IBA Accountancy Disciplines Resolution* identified seven changes that the IBA recommended be made to the WTO *Accountancy Disciplines* if the Disciplines were to be applied to the legal profession.¹⁴² The first recommended change was to add language to

before the GATS Forum and received comments, which were extensively discussed at the GATS Forum; and

WHEREAS, the papers that were circulated built heavily on the prior resolutions adopted by the IBA Council, which noted that notwithstanding the differences among legal professions, certain essential principles are common to all legal professions; and

WHEREAS, Exhibits A and B represent the results of the May 30, 2003, GATS Forum and the votes taken at that time.”

See *Accountancy Disciplines Resolution*, *supra* note 129.

139. *See supra*.

140. As set forth in note 24, *supra*, and accompanying text, GATS Article VI(4) only requires the development of “any necessary disciplines.” Thus, if WTO Member States were to conclude that disciplines for the legal profession are not in fact “necessary,” they need not develop such disciplines.

141. *See supra* note 121 (IBA WTO Working Group Member Akira Kawamura expressed a preference for having the legal profession begin from scratch when drafting possible disciplines).

142. The full title of Exhibit A to the *Accountancy Disciplines Resolution* is *Exhibit A—Changes the IBA Recommends Be Made to the WTO Accountancy Disciplines Before Applying Them to the Legal Profession* [hereinafter *Exhibit A to the IBA Accountancy Disciplines*]. Exhibit A to the *IBA Accountancy Disciplines* is reproduced as Appendix 9

Article II(2) of the *Accountancy Disciplines*; Article II(2) implemented the GATS' requirement that Member States develop any necessary disciplines to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.¹⁴³

Article II(2) of the *Accountancy Disciplines* identifies as legitimate objectives of regulation "the protection of consumers (which includes all users of services and the public generally), the quality of the service, professional competence, and the integrity of the profession."¹⁴⁴ The IBA resolution identified additional examples of what constitutes a "legitimate objective" in the context of legal services, including: 1) the protection of the independence of the profession, 2) the protection of confidentiality and the professional secret, and 3) the avoidance of conflicts of interest.¹⁴⁵ The IBA also recommended additional language, the purpose of which was to ensure that the WTO Appellate Body would treat a legal services measure in the same manner as a health and safety measure, thereby granting the WTO Member State the highest possible discretion in implementing its legitimate objectives.¹⁴⁶

The second change proposed by the IBA was to add language to Article III(3) and III(4) of the *Accountancy Disciplines*. The proposed new language for Article III(3) clarifies that the transparency

to this article.

143. See GATS, *supra* note 1, at art. VI(4).

144. See *Accountancy Disciplines*, *supra* note 9, at art. II(2).

145. The IBA recommended that Article II(2) of the *Accountancy Disciplines*, *supra* note 9, be amended to state:

Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in legal services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil 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 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."

See Exhibit A, *supra* note 9.

146. See *supra*.

requirement applies to both licensing *and discipline* requirements.¹⁴⁷ With respect to Article III(4), the IBA recommended that for clarity's sake, every time the words "technical standards" were used, these words be followed by the phrase "including ethical rules and rules of professional conduct."¹⁴⁸

The IBA also recommended three different changes to Article IV(8) of the *Accountancy Disciplines*, which is the provision that required licensing requirements to be pre-established and publicly available.¹⁴⁹ The first recommended change was the addition of a sentence clarifying that if a lawyer was practicing law in a Host Jurisdiction with a limited license, then the Host Jurisdiction was required to consider any discipline imposed by the Home Jurisdiction that had issued the primary license that was the basis for the limited license in the Host Jurisdiction.¹⁵⁰

147. See Exhibit A, *supra* note 9. As proposed by the IBA, Article III(3) of the *Accountancy Disciplines* would now state:

III(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).

148. See *supra*.

149. See Exhibit A, *supra* note 9. As proposed by the IBA, Article IV(8) of the *Accountancy Disciplines* would now state:

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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.'"

150. See *supra*. For an example of limited license or foreign legal consultant provisions, one can consult the ABA Center for Professional Responsibility website, which contains the text of many U.S. foreign legal consultant provisions. See ABA Joint Committee on Lawyer Regulation, available at http://www.abanet.org/cpr/jclr/jclr_home.html (last visited Oct. 1, 2004).

"Host Jurisdiction" and "Home Jurisdiction" are terms commonly-used by those who address global legal practice issues. After discussion at the *IBA GATS Forum*, those attending voted that the Host Jurisdiction must consider discipline imposed by the Home

The IBA also recommended additional language for Article IV(8) of the *Accountancy Disciplines* because it realized that lawyers around the world did not have a common understanding about the meaning of the terms “qualification” and “licensing” or how those terms related to the terms “full license” and “limited license” that had been used in prior IBA resolutions.¹⁵¹ The proposed changes to Article IV(8) further explained the relationship between the WTO’s definitions of *licensing* and *qualification*, on the one hand, and the *full-license* and *limited-license* terminology that had been used in prior IBA resolutions, on the other hand.¹⁵²

The fourth change recommended by Exhibit A to the *IBA Accountancy Disciplines Resolution* was an amendment to Article IV(12). Based on experience in the European Union, the IBA recommended that the paragraph be expanded to require WTO Member States to recognize the pension and social security schemes that lawyers might have in another state, as well as their insurance coverage in another WTO Member State.¹⁵³ The IBA also recommended that

Jurisdiction. The rationale is that a limited license issued by the Host Jurisdiction license is based on or derived from the Home Jurisdiction license. The *IBA GATS Forum* attendees decided, however, that the Home Jurisdiction would *not* be required to consider discipline imposed by the Host Jurisdiction because the Home Jurisdiction license does not derive from the Host Jurisdiction license.

151. See *supra* notes 54-57 and 62 and accompanying text for a discussion of the IBA’s prior resolutions that used the terminology “full license” and “limited license.” I experienced personal confusion about the meaning of these terms “qualification” and “license” when Jonathan Goldsmith and I met in person in London in February 2003 to work on this project. Even though we are both native English speakers who come from common-law jurisdictions, we realized that we had different understandings of the terms “qualification” and “license.” Furthermore, at that time, we had forgotten that the WTO Secretariat had issued papers that provided definitions for these terms. Accordingly, during our February 2003 meeting, we agreed that a set of definitions was necessary and selected definitions that would correspond to the language used in the IBA’s prior resolutions. These definitions were used in the GATS Forum *Accountancy Disciplines* Discussion Paper distributed in March 2003. See IBA WTO Working Group Discussion Paper, *What Changes Are Required to the WTO Accountancy Disciplines Before They Can Be Applied to the Legal Profession* at 24-26 [hereinafter *Accountancy Disciplines* Discussion Paper]. The *Accountancy Disciplines* Discussion Paper was circulated in March 2003, see *supra* note 95. As explained *supra* in note 116 and accompanying paragraph, however, the *Forum* attendees questioned these definitions and directed the Working Group to obtain additional information from the WTO Secretariat. After speaking with WTO Secretariat staff, the IBA WTO Working Group substituted the WTO’s suggested definitions of *licensing* and *qualification*. See *supra* note 118 and accompanying text (describing the post-*Forum* events).

152. See *supra* notes 118, 123 and 151 (explaining the basis for the revised recommendation concerning Article IV(8) of the *Accountancy Disciplines*.)

153. In some countries, for example, lawyers must contribute funds to pension and social security schemes. See Email Letter from Jonathan Goldsmith, CCBE Secretary General, to Laurel S. Terry (Feb. 23, 2004) (on file with author) (noting that this is true for some EU countries). If a lawyer is qualified or licensed in two jurisdictions that

Member States be permitted to place the burden on foreign lawyers to show the extent of their existing insurance.¹⁵⁴

The fifth change recommended by the IBA was related to its third proposed change. The IBA recommended additional language for Article VI(19) to clarify that both *full-license* and *limited license* systems can have qualification requirements.¹⁵⁵

The sixth change proposed by the IBA Resolution was to delete Article VI(20) from the *WTO Accountancy Disciplines*. This paragraph stated that 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.”¹⁵⁶ The IBA recommended deleting this paragraph because of confusion that might result about whether a lawyer was entitled to a qualification for only certain legal activities.¹⁵⁷

The seventh and final change endorsed by the IBA was to renumber the paragraphs to reflect the deletion of paragraph VI(20) and to again explain that the words “technical standards” include “ethical rules and rules of professional conduct.”¹⁵⁸

require such pension contributions, these jurisdictions must decide whether the lawyer must make pension contributions in both countries. The IBA’s suggested revision to the *Accountancy Disciplines* would require a jurisdiction to “recognize” or take notice of the pension contributions made by the lawyer in another jurisdiction.

154. See Exhibit A, *supra* note 9, at 2-3. As proposed by the IBA, Article IV(12) of the *Accountancy Disciplines* would now state:

‘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, on to 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.’

155. See *supra* note 149 for a discussion of the meaning of the terms *licensing* and *qualification* and their relationship to full and limited licensing systems. As proposed by the IBA, Article IV(12) of the *Accountancy Disciplines* would now state:

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.”

See Exhibit A, *supra* note 9.

156. See *Accountancy Disciplines*, *supra* note 9, at art. VI(20).

157. See Exhibit B, *supra* note 9, at 21-22.

158. See Exhibit A, *supra* note 9. As proposed by the IBA, Article IV(12) of the *Accountancy Disciplines* would now state:

4. The IBA Terminology Resolution

The *IBA Terminology Resolution*, like the *IBA Accountancy Disciplines Resolution*, is quite short, at two pages long. The *IBA Terminology Resolution* includes nine introductory paragraphs.¹⁵⁹

24. 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.

25. In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of any internationally recognized technical 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 organizations applied by that Member. (footnote defining international organizations omitted).

159. See *IBA Terminology Resolution*, *supra* note 129. These introductory paragraphs state:

The International Bar Association:

seeking to uphold the Rule of Law;

noting the resolution passed by the Council in 1998 on General Principles for the Establishment and Regulation of Foreign Lawyers;

noting also that, within the framework of the Doha Round, international trade negotiations are taking place on the subject of cross-border legal practice;

reaffirming its commitment to further liberalisation of regulations affecting cross-border legal practice;

believing that there should be a neutral framework within which such negotiations should take place;

believing also that an appropriate system of terminology is one which:

- is consistent with the core values of the legal profession;
- provides a solid, neutral foundation for negotiations so that ambiguity and uncertainty are minimised;
- facilitates those negotiations without pre-determining the negotiated outcome; and
- assists in minimising disputes over what has actually been agreed through negotiation;

recognising that the elements of such a system may be used in formulating either commitments or reservations to commitments within the framework of the General Agreement on Trade in Services, and expressing no view as to which of the two approaches will more fully achieve the objectives described above;

recognising as well the role of law firms in cross-border legal practice, and reserving for further consideration the question whether additional standard terminology may facilitate negotiations on this important issue;

noting finally that the WTO Secretariat has reported that: "As the UN CPC classification in this sector did not reflect the reality of trade in legal services, Members have preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services: (a) host country law (advisory/ representation); (b) home country law and/ or third country law (advisory/ representation); (c) international law (advisory/ representation); (d) legal documentation and certification services; (e) other advisory and information services.

Following these paragraphs, the body of the resolution recommends the terminology to be used in the ongoing GATS negotiations and further recommends that the terminology be understood in accordance with, and as qualified by, the definitions in the attached *Schedule*.¹⁶⁰ The recommended terminology included the following:

- (a) Home-country law
 - (i) advisory services
 - (ii) representation services
- (b) Third-country law
 - (i) advisory services
 - (ii) representation services
- (c) Host-country law
 - (i) advisory services
 - (ii) representation services
- (d) International law
 - (i) advisory services
 - (ii) representation services
- (e) International arbitration and mediation services.¹⁶¹

In the version of the *Schedule* transmitted to the WTO, the definitions occupied one page.¹⁶²

160. See *supra* note 129. The IBA Terminology Resolution *states in pertinent part* [The IBA] RESOLVES to recommend that the following system of terminology be used for such purposes . . . and RESOLVES FURTHER that the forgoing terminology should be understood in accordance with and qualified by the definitions set out in the schedule to these resolutions, and RESOLVES FINALLY to invite all members of the World Trade Organization to adopt this terminology for the purposes of negotiations on trade in legal services.

161. See *IBA Terminology Resolution, supra* note 129, at 2.

162. See *id.* The following definitions were included in the *Schedule* attached to the *IBA Terminology Resolution*:

- (a) “*Home country*” means, with reference to a particular lawyer, any country in the territory of which such lawyer is fully qualified and authorized to engage in the provision of legal services involving application and interpretation of the domestic laws of such country, and “*Home country law*” means the domestic law of such Home country.
- (b) “*Host country*” means, with reference to a particular lawyer, any country, other than a Home country, in the territory of which such lawyer provides legal services, and “*Host country law*” means the domestic law of such Host country.
- (c) “*Third country*” means, with reference to a particular lawyer providing legal services in the territory of a Host country, any other country which is not a Home country of such lawyer, and “*Third country law*” means the domestic law of such Third country.
- (d) “*International law*” means law established by international treaties and conventions as well as customary law.
- (e) “*Advisory services*” includes:
 - (i) provision of advice to and consultation with clients in matters, including transactions, relationships and disputes, involving the

These recommended terms drew upon the IBA's prior resolutions and were similar, but not identical to, the terminology contained in the Australian and Japanese proposals considered at the *IBA GATS Forum*.¹⁶³

By selecting terminology similar to the language used in the Australian and Japanese proposals rather than the terminology used in the WTO "Services Sectoral Classification List" and in the United Nations Provisional Central Product Classification ("UN CPC"), the IBA indirectly responded to a question proposed by the WTO Secretariat.¹⁶⁴

application or interpretation of the specified body of law;

(ii) participation with or on behalf of clients in negotiations and other dealings with third parties in such matters; and

(iii) preparation of documents governed in whole or in part by the specified body of law, and the verification of documents of any kind for purposes of and in accordance with the requirements of the specified body of law;

(f) "Representation services" includes:

(i) preparation of documents intended to be submitted to courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law; and

appearance before courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law.

