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GATS’ Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers
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F. Replacement of the Working Party on Professional Services with the Working Party on Domestic Regulation

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

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

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

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

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

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

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

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

As a theoretical matter, there are three major types of disciplines that the WPDR could develop to govern the domestic regulation of legal services. First, the WPDR could choose to develop a separate discipline focusing only on the legal profession. Second, the WPDR could draft a discipline that covers the legal profession and some or all of the other services that the WTO classifies as “professional services.” Third, the WPDR could draft a generic discipline that applies to all types of services covered by GATS, including professional services, non-professional services, and legal services.\textsuperscript{145}

In its\textit{Decision} creating the WPDR, the GATS Council for Trade in Services expressly acknowledged the possibility that individual sectors, such as legal services, could be treated in disciplines specific

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\item According to the WPPS minutes available on its website and\textit{Note on the Meeting Held on 4 December 1998, Note by the Secretariat, S/WPPS/M/24 (Dec. 18, 1998) (noting that this meeting was the twenty-fourth meeting of the WPPS and that the meeting of February 9, 1999 was the next meeting).}
\item “Professional Services” includes ten specific subcategories, one of which is legal services, and an eleventh category entitled “other.”\textit{Services Sectoral Classification List, Note by the Secretariat, MTN GNS/W/120 at 2 (July 10, 1991), available at http://www.wto.org/english/tratop_e/serv_e/sanali_e.htm (last visited July 16, 2001). The WTO includes on its website a powerpoint presentation about the GATS. In this document, the WTO identifies all of the categories of professional services except “other.” It states:}
\end{itemize}

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

to that service, but delegated to the WPDR the judgment about whether to do so.\footnote{Decision on Domestic Regulation, supra note 141, ¶ 3.}

From its formation in April 1999 through December 2000, the WPDR held nine formal meetings and two informal meetings.\footnote{See Working Party on Domestic Regulation, Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/2 ¶ 1 (Nov. 24, 2000).} As of June 2001, the WTO had “derestricted” and placed on its website two annual reports prepared by the WPDR,\footnote{See, e.g., Working Party on Domestic Regulation, Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/1 (Oct. 20, 1999); Report of the Working Party on Domestic Regulation to the Council for Trade in Services, S/WPDR/2 (Nov. 24, 2000).} seven sets of minutes,\footnote{See generally the minutes of the Working Party on Domestic Regulation (recording the meetings of the WPDR). These minutes are documents S/WPDR/M/1-7 and are available at http://docsonline.wto.org/gen_search.asp.} and fourteen “working documents.”\footnote{Id.} The fourteen working documents included formal papers that were submitted by Australia, the European Communities, Hong Kong, China, Japan, Korea, Poland, Canada, and the United States.\footnote{Working Party on Domestic Regulation, Communication from Australia, S/WPDR/W/1 (July 19, 1999); Working Party on Domestic Regulation, Communication From Hong Kong, China, S/WPDR/W/3 (Apr. 28, 2000); Working Party on Domestic Regulation, Communication from the United States, S/WPDR/W/4 (May 3, 2000); Working Party on Domestic Regulation, Communication from the European Communities and Their Member States, S/WPDR/W/5 (May 19, 2000); Working Party on Domestic Regulation, Communication from Japan, S/WPDR/W/6 (May 19, 2000); Working Party on Domestic Regulation, Communication from Poland, S/WPDR/W/7 (May 23, 2000); Working Party on Domestic Regulation, Communication from Australia, S/WPDR/W/8 (Sept. 18, 2000); Working Party on Domestic Regulation, Communication from the Republic of Korea, S/WPDR/W/9 (Sept. 28, 2000); Working Party on Domestic Regulation, Communication from Canada, S/WPDR/W/13 (Mar. 16, 2001); Working Party on Domestic Regulation, Communication from the European Communities and their Member States, S/WPDR/W/14 (May 1, 2001); Working Party on Domestic Regulation, Communication from Australia, S/WPDR/W/15 (May 3, 2001).} The WPDR has reported that it also considered informal papers from the Chairpersons, Members, and the Secretariat.\footnote{Report of the Working Party on Domestic Regulation to the Council for Trade in Services, supra note 147, ¶ 4.} At the request of Members, the Secretariat prepared an informal Checklist of Issues for WPDR. The Checklist was used as basis for the discussion of substantive issues at an informal meeting preceding the formal WPDR meeting on October 2, 2000.\footnote{Report of the Working Party on Domestic Regulation to the Council for Trade in Services, supra note 147, ¶ 4 (containing the WPDR’s annual report for 1999 and explaining that “Informal papers were submitted by the Chairperson and the Secretariat (Job No. 2800, 12 May 1999, and Job No. 5928, 8 October 1999”)}. Unfortunately, this Checklist
is considered an internal document and has not yet been made available to the public.

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

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

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

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

2. Transparency

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

158. See supra notes 86–89 and accompanying text.
159. GATS, supra note 4, art. VI(4)(b) (emphasis added).
161. Id.
162. Id. ¶ 4.
transparency measures from the accountancy disciplines may not