(g) "International arbitration and mediation services" includes:

(i) serving as an arbitrator in any dispute involving parties from two or more countries, without regard to the body or bodies of law that may ultimately be determined to have a bearing on the dispute;

(ii) serving as a mediator in attempts to resolve any such dispute; and

(iii) preparation of documents to be submitted to, preparation for and appearance before, arbitrators, or mediators in any such dispute.

163. See *supra* notes 99-100 and note 113 and accompanying text (mentioning the contributions submitted by the Japan Federation of Bar Associations (JFBA) and the Law Council of Australia). The JFBA and Law Council of Australia contributions used terminology that was similar to the IBA's *Establishment Resolution*, see *supra* note 46, and similar to the classification proposal submitted to the WTO by the government of Australia. See WTO Council for Trade in Services—Communication from Australia, Negotiating Proposal, Legal Services Classification, Supplement, S/CSS/W/67/Suppl.2 (Mar. 11, 2002).

164. In the WTO Services Sectoral Classification List, "legal services" are listed as a sub-sector of "(1) business services" and "(A) professional services." See WTO SERVICES SECTORAL CLASSIFICATION LIST, Note by the Secretariat, MTN.GNS/W/120 (July 10, 1991). In the provisional UN CPC (but not in the WTO Sectoral Classification List), the entry for "legal services" is sub-divided into "legal advisory and representation services concerning criminal law" (86111), "legal advisory and representation services in judicial procedures concerning other fields of law" (86119), "legal advisory and representation services in statutory procedures of quasi judicial tribunals, boards, etc." (86120), "legal documentation and certification services" (86130) and "other legal and advisory information" (8619). The revision of the UN CPC approved by the UN statistical Working Group in February 1997 left the legal services classification substantially unchanged. However, it included as a subclass of legal services "Arbitration and conciliation services," previously part of management consultancy

In its Legal Services Sectoral Analysis, the WTO Secretariat commented on WTO Members' use of the UN CPC categories when making GATS commitments:

It appears, however, that the UNC CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was not as relevant to Members scheduling commitments as the distinction between advice and representation in host country, home country and international law.¹⁶⁵

The WTO Secretariat's Legal Services Sectoral Analysis continued by asking:

- Should the revision of the UN CPC take account of the Uruguay Round scheduling distinctions in legal services in re-defining classification in the sector?

- Is the distinction between host country, international, home country and third country law satisfactory?¹⁶⁶

By employing the terms host country, international, home country and third country law, the IBA *Terminology Resolution* responded affirmatively to the second question posed in the WTO Secretariat's Legal Services Sectoral Analysis.

The IBA *GAT Forum* attendees initially had voted in favor of having the IBA take a position on classification. As this article explained earlier, the Discussion Paper considered at the IBA GATS Forum originally was titled "Classification of Legal Services."¹⁶⁷ Although the post-*Forum* activities included the circulation of a draft classification resolution that endorsed the Australia/Japan approach, IBA WTO working group members ultimately could not agree to support such a classification resolution. As a result, the resolution that ultimately was adopted in San Francisco was called a "Terminology" resolution, rather than a "Classification Resolution." IBA WTO Working Group Member Hans-Jürgen Hellwig explained as follows the evolution of this change

services. See WTO Secretariat's Legal Services Sectoral Analysis, *supra* note 52, at nn.3 and 4 and accompanying text.

165. See WTO Secretariat's Legal Services Sectoral Analysis, *supra* note 52, at 5. See also Materials Submitted to the Technical subgroup (TSG) of the Expert Group on International Economic and Social Classifications by Prof. Laurel S. Terry, representing the International Bar Association, TSG/27 (Oct. 18, 2004) (collects classification material regarding legal services) available at <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/27-IBA%20documents.pdf> (last visited Nov. 23, 2004).

166. See WTO Secretariat's Legal Services Sectoral Analysis, *supra* note 52, at 5.

167. See *supra* note 95 and accompanying paragraph. The full title of this Discussion Paper was "Classification Of Terminology in the Current GATS Round" (on file with author).

from “classification” to “terminology”:

The change from the original uniform classification paper to a uniform terminology paper and the many discussions that took place in this respect at the last year meeting of IBA in San Francisco are not to be found in written documents since almost everything was oral. It started with the Brussels uniform classification paper which, if my memory is correct, was of Australian and Japanese origin.¹⁶⁸ The Europeans led by me thereafter got second thoughts since the question whether a classification is wide or narrow is of prejudicial effect on the way how a WTO Member State has to write its commitments.¹⁶⁹ This question was discussed at length in San Francisco, first in a number of meetings, then bilaterally, with Steve Nelson acting as negotiator who spoke in [turn] with one side and then with the other side and then with the first side again etc. In the end the change was made from [a] uniform classification paper to uniform terminology paper because in the spirit of the work of the WTO Working Group already found in the FLP Resolution [the Establishment Resolution described *supra* in note 46] it was felt that it would be best if we were not to adopt a paper that could have a prejudicial effect on the WTO Member States, and that we should rather adopt a paper which would in that respect be absolutely neutral, leaving it to the Member States in which sense they want to make use of the uniform terminology. This can very well be likened to the open approach that has been found in the FLP Resolution and which describes both the (Anglo-Saxon) FLP concept and the (French) full

168. By way of further information, IBA WTO Working Group Member Jonathan Goldsmith prepared the first draft of the *IBA GATS Forum* Classification Discussion Paper; Laurel Terry and Ben Greer offered subsequent editorial comments. At the time the Classification Discussion Paper was prepared, neither the JFBA nor the Law Council of Australia had circulated their position papers. The *IBA GATS Forum* Classification Discussion Paper relied instead on the paper submitted by the Government of Australia to the WTO Council for Trade in Services. See WTO Council for Trade in Services, Communication from Australia—Negotiating Proposal for Legal Services, Revision, S/CSS/W/67/Supp2 (Mar. 11, 2002) available at <http://www.abanet.org/cpr/gats/australia.pdf> (last visited Oct. 1, 2004). After the *IBA GATS Forum* Classification Discussion Paper was circulated, both the JFBA and the Law Council of Australia responded with their own proposals that endorsed, in large measure, the Australian approach summarized in the *IBA GATS Forum* Classification Discussion Paper. (The commentary in this footnote is provided by this author, not Dr. Hellwig.)

169. By way of further information, after completion of the *IBA GATS Forum* Classification Discussion Paper, the European Union submitted to the WTO its own classification paper, in which it disagreed in part with the Australian government's proposal. See WTO Council for Trade in Services, Communication from the European Communities—Classification of Legal Services, S/CSC/W/39 (Mar. 24, 2003). Moreover, EU GATS negotiator Carlos Gimeno-Verdejo made a presentation to CCBE members regarding the EU's classification proposal and the EU's concerns about the Australian proposal. (The commentary in this footnote is provided by this author, not Dr. Hellwig.)

integration concept, leaves it to the WTO Member State to [choose] either one or any mixture between, and only defines principles that must be observed regardless of which choice is made. . . .

[The IBA WTO Working Group endeavors to use a problem-solving approach to issues.] It is not the take it or leave it majority approach but rather the approach by consensus to the greatest extent possible. However small the common denominator of a consensus may be, it has nevertheless still turned out to be of practical help for our Member States and for our WTO Working Group. Our reputation within the IBA and outside is largely due to this approach.¹⁷⁰ (internal footnotes added by article author).

This excerpt explains the evolution of the IBA Terminology Resolution. Although the IBA ultimately did not endorse a classification system in San Francisco, the IBA was able to develop a consensus about terminology that its members believed would be useful. This may not have been as large a step forward as the planners initially hoped for, but it was a step forward.

IV. Conclusion

Global legal practice is now a reality. Although it may only be a small percentage of legal work, it has increased dramatically and likely will continue to increase.¹⁷¹ The topic of this *Symposium*—Global Legal Practice—underlies all the events described in this article. As noted in the article's Introduction, legal services are now the subject of binding international trade agreements, including the GATS.

In order to fulfill the mandate in Article VI(4) of the GATS, WTO Member States have been considering the issue of whether to extend the provisions of the *Accountancy Disciplines* to other service sectors, including legal services. In December 2002, the WTO sent the IBA and other bar associations a consultation letter asking three questions about the *Accountancy Disciplines*. In May 2003, the IBA sponsored the *IBA GATS Forum* in order to discuss these and other GATS-related questions. In September 2003, the IBA Council adopted a *Terminology Resolution*

170. See Email Letter from Hans-Jürgen Hellwig, IBA WTO Working Group Member to Laurel S. Terry (Feb. 25, 2004) (on file with author).

171. See United States Department of Commerce, Bureau of Economic Analysis, Table 1, Private Services Trade by Type, 1992-2003, available at <http://www.bea.doc.gov/bea/di/1001serv/1003serv/tab103.xls> (last visited Oct. 1, 2004) (This table shows that the U.S. export of legal services increased from \$1.36 billion in 1992 to \$3.27 billion in 2002. During the same period, the U.S. import of foreign legal services increased from \$311 million in 1992 to \$768 million in 2002). See also Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 9, at 994-997.

and an *Accountancy Disciplines Resolution* that reflected the consensus that emerged during and after the *IBA GATS Forum*. In November and December, 2003, these documents were transmitted to the WTO as the IBA's response to the December 2002 WTO consultation letter. This article has explained the history of the WTO's December 2002 consultation letter to the IBA, the May 2003 *IBA GATS Forum* and the resulting IBA September 2003 Resolutions. The appendices to this article include the IBA *Resolutions* and supporting documentation that was sent to the WTO.

As these events demonstrate, lawyers and legal services regulators have an opportunity to participate in the trade law developments that will shape the new world of global legal practice. The IBA took such a role in September 2003 when it adopted its resolutions regarding the *Accountancy Disciplines* and the terminology to use in the ongoing GATS negotiations.¹⁷² Although only a small number of individuals were actively involved in the drafting efforts, the IBA has endeavored to engage lawyers around the world in these issues.

At this point in time, lawyers, regulators and bar associations who have not actively participated in this debate have an opportunity to use the IBA's ground-breaking work as a jumping off point for their own

172. As of mid-February 2004, only the IBA and the International Union of the Latin Body of Notaries (UINL) had provided substantive comments to the WTO. See Email Letter from Markus Jelitto, WTO Counselor, WTO Trade in Services Division to Laurel S. Terry (Feb. 18, 2004) (on file with author).

For a summary of the comments received by the WTO as of September 2003, see WTO Working Party on Domestic Regulation, Results Of Secretariat Consultations With International Professional Services Associations, Informal Note by the Secretariat, JOB(03)/126/Rev.1 (Sept. 22, 2003) (on file with author; because this document is a "Job," it is not publicly available). According to this document, the International Federation of Industrial Property Attorneys (FICPI) and International Union of Lawyers (UIA) have not responded to the WTO's December 2002 letter. The International Law Association (ILA) was not interested in participating. The International Association for the Protection of Industrial Property (AIPPI) also indicated that it was not interested in participating. The Secretary General of the AIPPI, Mr. Vincenzo Pedrazzini, has said that AIPPI would not send in the requested comments, as AIPPI is not a professional association, but is joined by Members of various professions. The wide range of professions would cause difficulties in reaching a common position. The International Union of the Latin Body of Notaries (UINL) responded by observing that a notary has nothing to do with free enterprise and is no way comparable to a chartered accountant. The notarial function is a public function, *i.e.*, State function, as a result of which the notary hold a part of the State's power, namely that of attributing public faith to the statements of parties and to the documents drafted by him. However, in order to ensure the necessary independence to this function, the Latin-type notary performs his activity within the framework of a liberal profession, although access to the profession and competencies, in terms of subject matters and place of practice, are regulated strictly. The notary, exercising functions delegated to him by the State, can only be replaced by another of the same kind, appointed by the same State, and therefore it is not possible to include notaries in the structure foreseen in the *Accountancy Disciplines*.

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consideration of these issues. Increased dialogue and discussion of these issues can only work to the benefit of lawyers, regulators and the public around the world.

APPENDIX 1
IBA GATS FORUM
Brussels, Belgium
May 30, 2003

Program Agenda

I. PURPOSE.

The purpose of the Forum is to convene representatives of a broad cross-section of the IBA's Member Organizations to examine specific issues arising from the impact of the General Agreement on Trade in Services ("GATS") on the legal profession. It is hoped that the Forum will facilitate development of a consensus among the IBA's Member Organizations on the issues under study. Where consensus exists, the Forum will make recommendations to the IBA's Council on resolutions addressing the issues. If passed by the council, these resolutions would be communicated to the World Trade Organization ("WTO") and other interested bodies. In seeking consensus, the Forum does not aspire to promote the position of an individual member organization or a particular WTO member government. Rather its goal is to develop consensus views that will facilitate the GATS negotiations by providing a conceptual framework for the conduct of the negotiations. The Forum will also seek to ensure that the consensus views of the worldwide legal profession are taken into account as the negotiations on legal services proceed.

The WTO recently has requested input from non-governmental organizations with respect to certain specified issues that are discussed in greater detail below. The IBA is one of the leading professional organizations in the world. Because of the breadth of its individual and organizational membership, its expertise regarding legal services and the prior resolutions of its Council regarding legal services, the IBA is uniquely situated to assist WTO Member States as they consider issues of trade in legal services.

II. METHOD OF OPERATION.

A. The issues to be examined by the Forum include the following:

- (1) Classification of Terms. During the Uruguay Round of trade negotiations, the WTO recommended that WTO Member

States use the U.N. classifications for legal services when submitting market access “offers” and “requests.” As noted in the WTO Secretariat’s paper on legal services, very few countries used the U.N. classification system in the Uruguay Round because this classification system did not seem to match the manner in which legal services are regulated. The Secretariat thus invited WTO Member States to suggest alternative definitions of legal services that could be used when countries submit their “market access” “requests” and “offers.” Australia has responded to the WTO Secretariat’s invitation by submitting a paper that sets forth 12 different categories of legal services that countries could use to present their “requests” and “offers.”

The Forum will solicit reactions from its participants and from the IBA’s Member Organizations to Australia’s proposed classification system, including any suggested corrections, additions or alternatives. Ideally, the Forum would lead to a recommendation to the IBA’s Council. If the Forum’s recommendations were adopted, these recommendations would be transmitted to the WTO as the IBA’s recommendations about the proper terminology to use when making market access “requests” and “offers” concerning legal services.

- (2) Discipline on Legal Services. In addition to covering “market access” issues, the GATS also addresses domestic regulation and requires WTO Member States to develop “disciplines” on domestic regulation. In 1998, WTO Member States agreed upon a discipline for the accountancy sector. WTO Member States are now considering whether the *Disciplines for the Accountancy Sector* can and should be extended to some or all other service sectors, including legal services.

In December 2002, the WTO asked a number of professional organizations, including the IBA, to comment on the desirability of extending the *Disciplines for the Accountancy Sector* to legal services. The Forum will elicit the views of the participating bars on the issues raised by the WTO’s letter to the IBA. In particular, the Forum will attempt to determine whether there is a consensus about problems that might exist in applying the *Disciplines for the Accountancy*

Sector to legal services. The Forum will also address the desirability of a separate “discipline” or “annex” for legal services. If, in their view, that is desirable, the Forum will identify the specific issues to be covered in such a “discipline.” Ideally, the Forum would lead to a recommendation to Council. If the Forum’s recommendations are adopted, they would be transmitted to the WTO as the IBA’s response to the WTO’s December 2002 letter concerning the desirability of making the Accountancy Discipline applicable to legal services.

- (3) Other GATS Issues. The Forum will facilitate an exchange of views among participating bars on other issues of concern arising under GATS, for example relating to scope of practice of foreign lawyers or their vehicles for practice in a host jurisdiction. If the OECD has issued a “checklist” of issues for countries to consider concerning legal services, this checklist may be discussed. The goal of this section of the Forum is to allow bars to discuss issues directly with one another, outside of the context of government-to-government negotiations.

B. Process.

- (1) Preparation. Not later than 3 months prior to the Forum the IBA’s WTO Working Group will circulate background information to participating bars requesting comments and proposals.
- (2) After receiving the background information, participating bars will be requested to send any proposals, suggestions or contributions on the designated subjects approximately 6 weeks before the Forum.
- (3) Approximately one month before the Forum, all of the papers that have been received will be assembled and distributed to all IBA Member Bars, members of its Council and to all Forum participants.

II. CONDUCT OF FORUM.

Following an opening Plenary Session, the participants in the Forum will be asked to join a small breakout group. Each breakout group will cover

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issues addressed in the prior Plenary Session. Each breakout session will be facilitated by a member of the IBA's WTO Working Group. Rapporteurs will be appointed for each group. At the conclusion of the breakout sessions, a final Plenary Session for that issue will be held, and reports of the deliberations of the three groups will be reported to all participants. If consensus views reached in the breakout groups are supported by a consensus of the entire Forum, they will be communicated to the IBA's Council with a recommendation that the Council by resolution endorse the Forum's recommendation(s).

III. VENUE.

The Forum will be held in Brussels on May 30 2003, the day before the IBA Council meeting in Brussels. A number of potential venues for the Forum are under consideration. As soon as the final number of participants is known, then the IBA's office in London will communicate the details of the Forum to all participants.

APPENDIX 2
April 22, 2003

TO: Participants in the IBA Council Brussels Bar Forum, May 30, 2003

Dear Colleagues:

I am pleased to enclose the final program outline for the Brussels Bar Forum. This event promises to be a milestone in the Doha Round negotiations on legal services, and it provides the IBA member organizations with the unique opportunity to make a direct contribution to the development of a framework for discussion of legal services under the GATS.

As you may recall, in December 2002, the WTO Secretariat, on behalf of all WTO Member States, sent the IBA a letter requesting its answers to three questions concerning the WTO Accountancy Disciplines. These questions asked how the Accountancy Disciplines would need to be changed before they could apply to legal services. The WTO Secretariat requested an answer from the IBA by February 2003, but was advised that this timetable was not feasible.

One of the goals of the Brussels Forum is to discuss the WTO's questions posed to the IBA about the disciplines on Domestic Regulation and, if there is a consensus, to present to the IBA Council for adoption recommended answers to the questions posed. Although it may not be realistic to reach a consensus in May 2003, delay creates some risk that WTO Member States may make decisions without the benefit of hearing from the IBA.

Sometime ago we sent to all of the IBA's member organizations copies of a "discussion paper" on the domestic regulation discipline that responds to the WTO's questions and an additional discussion paper on classification of terms. We would be grateful for any comments your Bar might have on the matters discussed in the two papers. If we receive your comments before the Brussels Forum, we will be able to compile and circulate them to all Forum participants in advance of the Brussels Forum. Accordingly, we would be grateful if you could provide us with your comments by May 9th. Comments received by that date will be sent to all Forum participants not later than May 16th, two weeks before the Forum. No particular format is required for the comments. If you have specific language changes or alternatives, however, it would be helpful

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for you to send those proposals to us by May 9th so that they can be circulated to Forum participants in advance of the Forum. If your Bar chooses to comment by making changes to the discussion papers, those changes should be clearly marked in the materials which you return to us. **Comments should be sent electronically to Sibylle Duell at the IBA Headquarters in London: sibylle.duell@int-bar.org.**

Please note that it is not our goal to promote the agenda or position of any particular Bar or government on GATS issues. We are seeking to determine the extent to which consensus exists among the world Bars on the issues under discussion and to communicate that consensus to the WTO. To the extent that lawyers around the world have common interests and perspectives, that view may be more persuasive if presented to all WTO Member States by the IBA, rather than requiring each bar to educate its WTO representatives. The Brussels Forum will provide the IBA's member Bars with the opportunity to participate directly in the development of a common framework for the conduct of the Doha Round negotiations and WTO rules that expressly recognize and acknowledge the professional values which are common to lawyers everywhere. The Brussels Forum will also help the IBA develop responses to the three specific questions posed to it by WTO Member States in December 2002.

We look to receiving your comments and to seeing you in Brussels.

With best regards, I am

Sincerely yours,

Bernard L. Greer, Jr.
Chairman, IBA/WTO Working Group

BLG:dbj
Enclosure
ATL01/11418894v1

APPENDIX 3
IBA WTO WORKING GROUP
BRUSSELS BAR FORUM
MAY 30, 2003

PROGRAM OUTLINE

The purpose of the IBA's Brussels Forum is to bring together representatives of as many of the IBA's member organizations as possible to consider the discussion papers on "Classification of Terms" and the draft "Discipline on Legal Services" contained in the IBA Council Meeting Agenda. The Forum participants will ascertain whether or not a consensus among those present can be developed on the issues raised in the papers. If consensus on the proposed discipline and one of the three classifications systems discussed in the classification paper is achieved, then the papers—amended by any changes agreed to by the Forum participants—will be forwarded to the IBA's Council with a recommendation from the WTO Working Group that the Council adopt a resolution endorsing the positions approved by the Forum participants. The timing of the submission of the positions will depend on the outcome of the Brussels Forum discussions, but the Working Group hopes that the papers will be ready for submission to the Council not later than the San Francisco meeting. Once approved by the IBA Council, the resolution and position papers would then be communicated to the WTO's Secretariat and other interested parties, including the IBA's member organizations. At the conclusion of the Forum, participants will consider other possible initiatives to be undertaken by the WTO Working Group in relation to future dialogue on GATS among the IBA's member organizations and as the Doha Round unfolds. We shall also consider other issues relevant to the work of the WTO Working Group of concern to the IBA's member organizations.

ALL PARTICIPANTS ARE ENCOURAGED TO SUBMIT
WRITTEN COMMENTS OR POSITION PAPERS.

I. WELCOME AND INTRODUCTION: 9:30-9:45

- IBA President, Emilio Cardenas, representatives of the host Bars and Ben Greer, Chair of the IBA WTO Working Group.

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II. CLASSIFICATION OF TERMS AND THE DOMESTIC REGULATION DISCIPLINE: THE CURRENT STATE OF PLAY: 9:45-10:05

Hamid Mamdouh, Invited.

III. CLASSIFICATION. (Segment Co-Chairs, Akira Kawamura and Steve Nelson).

A. Overview of the IBA Paper: 10:05 – 10:20

Jonathan Goldsmith, Secretary-General of the CCBE, and a member of the IBA WTO Working Group.

Coffee Break: 10:20 – 10:35

B. Discussion: 10:35 – 11:30

C. Conclusion of Classification Discussions and Wrap-Up: 11:30 – 12:00.

1. Final comment on proposals
2. Adoption of proposal.

IV. LEGAL SERVICES DISCIPLINE. (Segment Co-Chairs, Brian Wallace and Juan Javier Negri)

A. Overview of the IBA Paper: 12:00–12:15, Laurel Terry, member IBA WTO Working Group

V. LUNCH: 12:15 – 1:15 [Venue to be determined]

B. Discussion: 1:15 – 2:45

Coffee Break: 2:45 – 3:00

C. Discussion Continued: 3:00 – 3:30

D. Conclusion and Wrap-Up: 3:30 – 4:00

VI. NEXT STEPS/OTHER ISSUES (Segment Co-Chairs, Ben Greer and Hans-Juergen Hellwig): 4:00 – 4:30

A. New Projects

B. Other Issues of Concern to Forum Participants

C. Concluding Remarks

APPENDIX 4

the global voice of
the legal profession

Dr. Supachai Panitchpakdi
Director General
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneva 21
Switzerland

29 December 2003

Dear Director General Supachai:

In my letter to you of 4th November 2003, I mentioned to you that the resolution of the International Bar Association's Council on classification of terms which was enclosed was subject to further comment from the IBA's member Bars. The comment period has now elapsed, and the IBA's WTO Working Group has prepared a revised statement, a copy of which is enclosed herewith. The principal change is the reference to the statement as proposing a "System of Terminology" rather than a "System of Classification of Terms". It is the Working Group's view that these changes are of a clarifying, non-material nature. We hope that the Secretariat and the WTO's member governments will find this of use as negotiations on legal services under GATS proceed.

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Please accept our warmest best wishes for the holidays,

Sincerely yours,



Emilio J. Cardenas
President

CC: Hamid Mamdouh
Peter Morrison
Markus Jelitto
Dale Honeck

**APPENDIX 5
RESOLUTION IN SUPPORT OF A SYSTEM OF
TERMINOLOGY FOR LEGAL
SERVICES FOR THE PURPOSES OF INTERNATIONAL TRADE
NEGOTIATIONS**

Adopted at the IBA Council Meeting, San Francisco, September 2003

The International Bar Association:

seeking to uphold the Rule of Law;

noting the resolution passed by the Council in 1998 on *General Principles for the Establishment and Regulation of Foreign Lawyers*;

noting also that, within the framework of the Doha Round, international trade negotiations are taking place on the subject of cross-border legal practice;

reaffirming its commitment to further liberalisation of regulations affecting crossborder legal practice;

believing that there should be a neutral framework within which such negotiations should take place;

believing also that an appropriate system of terminology is one which:

- is consistent with the core values of the legal profession;
- provides a solid, neutral foundation for negotiations so that ambiguity and uncertainty are minimised;
- facilitates those negotiations without pre-determining the negotiated outcome; and
- assists in minimising disputes over what has actually been agreed through negotiation;

recognising that the elements of such a system may be used in formulating either commitments or reservations to commitments within the framework of the General Agreement on Trade in Services, and

expressing no view as to which of the two approaches will more fully achieve the objectives described above;

recognising as well the role of law firms in cross-border legal practice, and reserving for further consideration the question whether additional standard terminology may facilitate negotiations on this important issue;

noting finally that the WTO Secretariat has reported that: “*As the UN CPC classification in this sector did not reflect the reality of trade in legal services, Members have preferred to adopt the following distinctions in scheduling GATS commitments, which appear better suited than the UN CPC to express different degrees of market openness in legal services: (a) host country law (advisory/representation); (b) home country law and/ or third country law (advisory/representation); (c) international law (advisory/representation); (d) legal documentation and certification services; (e) other advisory and information services.*”¹

RESOLVES to recommend that the following system of terminology be used for such purposes:

- (a) Home-country law
 - (i) advisory services
 - (ii) representation services
- (b) Third-country law
 - (i) advisory services
 - (ii) representation services
- (c) Host-country law
 - (i) advisory services
 - (ii) representation services
- (d) International law
 - (i) advisory services
 - (ii) representation services

1. World Trade Organisation Council for Trade in Services Background Note by the Secretariat S/C/W/43, 6 July 1998.

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(e) International arbitration and mediation services.

RESOLVES FURTHER that the forgoing terminology should be understood in accordance with and qualified by the definitions set out in the schedule to these resolutions, and

RESOLVES FINALLY to invite all members of the World Trade Organization to adopt this terminology for the purposes of negotiations on trade in legal services.

SCHEDULE

- (a) “*Home country*” means, with reference to a particular lawyer, any country in the territory of which such lawyer is fully qualified and authorized to engage in the provision of legal services involving application and interpretation of the domestic laws of such country, and “*Home country law*” means the domestic law of such Home country.
- (b) “*Host country*” means, with reference to a particular lawyer, any country, other than a Home country, in the territory of which such lawyer provides legal services, and “*Host country law*” means the domestic law of such Host country.
- (c) “*Third country*” means, with reference to a particular lawyer providing legal services in the territory of a Host country, any other country which is not a Home country of such lawyer, and “*Third country law*” means the domestic law of such Third country.
- (d) “*International law*” means law established by international treaties and conventions as well as customary law.
- (e) “*Advisory services*” includes:
 - (i) provision of advice to and consultation with clients in matters, including transactions, relationships and disputes, involving the application or interpretation of the specified body of law;
 - (ii) participation with or on behalf of clients in negotiations and other dealings with third parties in such matters; and
 - (iii) preparation of documents governed in whole or in part by the specified body of law, and the verification of documents of any kind for purposes of and in accordance with the requirements of the specified body of law;
- (f) “*Representation services*” includes:
 - (i) preparation of documents intended to be submitted to courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law; and

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- (ii) appearance before courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law.
- (g) “International arbitration and mediation services” includes:
 - (i) serving as an arbitrator in any dispute involving parties from two or more countries, without regard to the body or bodies of law that may ultimately be determined to have a bearing on the dispute;
 - (ii) serving as a mediator in attempts to resolve any such dispute; and
 - (iii) preparation of documents to be submitted to, preparation for and appearance before, arbitrators, or mediators in any such dispute.

APPENDIX 6

the global voice of
the legal profession

Dr. Supachai Panitchpakdi
Director General
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneva 21
Switzerland

7 November 2003

Dear Director General Supachai:

As you may know, the International Bar Association (“IBA”) is the world’s largest international lawyers organization whose members include more than 180 bars and law societies as well as more than 16,000 individual practitioners from around the world. For many years, the IBA’s Council, which speaks for the IBA on issues of importance to the worldwide legal profession, has taken a great interest in the progress of the liberalization in trade in legal services under the General Agreement on Trade in Services. In so doing, it is not the Council’s intention to endorse or otherwise support particular views of one or more of the WTO’s member governments. Rather, it is the Council’s desire to express to the WTO’s member governments and its Secretariat consensus views of the independent legal profession as expressed through resolutions of the Council. Since 1998, four such resolutions have been communicated to the Secretariat.

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Earlier this year, the WTO's Secretariat asked the IBA, among other international legal organizations, to comment on the suitability of the Disciplines on Domestic Regulation in the Accountance Sector, dated December 17, 1998, for use as a model for the legal profession. Pursuant to that request, the IBA's WTO Working Group considered this question and developed proposed modifications to the Accountancy Disciplines. At the same time, the Working Group developed a proposed system of terminology to be used in the negotiations on legal services. The two proposals were debated at some length at a Forum, conducted by the IBA on May 30th in Brussels, Belgium, attended by representatives of approximately 60 of the IBA's member organizations. Based upon comments received at the Brussels Forum, the Working Group developed revised proposals which were submitted to the IBA's Council for approval at a meeting held in San Francisco on September 18th. The resolutions were unanimously passed. Copies are enclosed herewith. They are:

- A resolution approving a "Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector"; and
- "A Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations."

Copies of both resolutions, together with explanatory materials relating to the first, are enclosed herewith.

Please note that, with respect to the second resolution, additional minor modifications may be forthcoming. To the extent that there are eventually incorporated into the resolution we have enclosed, we shall communicate them to you and the Secretariat as soon as possible.

The IBA has enjoyed its close and productive relationship with the WTO Secretariat, and we look forward to continuing dialogue in the future on issues relevant to the legal profession as trade in legal services is liberalized.

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With all good wishes, I am

Sincerely yours,

Emilio J. Cardenas
President

cc: Abdel-Hamid Mamdouh
Markus Jelitto
Peter Morrison
Dale Honeck
IBA Officers:
Francis Neate
Fernando Pombo
Tomas Lindholm
Hugh Stubbs
Philip Zeidman
IBA WTO Working Group

APPENDIX 7
COMMUNICATION TO THE WORLD TRADE
ORGANIZATION ON THE SUITABILITY OF APPLYING TO
THE LEGAL PROFESSION THE WTO DISCIPLINES FOR THE
ACCOUNTANCY SECTOR

Adopted at the IBA Council Meeting, San Francisco, September 2003

WHEREAS, the phenomenon known as globalization has resulted in a dramatic increase in the movement of people, capital, goods and services across national borders; and

WHEREAS, central to the future development of the legal profession is the fact that international trade in legal services is now subject to the General Agreement on Trade in Services (“GATS”) and such development must be consistent with the basic concepts underlying GATS, which include transparency in regulation, nondiscriminatory treatment of regulated parties, and the requirement that regulation should be no more burdensome than necessary to protect the public interest; and

WHEREAS, Article VI:4 of the GATS states that “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*:

- based on objective and transparent criteria, such as competence and the ability to supply the service;
- not more burdensome than necessary to ensure the quality of the service;
- “in the case of licensing procedures, not in themselves a restriction on the supply of the service;” and

WHEREAS, pursuant to Article VI:4 of the GATS, WTO Member States have developed “Disciplines on Domestic Regulation in the Accountancy Sector” [document S/L/64, 17 December 1998]; and

WHEREAS, the WTO Working Party on Domestic Regulation currently

is considering whether and how to develop “disciplines” for other service sectors, including legal services; and

WHEREAS, the WTO Member States agreed to solicit the opinion of the IBA concerning the suitability of applying to the legal profession the “Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64)”; and

WHEREAS, the WTO Secretariat sent the IBA a letter in December 2002, in which it sought input by February 2003 on three questions:

- “ - 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;” and

WHEREAS, the IBA believes that it is desirable and in the public interest for its member organizations to participate in the developments at the WTO by responding to this letter directed to the IBA; and

WHEREAS, the IBA recognizes and acknowledges that in connection with such review and consideration, the legal profession in each of its member jurisdictions may take into account its own characteristics, influenced, *inter alia*, by its system of laws, historical factors and level of economic development; and

WHEREAS, the IBA affirms that, while the legal profession performs a unique and valuable service in each of their societies, lawyers from all over the world share common core values of the profession which must be given due respect when we negotiate the trade in legal services among the WTO member States; and

WHEREAS, IBA Member Bars were invited to participate in the GATS Forum in Brussels, Belgium on May 30, 2003; and

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WHEREAS, the IBA WTO Working Group circulated drafts of its papers before the GATS Forum and received comments, which were extensively discussed at the GATS Forum; and

WHEREAS, the papers that were circulated built heavily on the prior resolutions adopted by the IBA Council, which noted that notwithstanding the differences among legal professions, certain essential principles are common to all legal professions; and

WHEREAS, Exhibits A and B represent the results of the May 30, 2003, GATS Forum and the votes taken at that time;

NOW, THEREFORE, BE IT RESOLVED, that the IBA Council hereby approves Exhibits A (Suggested Changes to the WTO Disciplines for the Accountancy Sector) and B (Explanatory Memorandum to Accompany the "Suggested Changes to the WTO Disciplines for the Accountancy Sector") and authorizes transmission of these documents to the WTO and its Member organizations for their consideration.

APPENDIX 8
EXECUTIVE SUMMARY ACCOMPANYING THE
RESOLUTION FOR CONSIDERATION BY THE COUNCIL
OF THE INTERNATIONAL BAR ASSOCIATION AT
ITS MEETING IN SAN FRANCISCO IN SEPTEMBER, 2003:

COMMUNICATION TO THE WORLD TRADE
ORGANIZATION ON THE SUITABILITY OF APPLYING TO
THE LEGAL PROFESSION THE WTO DISCIPLINES FOR THE
ACCOUNTANCY SECTOR

Introduction

In December 2002, after months of discussion and debate by World Trade Organization (WTO) Member States, the WTO Secretariat sent a letter to the IBA seeking its response to three specific questions. The WTO Secretariat requested a response to these questions by February 2003 because the WTO Working Party on Domestic Regulation is actively considering the issues addressed in the letter.

In response to the WTO Secretariat's December 2002 letter, the IBA's WTO Working Group organized the IBA GATS Forum, which was held May 30, 2003. The purpose of the GATS Forum was to prepare, discuss and debate the IBA's response to the WTO's December 2002 letter. An informal extension to the February 2003 deadline was granted.

The proposed resolution and accompanying exhibits represent the results of the May 30, 2003 IBA GATS Forum. If the resolution is adopted, it will be transmitted to the WTO Secretariat, as the IBA's answer to the WTO's December 2002 letter.

Background about the GATS and Legal Services

The World Trade Organization or WTO was established in 1994. The General Agreement on Trade in Services ("the GATS") was one of the agreements annexed to the Agreement Establishing the World Trade Organization. The GATS was the first major world trade agreement to cover trade in services, rather than trade in goods. The GATS includes legal services within its coverage. As of April 4, 2003, the WTO had 146 Member States and an additional 30 Observer States. Thus, a large number of International Bar Association members are from countries that are WTO Member or Observer States.

Current Developments in the WTO Concerning the GATS

The GATS includes two provisions that require WTO Member States to undertake ongoing obligations. Article XIX of the GATS requires WTO Member States to engage in negotiations for progressive liberalization. In November 2001 in Doha, Qatar, WTO Member States agreed to a timetable for these ongoing negotiations. The Doha Development Agenda negotiations currently are scheduled to end January 1, 2005.

In addition to the Article XIX obligation, Article VI:4 of the GATS requires the development of “any necessary disciplines” to ensure compliance with that provision. Thus, in accordance with the GATS, there currently are two ongoing “tracks” of developments that are relevant to the GATS and legal services.

Additional Information About the “Disciplines” Track

As noted above, Article VI:4 of the GATS requires WTO Members to develop “any necessary disciplines.” This provision states:

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

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;*
- (b) not more burdensome than necessary to ensure the quality of the service;*
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.*

When the GATS originally was negotiated, WTO Member States agreed that the work on Article VI:4 “Disciplines” should begin with the Accountancy Sector. Accordingly, on December 17, 1998, the WTO adopted a document entitled “Disciplines on Domestic Regulation in the Accountancy Sector [S/L/64].”

Currently, the WTO Working Party on Domestic Regulation is

considering the issue of whether to adopt additional “disciplines” that would apply to other service sectors, including the legal services sector. Any results regarding “disciplines” likely will be incorporated into commitments undertaken by Member States in the new negotiations, currently scheduled to end on January 1, 2005.

As part of the effort to develop “disciplines,” WTO Member States negotiated and finally agreed upon the text of a letter to be sent to non-governmental organizations, such as the International Bar Association. This letter, which was quoted in the first paragraph, was sent to the IBA in December 2002 and requested a response from the IBA by February 2003. Since December 2002, however, the WTO Working Party on Domestic Regulation has continued to work on the “disciplines” issue.

The Role of the IBA in the WTO

The IBA has played a leading role in the WTO on behalf of the world’s legal profession. The IBA has adopted two resolutions directly relevant to the GATS and legal services; these resolutions have been transmitted to the WTO. These are: 1) the Resolution Adopted By The Council Of The International Bar Association At Its Meeting In Istanbul In June 2001 Authorizing Transmission Of The Statement On Standards And Criteria For Recognition Of The Professional Qualifications Of Lawyers; and 2) the Resolution of June 6, 1998, Concerning an Independent Legal Profession.

These resolutions and the work of the IBA were cited prominently in the “Sectoral analysis” of legal services issued by the WTO Secretariat. This 1998 paper relies heavily on the work of the IBA when explaining the special nature of the legal profession. See WTO Council for Trade in Services, LEGAL SERVICES, Background Note by the Secretariat, S/W/43 (6 July 1998), available at http://www.abanet.org/cpr/gats/bkground_note.pdf.

The IBA also has played a leading role in connection with its sponsorship of the Handbook on the GATS for IBA Member Bars. This Handbook uses a “question and answer” format to educate IBA Member Bars about the GATS and legal services so that they may participate in the ongoing policy discussions and developments. The IBA GATS Handbook is available without cost on the IBA website at <http://www.ibanet.org/pdf/gats.pdf>. The WTO Secretariat staff has been very complimentary about the IBA GATS Handbook.

The IBA also has sponsored several educational programs at the WTO in Geneva, in order to learn more about the ongoing developments and to share information educate the WTO Member State representatives about the legal profession. These educational programs include a 2½ day program in February 2002 and a one-day program in July 2002.

In sum, the IBA has taken a leading role in educating WTO Member States about the legal profession. The WTO's December 2002 letter to the IBA about the "Accountancy Disciplines" gives the IBA an opportunity to continue its role as the "global voice of the legal profession."

The May 30, 2003 IBA GATS Forum

After the IBA received the WTO's December 2002 letter requesting input on the suitability of applying to the legal profession the "Accountancy Disciplines," the IBA WTO Working Group began planning the May 30, 2003 IBA GATS Forum. The IBA GATS Forum was scheduled to coincide with the IBA meeting in Brussels, in order to maximize the ease of attendance.

In early March 2003, approximately two months before the IBA GATS Forum, the IBA WTO Working Group circulated two "discussion papers." One of these papers concerned the proper terminology or "classification" for legal services to use during the ongoing GATS negotiation. The second paper responded to the WTO's December 2002 letter and proposed specific changes to the Accountancy Disciplines. The "Accountancy Disciplines" discussion paper drew heavily on the prior work of the IBA. The IBA WTO Working Group used, as the basis for this discussion paper and conclusions reached, the existing resolutions that already had been debated and adopted by the IBA Council.

IBA Member Bars were encouraged to provide comments on these "discussion papers" and to submit additional or alternative changes. Several bars submitted such comments before the IBA GATS Forum. These comments were circulated to the IBA GATS Forum attendees prior to the meeting.

The IBA GATS Forum lasted an entire day. The session on the Accountancy Disciplines began with a summary of the proposed changes; this summary was presented by Professor Laurel Terry, Penn

State Dickinson School of Law, Carlisle, Pennsylvania, USA, who is a member of the IBA WTO Working Group and a co-author of the IBA GATS Handbook. Following this introduction, the GATS Forum attendees then discussed and debated the proposed changes and then voted.

Those attending the GATS Forum ultimately voted in favor of responding to the WTO's letter and voted in favor of the changes now included on Exhibit A to the proposed resolution. The changes include a recommendation that any disciplines applicable to the legal profession refer to the core values that have been approved in prior IBA resolutions, language indicating that lawyer regulations should not be lightly overturned by the WTO Appellate Body, and additional language that explains how certain GATS provisions apply in the context of legal services. Exhibit B, which is the Explanatory Memorandum, is based heavily on the "discussion paper" circulated two months before the GATS Forum. It has been modified, however, to reflect comments made and actions taken at the GATS Forum.

The Proposed Resolution and Accompanying Exhibits

The resolution that has been submitted to the IBA Council for approval seeks authorization to transmit to the WTO Secretariat the results of the IBA GATS Forum. The results of the IBA GATS Forum are included in Exhibits A and B.

Conclusion

The IBA WTO Working Group encourages the IBA Council to endorse the actions of the IBA GATS Forum and to adopt the proposed resolution that responds to the WTO's December 2002 letter to the IBA. Although the issues are complex, the failure to adopt a resolution would leave the IBA without a voice as the WTO debates these issues that are of critical importance to the legal profession. The IBA WTO Working Group encourages the Council to carefully consider this resolution, but also encourages the Council not to delay unnecessarily in responding to this issue. Because the WTO requested a response by February 2003 and because the WTO discussions and debates have not stopped during the period in which the IBA has discussed these issues, delay might possibly dilute the effect of the IBA's contributions.

APPENDIX 9
EXHIBIT A: CHANGES THE IBA RECOMMENDS BE MADE
TO THE WTO ACCOUNTANCY DISCIPLINES
BEFORE APPLYING THEM TO THE LEGAL PROFESSION

The WTO Member States have solicited the views of the International Bar Association (IBA) concerning any changes that would need to be made to the WTO *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (17 December 1998) before they could be applied to the legal profession. The IBA has taken no position on whether disciplines are indeed necessary or whether disciplines for the legal profession should have, as their model, the disciplines developed for the accountancy sector. If the *Disciplines on Domestic Regulation for the Accountancy Sector* are used as the basis for disciplines for the legal profession, the IBA responds to the WTO's inquiry by recommending the following underlined changes be made before applying to the legal profession the *Disciplines on Domestic Regulation for the Accountancy Sector*:

1. Change Article II(2) so that it states:

“Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in legal services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil 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 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.”

2. Change Article III(3) and (4) so that they state:

III(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).”

III(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 licences 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 practise within their jurisdiction.*

3. Change Article IV(8) so that it states:

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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.'

4. Change Article IV(12) so that it states:

'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, on to 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.'

5. Change Article VI(19) so that it states:

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."

6. Delete Article VI(20)

7. Change and Renumber Paragraphs 25 and 26 of Article VII so that it states:

24. 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.

25. *In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of any internationally recognized technical 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 organizations¹ applied by that Member.”*

1. 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.

APPENDIX 10
EXHIBIT B: EXPLANATORY MEMORANDUM

**ACCOMPANYING THE IBA'S SUGGESTED
CHANGES TO THE WTO ACCOUNTANCY DISCIPLINES
BEFORE THEY CAN BE APPLIED TO THE LEGAL
PROFESSION**

Introduction

In December 1998, a working party of the World Trade Organization (WTO) completed 'Disciplines on Domestic Regulation in the Accountancy Sector.' Development of these disciplines was conducted pursuant to Article VI, paragraph 4 of the GATS. This provision requires the WTO, through its Council for Trade in Services, to develop any necessary disciplines whose aim should be to ensure that 'measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.' Article VI, paragraph 4 also states that such disciplines shall aim to ensure that these 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.

On December 17, 1998, the WTO issued the Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 (hereafter "the Accountancy Disciplines"). The Accountancy Disciplines are attached within Annex 1 to this Explanatory Memorandum.

The WTO Secretariat has now consulted the IBA on whether the Accountancy Disciplines can and should be extended to cover the legal profession as well. In particular, the WTO Secretariat sought advice from the IBA on three questions:

- "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.”

The WTO’s consultation is attached as Annex 1, together with the supporting documentation that includes the Disciplines on Domestic Regulation in the Accountancy Sector.

There are, of course, several different ways the legal profession might respond to GATS Article VI(4) and the issue of “disciplines.” The legal profession might contend, for example, that “disciplines” for the legal profession are not NECESSARY and thus need not be developed. Alternatively, the legal profession might contend that the legal profession should be covered by original “disciplines” developed specifically for the legal profession. The legal profession might also develop “disciplines” by using the framework of the existing “Accountancy Disciplines” and then specifying minor or perhaps major changes.

The three questions posed to the IBA by the WTO Secretariat, on behalf of the WTO Member States, were premised on the third assumption identified above. In other words, the WTO questions specifically asked the IBA to comment on which provisions of the Accountancy Disciplines should be amended or supplemented when applied to the legal profession.

The IBA Resolution and accompanying Exhibits (the proposed changes and this Explanatory Memorandum) respond to the three questions posed to the IBA by the WTO Secretariat. The IBA Resolution and accompanying Exhibits take no position on whether Disciplines are “necessary” or whether, in the absence of the Accountancy Disciplines, the legal profession would have preferred a completely different framework.

This Explanatory Memorandum explores some of the concerns that have been expressed that the Accountancy Disciplines, as drafted, do not take account of the specific values and ways of practice of the legal

profession, which are different to those of the accountancy sector. It provides suggested answers to the WTO Secretariat's questions about what changes, if any, should be made to the Accountancy Disciplines before they can be made applicable to lawyers. The IBA is grateful to the Canadian Bar Association and the Federation of Law Societies of Canada for their useful submissions to the WTO on the issues addressed in this Memorandum.¹

***In summary**, the IBA recommends that, if the Accountancy Disciplines are to be extended in the future to lawyers, this should be undertaken only on the basis that the changes proposed in this Explanatory Memorandum are incorporated into a special version for the legal profession. The full amendments suggested by the IBA, taking account of all the proposals below, are incorporated into Exhibit A to the IBA's Resolutions. The sections that follow explain the basis for the IBA's suggested changes included on Exhibit A.

I. Change 1—Add a Reference To The Core Values of the Legal Profession

The WTO Secretariat has asked the IBA to advise it of any "points or areas which you consider are missing from the [Accountancy] disciplines and which you feel should be included." The first point that is missing from the Accountancy Disciplines is reference to the core values of the legal profession. The IBA respectfully requests that WTO Member States not apply the Accountancy Disciplines to the legal profession unless the Disciplines are revised to include reference to the core values of independence, confidentiality, and avoidance of conflicts of interest.

A. Background Information about the Core Values of the Legal Profession

The IBA has adopted a resolution that expresses the core values of the legal profession. The IBA Resolution on the Regulation of the Legal Profession dated 6 June 1998 states, *inter alia*:

1. 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 (Nov. 2000), available at <http://www.cba.org/cba/submissions/pdf/00%2D30%2Deng.pdf>; 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) available at <http://www.flsc.ca/en/pdf/2001wtoreport.pdf>.

the Council of the International Bar Association, considering that the legal profession nevertheless fulfils a special function on society, distinguishing it from other service providers, in particular with regard to

- *its role in facilitating the administration of and guaranteeing access to, justice and upholding the rule of law,*
- *its duty to keep client matters confidential,*
- *its duty to avoid conflicts of interest,*
- *the upholding of general and specific ethical and professional standards,*
- *its duty, in the public interest, of securing its independence, politically and economically, from any influence affecting its service.*

resolves

that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and that any steps taken with a view to regulating the legal profession should respect and observe the principles outlined above.

On two occasions since 1998, the IBA has reaffirmed these core values of the legal profession. In 2001, the IBA Council adopted a resolution concerning Multidisciplinary Partnerships that included the following language:

NOW THEREFORE the Council of the International Bar Association RESOLVES

1. *THAT clients and the public must be protected from threats to lawyer independence, conflicts of interest and loss of client privilege.*
2. *THAT countries should ensure that the fundamental principles protecting clients and the public embodied in the IBA General Principles of Ethics for Lawyers are adequately addressed in the context of any rules permitting or affecting the operation of MDPs.*
3. *THAT Regulators, including authorities responsible for regulating and/or promoting trade in services, be made aware of the factors which make core services provided by the legal profession unique and distinct (being those out in the IBA Resolution on the Regulation of the Legal Profession dated 6 June 1998 and those mentioned*

above) and which necessitate that the regulatory framework for the legal profession be given separate consideration, distinct from that given to other professions.

During 2001, the IBA Council also adopted, for purposes of submission to the WTO, a *Statement of Standards and Criteria for Recognition of the Professional Qualifications of Lawyers* (“the Statement”). As with the MDP resolution, the *Statement* refers to the ethical rules and core values of lawyers.

The European Court of Justice recognised the three values of independence, confidentiality and the avoidance of conflicts of interest as central to the legal profession in its landmark judgment of 19 February 2002 in the case brought by the Dutch Bar in relation to multi-disciplinary partnerships—Case C—309-99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*. Furthermore, the European Court of Justice stated that these core values were different to the values of the accountancy sector.

Other legal professional organizations have recognised the same core values. The Union Internationale des Avocats recognises confidentiality, independence and avoidance of conflicts of interest as core values of the legal profession—see, 2002 *Turin Principles* available at http://www.uianet.org/english/e_turin2000_principles.pdf. Similarly, the *United Nations’ Statement on Basic Principles on the Role of Lawyers* embodies the same core values.

In sum, although lawyers from different parts of the world have some differences in the manner in which they express their values, lawyers around the world regularly refer to independence, confidentiality and avoidance of conflicts of interest as core values of the legal profession.

B. Proposed Addition to the Disciplines

Article II(2) of the General Provisions of the Accountancy Disciplines states as follows:

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

trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.”

The IBA respectfully suggests that the language underlined below be added to this paragraph. The added language would refer to the core values of confidentiality, independence and avoidance of conflicts of interest, which are core values of the legal profession that are recognised around the world. As modified, the Disciplines would read:

‘Legitimate objectives are, inter alia, the protection of consumers (which includes all users of 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.’

C. Why Reference to the Legal Profession’s Core Values is Needed in any Disciplines Applicable to the Legal Profession

The 2001 *Statement* explains the manner in which the legal profession differs from other service providers. The *Statement* also explains the critical role of lawyers with respect to the rule of law in the world and the administration of justice. The IBA respectfully suggests that because of the critical role of the legal profession, any disciplines applicable to the legal profession should refer to the “core values” about which there is world consensus. The Disciplines should make it clear that in the context of legal services, “legitimate objectives” include protection of these core values.

The 2001 *Statement* includes the following explanation:

III. Considerations Unique to the Legal Profession

The legal profession differs from other service professions in at least three major respects that are relevant to the question of recognition of professional qualifications.

A. The Special Role of the Legal Profession

The legal profession fulfils a special role or function in democratic societies, facilitating the administration of and guaranteeing access to justice and upholding the rule of law. Lawyers are at the same time officers of the courts and the guardians of the rights of citizens, public responsibilities that call for the utmost integrity and the strictest compliance with rules of ethics and professional conduct if effective operation of and public confidence in the system of justice are to be maintained. Accordingly, it is essential that standards and criteria for recognition of qualifications for the practice of law include not only the requisite elements of intellectual qualification, such as competence and ability to supply the service, but also those elements of ethical and moral qualification that are essential to the preservation of the integrity of the profession and, indeed of the legal system itself. Were these elements to be excluded from legitimate consideration as differentiating factors in the decision whether or not to recognize professional qualifications, Article VII of the GATS would be without practical value insofar as the legal profession is concerned, as neither governments nor the profession would be willing to grant recognition without regard to these fundamental criteria.

B. Heterogeneity of Substantive Knowledge

The education, practical training and other qualifications of a lawyer relate, to a substantial extent, to a particular national legal system. Thus, unlike medicine or engineering, where the applicable principles are exactly the same from one country to another, or accounting, where the rules tend to vary somewhat in their details but are readily subject to reconciliation in accordance with common principles, law is highly variable from one jurisdiction to the next and, as an expression of the mores and mutual expectations of the citizens, is significantly cultural in its content.

C. The Regulatory Structure of the Legal Profession

For historical reasons, regulation of the legal profession is carried out in many countries at the level of political subdivisions rather than at the national level. Even where the regulatory framework is established on a national basis, authority for admission to the profession and professional discipline frequently rests with local, state or provincial bodies, in some cases governmental and in others professional, acting pursuant to delegated authority. In consequence, implementation of the provisions

of the GATS relative to legal services will necessarily involve cooperation between local, regional and national authorities of the Members involved. The term “competent authorities” when used with reference to any Member must be read in this light, unless the context requires that the term refer only to the national government of any Member.

The IBA respectfully suggests that before the Accountancy Disciplines are applied to the legal profession, the Disciplines should be modified to include as legitimate objectives, lawyers’ core values of independence, confidentiality and avoidance of conflicts of interest. These values are legitimate objectives and help determine, in the context of legal services, how lawyers may protect consumers (including the users of legal services and the public generally) and ensure the quality of the service and professional competence.

D. Conclusion

***In summary**, Article II(2), as revised, will now read as follows:

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

II. Change 2—Add A Sentence Explaining How The Term “Necessary” Will Be Interpreted In The Context Of The Legal Profession

In addition to adding a reference to the “core values” of the legal profession, the IBA suggests that the word “necessary” in the phrase ‘not more trade-restrictive than necessary’ needs further explanation in relation to the legal profession. The phrase ‘not more trade-restrictive

than necessary' is central to the GATS and cannot be changed (indeed it appears in Article VI quoted above). The IBA suggests that an explanatory sentence be added to the Disciplines to explain how the concept of "necessary" should be applied in the context of evaluating measures that affect the legal profession. The intention is to reference existing WTO Appellate Body jurisprudence and ensure that WTO Member State decisions regarding the legal profession and the rule of law are treated with the same respect as decisions regarding health and other critically important matters.

As explained in greater detail below, the IBA believes that this is not baseless special pleading, but rather, it is inserted in recognition of the special place of lawyers in maintaining the rule of law, participating in the administration of justice and ensuring a fair and democratic society.

A. Background Information About the Vital Role of Lawyers in Society

The IBA has adopted various resolutions that explain the important role of the legal profession with respect to the rule of law. As noted above, in its 1998 resolution, the IBA "**resolve[d]** that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society." In the preamble to its various resolutions on MDPs, the IBA cited the following language:

"WHEREAS respect for the rule of law is a principle that has found universal acceptance and encompasses the principle that citizens have recourse to the law, not only for the resolution of disputes, but also for protection against arbitrary actions of public authorities and abuse of power by other institutions, since under the rule of law, the law is equally binding upon all concerned, citizens, powerful or not, and public authorities alike;

WHEREAS recognition of the rule of law places heavy emphasis on the necessity for adequate access to justice and lawyers form an essential element of access to justice so that the legal profession is a necessary element in the implementation of any system based on the rule of law;

The 2001 *Statement* resolution also emphasized that "*The legal profession fulfils a special role or function in democratic societies, facilitating the administration of and guaranteeing access to justice and*

upholding the rule of law. Lawyers are at the same time officers of the courts and the guardians of the rights of citizens, public responsibilities that call for the utmost integrity and the strictest compliance with rules of ethics and professional conduct if effective operation of and public confidence in the system of justice are to be maintained.”

The IBA is not alone in recognizing the important and unique role of the legal profession in maintaining the rule of law and administration of justice around the world. For example, the *U.N. Basic Principles on the Role of the Lawyer* contains numerous paragraphs that refer to the important role of lawyers with respect to the rule of law and the administration of justice. Some of the relevant paragraphs from the *UN Basic Principles* are the following:

Special safeguards in criminal justice matters

5. *Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon any arrest or detention or when charged with a criminal offence.*
6. *Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.*
7. *Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, in any case not later than forty-eight hours from the time of arrest or detention.*
8. *All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.*

Guarantees for the functioning of lawyers

16. *Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance,*

harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

Professional associations of lawyers

24. *Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.*
25. *Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.*

The Union Internationale des Avocats also approved in 2002 *Standards For Lawyers Establishing A Legal Practice Outside Their Home Country* (available at http://www.uianet.org/english/e_turin2000_standards.pdf), standards that are consistent with the IBA resolutions and the UN Basic Principles. The UIA resolution includes the following statements which are consistent with the IBA resolution cited above:

Everywhere in the world, citizens and others subject to the rule of law must have available the possibility of recourse to the services of an independent lawyer. The lawyer undertakes the defense of personal, economic or other interests of clients before the courts as well as legal consulting in the national and international legal system, plays a unique role in the world in maintaining the rule of law.

2. *Role of the Lawyer. Lawyers are by definition part of the legal system in every country. As direct participants in the system of justice, lawyers ensure and maintain the quality of the legal system. Lawyers also play a critical role as counselor and assistant in accomplishing many commercial and civil transactions. However, clients of lawyers must be viewed not only as possible participants in*

a commercial transaction, but also and more importantly as citizens who are to be informed, counseled, aided and defended by lawyers who, in so doing, are ensuring the efficient operation of the justice system.

The UIA Code Of Professional Conduct For The Legal Profession In The 21st Century, available at http://www.uianet.org/english/e_turin2000_principles.pdf similarly states:

- *Whereas, even in widely differing geographic and economic contexts, the Lawyer continues to play a fundamental role in the defense of human rights, be they civil, political, economic, social or cultural in nature.*

- *Whereas, that role is played not only in the courts, but also privately, as an advisor, in order to:*

ensure that, despite the complexity of modern legal systems, the rules of law are more widely known, thereby ensuring that they will be respected and observed.

limit recourse to the courts by discouraging frivolous suits and helping settle disputes by first referring the parties to mediation or conciliation.

maintain stability in legal relationships despite an increasing trend toward self-regulation, deregulation and globalization.

- *Whereas, it is necessary to ensure the recognition and continued significance of the Lawyer's role, even in the face of pressure from authorities, be they executive, legislative or judicial.*
- *Whereas, in order to attain this goal, it is essential that all States recognize the basic principles underlying the legal profession through which, despite differences in culture and development, its fundamental characteristics can be distilled and rules can be developed to protect and preserve them.*
- *In light of the fundamental principles of the legal profession set forth in the Bylaws and Codes of the UIA and in the basic principles governing the role of Bars and Law Societies adopted by the UN General Assembly in 1990, according to which:*

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- the Lawyer plays an essential role in defending individuals in the courts, by guaranteeing them an absolute right to the effective assistance of counsel and a defense without prejudice or discrimination, in complete independence and freedom, including but not limited to freedom of association, religion, speech and opinion.

- the Lawyer has both the right and the duty to participate in the development of the law and its dissemination.

- the Lawyer must practice his profession in a spirit of service and humanism, in accordance with the legal code of ethics and professional conduct and the rules of attorney-client privilege.

- the fundamental task of professional associations is to ensure compliance with the standards and norms governing the practice of law, to defend their members against any unwarranted interference or restraint, to ensure free access by all to legal services and to cooperate with all other institutions which serve the cause of justice.

- *Whereas, finally, the corollary to the Lawyer's role and rights is the obligation to perform the corresponding duties, as the said rights and duties are an essential condition of the protection of both the public interest and the interests of the individuals.*

In sum, these excerpts show that lawyers and institutions around the world recognize that in the context of legal services, lawyers play a critical role in society with respect to the rule of law and administration of justice.

B. Proposed Addition to the Disciplines

The IBA recommends that the following sentence be added to the Disciplines "General Provisions" before the new definition of 'legitimate objectives' as already detailed above;

"Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in legal services. For this purpose,

Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil 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 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.”

C. Why Clarification of the Term “Necessary” is Needed in Any Disciplines Applicable to the Legal Profession

The GATS provides a dispute resolution mechanism for disagreements that occur between WTO Member States about compliance with the GATS. Thus, the legal profession should expect that at some time in the future, one WTO Member State may challenge the domestic regulation measures in another WTO Member State on the ground that the “measures are more trade-restrictive than necessary to fulfil a legitimate objective.” If and when such challenges occur, and if the Member States cannot resolve their disagreement, then the WTO Member State’s domestic regulation measure related to legal services could be reviewed by a dispute resolution panel and ultimately, the WTO Appellate Body.

Scholars and lawyers recognize that dispute resolution systems sometimes require time in order to find the proper balancing of interests. Thus, while some early decisions may veer too far in one direction or another, a natural correction process usually occurs. Therefore, even if a WTO Member State disagrees with a particular decision, one expects that ultimately the correct balancing of interests will be reached.

In other sectors of the world economy, this “correction” process may not pose any major risks. It is different, however, for the legal system because of the critical role lawyers play to maintain a country’s rule of law and system of justice. Because such important values are at stake,

the “correction” process poses risks that are not associated with other sectors of the economy. These risks include upsetting the balance and role lawyers play with respect to the rule of law and administration of justice. In other words, legal services are matters of critical and highest importance to WTO Member States. In this respect, the regulation of the legal profession is comparable to issues involving the regulation of health matters in the Asbestos case.²

Accordingly, although the provisions of the GATS and the disciplines must be adhered to in the context of legal services, the IBA submits that deference should be given to the interpretation by competent authorities about whether a particular domestic regulation measure is indeed “necessary” to achieve legitimate objectives.

The deference is not unlimited. Such deference would still require, on the one hand, that these authorities follow the strictures of the GATS or any applicable disciplines. On the other hand, the competent authorities in a WTO Member State may have centuries of experience in determining, for the particular country and legal culture, the proper role of lawyers in order to maintain a vigorous rule of law. Therefore, in determining whether a WTO Member State has complied with the GATS and the disciplines, an area of reasonable discretion should be given to the local authorities and regulators.

D. Conclusion

In summary, the whole of Article II(2) will now read as follows:

“Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in legal services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. For the purpose of defining what is “necessary” in the context of legal services, it is recognised that in

2. See WTO Appellate Body Report: European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001 [Asbestos case]; see also Joel P. Trachtman, Lessons for GATS Article VI from the SPS, TBT, and GATT Treatment of Domestic Regulation, 7 June 2002 [Paper prepared for the OECD-World Bank Services Experts Meeting Held in Paris on M4-5 March 2002] available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=298760.

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 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. Change 3—Add Regulatory Discipline to the Transparency Requirements in Article III(3) and (4)

A. Background Information About Regulatory Discipline for the Legal Profession

In many countries, lawyers are subject to rules of professional conduct and other requirements. These lawyers may be subject to regulatory discipline for their failure to comply with these provisions. Discipline may range from informal admonitions to removal of the lawyer’s license and ability to practice law.

B. Proposed Addition to the Disciplines

The IBA recommends that the following language be added to Article III(3) and (4):

III(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).

III(4) Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

(e) where applicable, information describing the activities and

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professional titles which are regulated or which must comply with specific technical standards including ethical rules and rules of professional conduct;

- (f) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;*
- (g) information on technical standards, including ethical rules and rules of professional conduct; and*
- (h) upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.*

C. Why the Language Needs to be Added

The suggested language would ensure that the lawyer disciplinary measures in WTO Member States are transparent. The IBA submits that the information about disciplinary authorities is also important and should be transparent.

D. Conclusion

In summary, revised articles III(3) and (4) would now state:

III(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).

III(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 licences 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 practise within their jurisdiction.*

IV. Change 4—Add Additional Language to Article IV(8) on Licensing and Regulatory Discipline Requirements in Order to Avoid the Current Ambiguities

One of the questions posed by the WTO Secretariat was whether there were any elements of the Accountancy Disciplines that were “not appropriate” for the legal profession. The IBA suggests that in the context of legal services, the distinction that is drawn in GATS Article VI(4) and Article IV(8) of the Accountancy Disciplines between the terms “qualification” and “licensing” is not necessarily clear to non-trade law experts. Accordingly, the IBA recommends that additional language be inserted in order to avoid this ambiguity.

A. Background Information about “Licensing Requirements”

Article VI(4) of the GATS required the creation of any “necessary” disciplines to address qualification requirements and procedures, technical standards and licensing requirements. Section IV of the Accountancy Disciplines deals with licensing requirements. Article IV(8) states:

‘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, publicly available and objective.’

Thus, both the GATS itself and the Accountancy Disciplines distinguish between the terms “licensing” and “qualification.”

In the legal profession generally, however, 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. The IBA resolutions instead distinguish between “full licensing” systems and “limited licensing” of foreign lawyers.

Thus, because of the different meaning sometimes ascribed by lawyers to the terms “licensing” and “qualification,” the IBA recommends that the terms be defined in the Disciplines and that the Disciplines specify that both “full licensing” systems and “limited licensing” systems can have both qualification and licensing requirements and procedures.

The IBA suggests additional language based on the Secretariat Note, *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 September 1996). This Secretariat Note uses the following definitions:

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 licence.

B. Background Information About Regulatory Discipline for the Legal Profession

Some countries issue a “limited license” to lawyers from another jurisdiction that allows the transient lawyer a limited scope of practice, i.e., something less than is granted by the full title of lawyer used in the Host State. The limited license issued by the Host State often is based on the fact that the transient lawyer is in good standing in that lawyer’s Home Jurisdiction. Thus, if a lawyer is disciplined in his Home Jurisdiction and no longer in good standing, the basis for the lawyer’s Host State limited license has been compromised.

Furthermore, in many countries, lawyers are subject to rules of professional conduct and other requirements. These lawyers may be subject to regulatory discipline for their failure to comply with these provisions. Discipline may range from informal admonitions to removal of the lawyer’s license and ability to practice law. The disciplinary authorities may be organized by city, by sub-jurisdiction, or by the country. Because lawyers now cross borders, both within a country and from one country to another, disciplinary authorities may have had to decide how to respond if a lawyer from another jurisdiction commits a disciplinary violation in the Host State.

Although not all jurisdictions have mechanisms for such disciplinary “referrals,” a number of countries have developed referral systems. The issue of disciplinary referral can be an issue of critical concern to those who regulate lawyers. One of the primary concerns for lawyer regulators is that without some sort of discipline referral to the lawyer’s Home State, there may be little incentive for transient lawyers to comply with the Host State’s rules of conduct.

C. Proposed Addition to the Disciplines

The IBA recommends that the following language be added to Article 8 of the Accountancy Disciplines before they are applied to the legal

profession:

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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 fulfil 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.

D. Why Clarification of the Term “Licensing” is Needed in any Disciplines Applicable to the Legal Profession.

As noted above, the use of the terms “licensing” and “qualification”—without additional explanation—is likely to cause confusion with the legal profession because these terms are used in the legal profession, but not in a consistent manner. Accordingly, the IBA recommends that additional explanatory language be provided based on the explanatory language contained in a WTO Secretariat paper. Although the definitions in the Secretariat paper have never been officially adopted, they are commonly used within the WTO.

The IBA also recommends that additional language be added in order to indicate that there may be both qualification and licensing requirements for all of the common methods by which lawyers cross borders. This additional language will minimize the chance the likelihood that lawyers would try to equate the GATS terms “qualification” and “licensing” with

the “full licensing” and “limited licensing” terms with which lawyers may be more familiar.

E. Why The Language on Regulatory Discipline Needs to be Added

The suggested language would ensure that regulators in the Host State will be aware of any discipline against a lawyer in the lawyer’s Home State. This is important because the license issued by the Host State may be based on the lawyer’s continued good standing and license from the lawyer’s Home State. The Host State is entitled to be aware of any changes

F. Conclusion

***In summary**, Article IV(8) should now read as follows:

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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.

V. Change 5—Add Additional Language to the Section on Professional Indemnity Insurance in Article IV(12)

Another area where changes should be introduced to reflect the special experience of the legal profession is in relation to Article IV, paragraph 12 on professional indemnity insurance. The Article states:

Article IV(12): Professional Indemnity:

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.

A. Background Information About Legal Services and Professional Indemnity Insurance and Social Security Funds

Although the IBA has not adopted any resolutions concerning professional liability insurance, the IBA takes note of several developments that inform its view about Article IV(12) of the Accountancy Disciplines.

- (1) The European experience in relation to professional indemnity insurance.

The EU has an Establishment of Lawyers Directive (98/5) that permits EU lawyers to practice in other EU Member States. Article 6 of this Directive allows lawyers to bring with them their home professional indemnity insurance when establishing in another Member State, just as outlined in paragraph 12 of the Accountancy Disciplines. The EU Establishment Directive also permits Member States to require a top-up to the level mandated in the host Member State, which is doubtless what other countries will do if the Accountancy Disciplines are applied world-wide to lawyers.

The simple phrase in paragraph 12 above brings with it, if the experience of European lawyers is replicated world-wide, a series of very complex problems, because of the following:

- the definition of lawyer varies according to different cultural traditions, and so the scope of practice, and the resultant activities covered by professional indemnity insurance, are

widely different;

- lawyers bring with them insurance policies in their own language, which contain technical terms which are expensive and difficult to translate; and
- bars and law societies arrange their affairs in different ways, so that activities are not always covered in the same way and by a single insurance policy.

In addition, when an EU Member State accepts professional indemnity insurance issued in another EU Member State, it does so with the knowledge that there are protections within the EU as to insurance firms being used by lawyers. There are European directives which prescribe minimum standards for insurance firms operating within the EU. That will not necessarily be the case world-wide, where lawyers might bring with them insurance from unknown and possibly risky insurance companies.

(2) Pension and social security schemes and fidelity funds

In some countries, the competent authorities (i.e., the bars) run compulsory pension and social security schemes for local lawyers, along with compulsory professional indemnity schemes. Some countries also have fidelity funds. As a result, if a foreign lawyer registers with a host bar, that lawyer might be required to buy into the compulsory local pension and social security arrangements or fidelity fund, regardless of home arrangements made in these areas. It is arguable that the same logic which applies to professional indemnity insurance crossing borders should be applied also to pension and social security arrangements and fidelity funds, to avoid duplication of cover.

B. Proposed Addition to the Disciplines

The IBA proposes that an additional phrase be added at the end of the paragraph IV(12) to provide additional detail about how the obligation in relation to professional indemnity insurance would be applied in the context of legal services. The recommended provision would state:

'subject to Members being permitted to put the burden, including the costs of the exercise, on to foreign applicants to show the extent of their existing insurance, and the solvency and security of the company providing such insurance.'

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The following sentence also should be added to the end of paragraph 12 to deal with the extra matters raised:

'The same principles shall apply to any existing pension or social security arrangements or fidelity funds for which Members have requirements covering foreign applicants.'

C. Why Additional Language is Required in the Article Concerning Professional Indemnity If the Disciplines Are Applicable to the Legal Profession

The experience in the EU demonstrates that provisions such as Article IV(12) are very difficult to implement, even in countries that have minimal shared solvency requirements for professional liability insurers. Experience has shown that in the context of legal services, significant practical difficulties exist as a result of different policy languages and coverages. The additional language suggested above will help the legal profession minimize some of these difficulties. It also grants bars and law societies the power to set certain solvency requirements for the insurance companies of the migrant lawyers concerned.

If the Accountancy Disciplines are extended to lawyers, with or without the extra phrase proposed above, it may be useful to have the IBA establish a committee in conjunction with the global insurance industry (just as the CCBE has done with the European insurance industry to deal with the problems arising out of the Establishment Directive), to ensure that professional indemnity insurance crosses borders as easily and safely as possible.

D. Conclusion

***In summary**, paragraph 12, taking into account both (1) and (2) above, would now read as follows:

'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, on to 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.'

VI. Change 6—Delete Article VI, paragraph 20 Regarding Qualification Requirements

Article VI(19 and 20) of the Accountancy Disciplines address the topic of qualification requirements. Paragraph 19 establishes general obligations, whereas paragraph 20 includes more specific details. The IBA suggests that in the context of legal services, the language used and specific details set forth in paragraph 20 may cause difficulties in implementation. Accordingly, the IBA recommends that in any discipline applicable to the legal profession, the general provisions in paragraph 19 are sufficient and that paragraph 20 be deleted.

A. Background Information About “Qualifying” as a Lawyer

Article VI, paragraphs 19 and 20 of the Accountancy Disciplines provide as follows:

Article VI(19 and 20): Qualification Requirements

19. *A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.*
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.*

There are several different types of background information that the IBA has considered before reaching its recommendation concerning article VI(20). The IBA began its analysis by noting that if nonlawyers consider the application of paragraph 20 to the legal profession, they might possibly find this provision ambiguous. Article VI(20) states that any examination or qualification requirement must be ‘limited to subjects relevant to the activities for which authorization is sought.’ To a nonlawyer, this paragraph might be interpreted to mean that a lawyer who plans to practice tax law should only be examined with respect to

that lawyer's qualifications with respect to tax law or that a lawyer who plans to advise solely on solvency laws should be subject to examination only on that subject.

In the context of the legal profession, however, such an interpretation would be factually flawed. The IBA believes that in the context of legal services, the highlighted phrase in paragraph 20 can and should only mean one thing—that the “activities” for which authorization is sought should be interpreted to refer to the “activity” of serving as a lawyer, not the particular subject matter specialty in which the lawyer plans to practice.

The IBA is not aware of any jurisdiction in the world in which foreign lawyers are able to acquire a host qualification or title (as opposed to an ability to practice under home title) that is limited to a particular subject matter area or specialty. In other words, if a lawyer is going to requalify in the host state and acquire the host title, then the lawyer will receive all the rights and privileges attendant on that title of host state lawyer. Furthermore, the host state title that is acquired on requalification will enable the foreign lawyer to carry out ALL of the activities permitted to host state lawyers.

Second, it is possible that in other professions, a service provided can be qualified as a specialist, without first obtaining the general qualification. This is not true for lawyers.

Although there may be particular qualifications within specific jurisdictions which host lawyers are able to obtain (in other words, specialization qualifications), the IBA does not believe that such specialty qualifications would be available to foreign lawyers unless the foreign lawyers first obtained the host state qualification or title.

The third background fact that is relevant to article VI(19) is the experience of the European Union in applying a similar provision to the EU legal professions. The EU Mutual Recognition of Diplomas Directive (89/48) (“the Diplomas Directive”) requires EU Member States to take into account prior qualifications obtained in another EU Member State. This Directive applies to the legal profession, among other groups. The EU Diplomas Directive is based on the assumption that lawyers qualify in similar ways, to a similar standard and with the same range of activities in all EU Member States. Approximately ten years after adoption of the Diplomas Directive, the EU adopted an Establishment Directive for lawyers (98/5). The Lawyers' Establishment Directive, in

general, makes it easier for a lawyer from one EU Member State to practice in another EU Member State than did the Diplomas Directive. EU Member States found it difficult, as a practical matter, to take into account the type of detail that is specified in paragraph VI(20) of the Accountancy Disciplines. It should be noted that this difficulty occurred even though the EU directives assume they qualify in a similar manner with a similar range of activities.

B. Proposed Change to the Disciplines

In order to eliminate any potential confusion concerning its applicability, the IBA recommends that Paragraph 19 of the Accountancy Disciplines be amended to read as follows:

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.

The IBA also recommends that Article VI, paragraph 20 be deleted before any disciplines are applied to the legal profession.

C. Why Article VI, Paragraph 20 Should Be Deleted in Disciplines Applicable to the Legal Profession

Because the IBA believes that the general principles in Article VI(19) provide sufficient protection and that Article VI(20) may create practical difficulties when applied in the context of legal services, it recommends that any disciplines applicable to the legal profession delete paragraph 20.

This recommendation is based on several conclusions. As a starting matter and as explained above, the IBA notes that the “activities” subject to examination is the “activity” of serving as a host state lawyer. Because a foreign lawyer who obtains a host state lawyer qualification will be entitled to practice in all subject matter areas permitted to the host state lawyer, it would be inappropriate to limit any examination to the particular subject matter areas in which the lawyer intends to limit his or her practice.

(The host state may, of course, choose to grant a foreign lawyer a more limited “license”, rather than the title used by host state lawyers (“full

licensing.”) In the case of such “limited licenses,” it may be appropriate for the host state to examine the migrant lawyer on only certain limited subject matter areas, such as the host state’s ethics rules.)

The IBA further recommends that paragraph 20 be deleted because the type of detail specified here has proved impractical in the context of legal services. Paragraph 19, with its general duty to take account of foreign qualifications, should be deemed to be acceptable and sufficient. However, paragraph 20 should be removed, because it assumes that for every country, or possibly for groups of countries, bars will have special exams and qualification routes. Because many bars in Europe and elsewhere are not rich, national bodies, but based on city jurisdictions, it is not reasonable to suppose that they will be able to undertake the research and assessment necessary to give effect to paragraph 20. It may be an acceptable burden for a profession where something less than a full title can be obtained, but given the comments made previously, it is believed to be too onerous to expect each bar to carry it out.

In the EU, there is no trawling through the specific qualifications, subjects, university attended and results obtained from elsewhere in the EU, because of the underlying common assumption. If that were to be extended around the world, it would involve the bars and law societies in one of two options. It may be safe to make that assumption in the EU, but it is a much more difficult assumption to make when the whole world is involved. Either, the competent authorities from WTO Member States would have to make the same common assumption that is made in the EU about the qualifications brought to them across borders. That is doubtless an unsafe assumption to make about the whole world. Or, they would have to establish a system whereby they could recognize each degree, each title, each university from each country. That is a very time-consuming and resource-rich exercise that has not proved easy or practical to do in the legal services context.

D. Conclusion

***In summary,** and for the reasons stated, paragraph 20 sets an impractical standard for bars and law societies, and should be deleted. Furthermore, paragraph 19 should be changed so that it states:

20. 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.”

VII. Change 7—Define the Term “Technical Standards” in Article VII

The WTO Secretariat has asked the IBA to identify “elements of the disciplines which you consider are not appropriate for your profession.” The Accountancy Disciplines use the terms “technical standards” and “technical qualifications.” This is because Article VI.4 of the GATS refers to “technical standards.”

For the reasons described below, the IBA suggests that, for disciplines applicable to the legal profession, an explanation be included that explains the meaning of the term “technical standards” in the legal services context. This explanation would explain that “technical standards” refers to “ethical rules and rules of professional conduct.” This explanatory statement is consistent with other WTO documents and would clarify the meaning of a term that is not typically used in conjunction with the legal profession and that might cause confusion.

A. Background Information About “Technical Standards” and the Legal Profession

The Accountancy Disciplines include the following provisions:

Article VII(25 and 26)—Technical Qualifications

25. Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.

26. In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognised standards of relevant international organizations³ applied by that Member.

The term “technical standards” is not an expression that is regularly used in the context of the legal profession. For example, the phrases “technical standards” and “technical qualifications” do not appear in any of the resolutions of the IBA, UIA or in the UN Basic Principles on

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.

Lawyers.

What lawyers have are ethical rules and rules of professional conduct. Sections 1 and 2 of this Explanatory Memorandum discussed extensively various IBA resolutions that address these ethical rules and rules of professional conduct. The other international instruments referred to in that section also are framed in terms of “ethical rules” or “rules of professional conduct,” rather than “technical qualifications.” Therefore, in the absence of an additional explanatory statement, members of the legal profession may be unsure of the meaning of the term “technical standards.”

The IBA’s proposed additions are consistent with the interpretation of Article VI.4 used in the WTO. For example, in a paper analyzing Article VI.4, the WTO Secretariat noted that the term “technical standards” could include ethical rules:

*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.*⁴

B. Proposed Addition to the Disciplines

The IBA respectfully suggests that before the Accountancy Disciplines are applied to the legal profession, they be amended and renumbered in light of the deletion of Article VI (20) as follows:

“Article VII (24 and 25)—Ethical and Other Standards

24. Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives. In the context of legal services, “technical standards” refers, not only to technical standards in the narrow sense, but also to ethical rules and rules of professional conduct.

4. 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 September 1996).

25. *In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of any internationally recognised technical 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 organizations applied by that Member.*”

In addition, in Article III(4(a) and (c)) on Transparency, the explanatory phrase ‘, such as ethical rules and rules of professional conduct,’ should follow the words ‘technical standards.’

C. Why the “Technical Standards” Language Should be Replaced by Language Applicable to the Legal Profession

If the phrase “technical standards” were followed by the phrase “, *such as ethical rules and rules of professional conduct,*”, the Disciplines would make sense for the legal profession. For this reason, Article VII(25 and 26) should be changed, together with all other references to “technical standards” that appear in the Accountancy Disciplines.

D. Conclusion

***In summary**, Article VII, paragraphs 24 and 25 (the heading to which should be re-named “Ethical and other standards”) should be amended and renumbered in light of the deletion of Article VI (20), as follows:

‘Article VII(24 and 25)—Ethical and Other Standards

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

25. *In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of any internationally recognised technical 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 organizations applied by that Member.*’

VIII. Change 8—Add A Reference to Disciplinary Referral By the Home State

A. Proposed Addition to the Disciplines

The IBA recommends that the following language be added to Article IV(8):

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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 route to access to the full local title of lawyer’ and ‘licensing’ shall mean ‘the route to access to something less than the full local title of lawyer.’

The IBA further recommends that efforts be undertaken to facilitate greater communication among the lawyer disciplinary authorities in WTO Member States. The IBA does not recommend that specific language be added to the Disciplines to this effect, but believes that addressing the concerns of lawyer regulators will contribute to greater mobility by lawyers.

B. CONCLUSION

In summary, revised section IV(8) would now state:

IV(8) Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, and publicly available, 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 route to access to the full local title of lawyer' and 'licensing' shall mean 'the route to access to something less than the full local title of lawyer.'



WORLD TRADE ORGANIZATION
ORGANIZATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

Direct line:(+41 22) 739 5435

Direct fax:(+41 22) 739 5771

Email:Abdel-Hamid.Mamdouh@wto.org

Reference:

Dear Mr.Ellis,

The Working Party on Domestic Regulation (WPDR) of the World Trade Organization (WTO) has requested the WTO Secretariat to conduct consultations with international professional services associations regarding the potential applicability of elements of the *Disciplines on Domestic Regulation in the Accountancy Sector* (see Annex I and the attached Background Information) for other professions.

The *Accountancy Disciplines* were adopted by the Council for Trade in Services in December 1998 (Annex II). At the time, the Council stipulated that the *Accountancy Disciplines* would come into force no later than the conclusion of the current round of services negotiations. An important element of the Council *Decision* adopting the *Accountancy Disciplines* was the statement that WTO Members would continue their work on domestic regulation, aiming to develop general disciplines for professional services while retaining the possibility to develop additional sectoral disciplines.

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:

- 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;

The Working Party would greatly appreciate your organization's responses to the above questions, for each of the professions your organization is concerned with. It would also be greatly appreciated if you were to include in your response any information concerning your organization's activities in regard to international regulatory issues.

Your early response will constitute a valuable input to the discussions of the Working Party on the relevant issues. It would therefore be helpful if your response was received by the end of February 2003, in order to ensure its timely circulation to Members of the Working Party before its March meeting. However, in case this would not be feasible, your response would still be appreciated at your earliest convenience. It should be noted that this is a continuing exercise and the overall services negotiations, of which this process is part, is due to conclude by 1 January 2005.

Thank you for your attention. Please contact me if any additional information is required.

Yours sincerely,

Hamid Mamdouh
Director
Trade in ServicesEncl.: ATTACHMENTS

BACKGROUND INFORMATION

In the context of the Uruguay Round negotiations, governments recognized the potentially trade-restrictive effects of certain non-discriminatory domestic regulatory measures, and agreed to consider developing specific disciplines to ensure that they were not more burdensome or trade restrictive than necessary. The result was Article VI:4 of the General Agreement on Trade in Services (GATS), which refers to three types of regulation (licensing requirements, qualification requirements and procedures, and technical standards) and mandates the development of “any necessary disciplines.”

Recognizing as well that regulation is especially pervasive in professional services, the first step in implementing the mandate of GATS Article VI:4 was the 1995 Ministerial *Decision on Professional Services*, and the establishment of the Working Party on Professional Services (WPPS). After several years of discussions, including in regard to determining the coverage of Article VI:4 vis-à-vis the market access and national treatment provisions of Articles XVI and XVII of the GATS (see Annex III), WTO Members succeeded in creating the *Accountancy Disciplines*, adopted in December 1998.

WTO Members subsequently embarked upon a major expansion of their efforts to develop regulatory disciplines under Article VI:4. In April 1999 the Council for Trade in Services established the Working Party on Domestic Regulation, incorporating the activities of the previous WPPS into those of the WPDR (see Annex IV). The current Working Party is mandated to develop generally applicable disciplines, and may develop disciplines as appropriate for individual sectors or groups of sectors, including professional services.

In the context of the current services negotiations, WTO Members have established a timeframe for negotiations under GATS Article VI:4. Paragraph 7 of the *Guidelines and Procedures for the Negotiations on Trade in Services* states that “Members shall aim to complete negotiations under Article VI:4 (...) prior to the conclusion of negotiations on specific commitments.” Under the *Doha Development Agenda*, Members have set the deadline of 1 January 2005 for the specific commitments negotiations and the whole single undertaking.

The *Disciplines on Domestic Regulation in the Accountancy Sector* are rather concise, comprising twenty-six paragraphs in four pages. They are

divided into eight sections, i.e.: Objectives, General Provisions, Transparency (five paragraphs), Licensing Requirements (six paragraphs), Licensing Procedures (five paragraphs), Qualification Requirements (three paragraphs), Qualification Procedures (three paragraphs) and Technical Standards (two paragraphs).

The main elements of the accountancy disciplines, relative to the current Article VI:4 provisions, are found in paragraphs one, two, five, and six. Paragraph one, for example, confirms that that Article VI disciplines are separate and distinct from measures under GATS Articles XVI and XVII. Paragraph two is the most important element of the disciplines, as it mandates a “necessity test” for all applicable regulatory measures, i.e. the requirement that regulatory measures shall not be more trade-restrictive than necessary to fulfil a specified legitimate objective. Examples of such legitimate objectives mentioned in the disciplines are the protection of consumers (including all users of accounting services and the public generally), the quality of the service, professional competence and the integrity of the profession. In paragraph five, WTO Members are required to explain upon request the specific objectives intended by their accountancy regulations. In paragraph six, WTO Members are asked to provide an opportunity for trading partners to comment upon proposed accountancy regulations, and to give consideration to such comments.

Other important provisions of the accountancy disciplines include the requirement in paragraph nine that WTO Members consider less trade restrictive alternatives to residency requirements, the requirement in paragraph 15 for reasonable documentation requirements, and the requirement in paragraph 19 that account be taken of qualifications earned abroad.

ANNEX I**WORLD TRADE
ORGANIZATION**S/L/64
17 December 1998

(98-5140)

Trade in Services**DISCIPLINES ON DOMESTIC REGULATION
IN THE ACCOUNTANCY SECTOR**

Adopted by the Council for Trade in Services on 14 December 1998

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.

GENERAL PROVISIONS

Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,⁵ relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which

5. The text of GATS Articles XVI and XVII is reproduced in an appendix to this document

includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

TRANSPARENCY

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 of professionals or firms, or accounting regulations).

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;
- b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;
- c) information on technical standards; and
- d) upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.

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.

When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption.

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.

LICENSING REQUIREMENTS

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, publicly available and objective.

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.

Where membership of a professional organisation is required, in order to fulfil 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 fulfilment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.

Members shall ensure that the use of firm names is not restricted, save in fulfilment of a legitimate objective.

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.

Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising 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.

LICENSING PROCEDURES

Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practise) shall be pre-established, publicly available and objective, and

shall not in themselves constitute a restriction on the supply of the service.

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

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.

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.

A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

QUALIFICATION REQUIREMENTS

A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

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.

Members note the role which mutual recognition agreements can play in

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facilitating the process of verification of qualifications and/or in establishing equivalency of education.

QUALIFICATION PROCEDURES

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.

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 practising 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.

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

TECHNICAL STANDARDS

Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.

In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognized standards of relevant international organizations⁶ applied by that Member.

APPENDIX

For the purpose of clarity, the text of GATS Articles XVI and XVII is reproduced below.

6. 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.

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.⁷

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) imitations 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;⁸
- (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 related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

7. 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.

8. Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

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- (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 share-holding or the total value of individual or aggregate foreign investment.

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.⁹
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.

9. 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 supplies.

ANNEX II

**WORLD TRADE
ORGANIZATION**S/L/63
15 December 1998

(98-5102)

Trade in Services**DECISION ON DISCIPLINES RELATING TO THE
ACCOUNTANCY SECTOR**

Adopted by the Council for Trade in Services on 14 December 1998

The Council for Trade in Services,

Having regard to the Decision on Professional Services adopted by the Council on 1 March 1995 (S/L/3) and the recommendations of the Working Party on Professional Services contained in document S/WPPS/4.

Decides as follows,

- i. To adopt the text of the Disciplines on Domestic Regulation in the Accountancy Sector contained in document S/WPPS/W/21. These disciplines are to be applicable to Members who have entered specific commitments on accountancy in their schedules.
- ii. The Working Party on Professional Services shall continue its work pursuant to the terms of reference contained in the Decision on Professional Services (S/L/3) taking account of any decisions which may be taken in the Council regarding work on Article VI:4. In doing so the Working Party shall aim to develop general disciplines for professional services, while retaining the possibility to develop or revise sectoral disciplines, including accountancy. No later than the conclusion of the forthcoming round of services negotiations, the disciplines developed by the WPPS are intended to be integrated into the General Agreement on Trade in Services (GATS).

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- iii. Commencing immediately and continuing until the formal integration of these disciplines into the GATS, Members shall, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines.

ANNEX III

Job No. 6496

Working Party on Professional Services

25 November, 1998

DISCUSSION OF MATTERS RELATING TO ARTICLES XVI AND XVII OF THE GATS IN CONNECTION WITH THE DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR

Informal Note by the Chairman

1. For the purpose of transparency, this Note explains the method by which the Working Party on Professional Services (WPPS) pursued its work with respect to the question of the types of measures it would address in creating the disciplines in the accountancy sector. For the avoidance of any doubt, it is emphasised that this Note has no legal status.
2. In the course of work to develop multilateral disciplines on domestic regulation in the accountancy sector, pursuant to paragraph 4 of Article VI of the GATS, the WPPS addressed a wide range of regulatory measures which have an impact on trade in accountancy services. In discussing the structure and content of the new disciplines, it became clear that some of these measures were subject to other legal provisions in the GATS, most notably Articles XVI and XVII. It was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty. For this reason, a number of the suggestions for disciplines were excluded from the text.
3. Although it was not in the mandate of the WPPS to provide an interpretation of GATS provisions, the important relationship between the new disciplines and Articles XVI and XVII was noted. While these two Articles relate to the scheduling of specific commitments on measures falling within their scope, the disciplines developed under Article VI:4 aim at ensuring that other types of regulatory measures do not create unnecessary barriers to trade. It has been noted that Article XVI (Market Access) covers the categories of measures referred to in paragraph 2 (a) to (f), whether or not any discrimination is made in their application between domestic and foreign suppliers. Article XVII (National Treatment)

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

4. The following types of measures affecting trade in accountancy services were raised by some Members as examples of those which may be subject to negotiation and scheduling under Articles XVI and XVII:
 - * Restrictions relating to the number of foreign accountants that can be employed, the number of new licences to be issued, the legal form of establishment and the ownership of firms.
 - * Discriminatory requirements and procedures relating to the licensing of foreign individuals and the establishment of natural persons and legal persons in the accountancy sector, including the use of foreign and international firm names. Discriminatory elements which set prior conditions unrelated to the ability of the supplier to provide the service when preparing, adopting or applying licensing requirements.
 - * Discriminatory residency requirements or requirements for citizenship, including those required for sitting examinations related to obtaining a licence to practice. Discriminatory requirements for membership of a particular professional body as a prior condition for application.
 - * Discriminatory treatment of applications from foreign service suppliers vis-à-vis domestic applications including: criteria relating to education, experience, examinations and ethics; the overall degree of difficulty when testing competence of applicants; the need for in-country experience before sitting examinations.

5. The above mentioning of these types of measures does not prejudice future negotiations, which are mandated under Article XIX of the GATS.

ANNEX IV

**WORLD TRADE
ORGANIZATION**S/L/70
28 April 1999

(99-1717)

Trade in Services**DECISION ON DOMESTIC REGULATION**

Adopted by the Council for Trade in Services on 26 April 1999

The Council for Trade in Services,

Acting pursuant to Article IV of the Agreement establishing the World Trade Organization and Article XXIV of the General Agreement on Trade in Services (GATS),

Having regard to paragraph 4 of Article VI of the GATS,

Having regard to the Decision on Professional Services adopted by the Council on 1 March 1995 (S/L/3),

Having regard to the Decision on Disciplines relating to the Accountancy Sector adopted by the Council on 14 December 1998 (S/L/63),

Recognising the importance of domestic regulation in pursuing national policy objectives,

Desiring to ensure that measures relating to domestic regulation do not constitute unnecessary barriers to trade in services,

Decides as follows,

1. A Working Party on Domestic Regulation shall be established and the Working Party on Professional Services shall cease to exist.

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

ANNEX V

LISTING OF INTERNATIONAL PROFESSIONAL SERVICES ORGANIZATIONS TO BE CONTACTED BY THE WPDR

General organizations

- * International Organization for Standardization (ISO)
- * World Union of Professions (UMPL)

Legal services

- * International Association for the Protection of Industrial Property (AIPPI)
- * International Bar Association (IBA)
- * International Federation of Industrial Property Attorneys (FICPI)
- * International Law Association (ILA)
- * International Union of Lawyers (UIA)
- * International Union of the Latin Body of Notaries (UINL)

Other accounting services

- * International Actuarial Association
- * International Valuation Standards Committee (IVSC)

Architectural services

- * International Union of Architects (UIA)

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Engineering services, integrated engineering services

- * International Federation of Consulting Engineers (FIDIC)
- * World Federation of Engineering Organizations (WFEO)

Urban planning and landscape architectural services

- * International Federation of Surveyors (FIG)

Medical and dental services

- * FDI World Dental Federation (FDI)
- * World Council of Optometry (WCO)
- * World Medical Association (WMA)

Veterinary services

- * World Veterinary Association (WVA)

Services provided by midwives, nurses, physiotherapists and para-medical personnel

- * International Council of Nurses (ICN)
- * World Confederation for Physical Therapy (WCPT)
- * World Federation of Occupational Therapists (WFOT)

Other

- * International Association of Medical Laboratory Technologists (IAMLT)
-

APPENDIX 11

**WORLD TRADE
ORGANIZATION****S/L/64**

17 December 1998

[unofficial annotation
prepared by Prof. Laurel
Terry to show the changes
recommended by the IBA
on Sept. 18, 2003]

Trade in Services

**[Unofficial, Annotated] DISCIPLINES ON DOMESTIC
REGULATION IN THE ACCOUNTANCY SECTOR
[showing changes that the International Bar Association (IBA)
recommends be made *if* this document is applied to the legal
profession. On Sept. 18, 2003, the IBA unanimously adopted a
Resolution that endorsed these changes and authorized transmission
of the Resolution to the WTO Secretariat.]**

Adopted by the Council for Trade in Services on 14 December 1998

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 fulfil 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;

1. The text of GATS Articles XVI and XVII is reproduced in an appendix to this document

- (b) requirements and procedures to obtain, renew or retain any licences 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 practise 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 which significantly affect trade in ~~accountancy~~ services, Members shall endeavour 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 organisation is required, in order to fulfil 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 fulfilment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (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 is not restricted, save in fulfilment 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, on to 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 practising 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 practise) 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 fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

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.

18. A licence, 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.

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~~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.~~

~~21~~20. Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

VII. QUALIFICATION PROCEDURES

~~22~~21. 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.

~~23~~22. 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 practising 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.

~~24~~23. Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.

VIII. TECHNICAL STANDARDS

~~25~~24. Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil 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.*

~~26~~25. 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.

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.

APPENDIX 12

World Trade Organization
Organization Mondiale du Commerce
Organización Mundial del Comercio

Dr. Supachai Panitchpakdi
Director-General

28 January 2004

Mr. Emilio J. Cardenas
Presidents
International Bar Association
271 Regent Street
London W1B 2AQ

Dear Mr. Cardenas,

I should like to thank you very much for your letters of 4 November and 29 December 2003 kindly enclosing two recent IBA Resolutions.

The WTO Secretariat has benefited from the close cooperation with the International Bar Association over the last years. I recall in this context the very informative visit from the IBA WTO Working Group to Geneva in the fall 2001, as well as the information seminar for WTO Members on 19 July 2002.

WTO Members have repeatedly stressed the importance of a clear and harmonized usage of terms in schedules of commitments. The "Resolution in Support of A System of Terminology for Legal Services" will provide valuable input to Members' deliberations in this regard.

In this context, I should also like to thank you for the thorough reply to the request by the Working Party on Domestic Regulation on the suitability of applying the WTO Disciplines for the Accountancy Sector to the legal profession. This contribution by the IBA has been made available to WTO Members, and will be discussed at a forthcoming meeting of the Working Party.

Yours sincerely,

Supachai Panitchpakdi

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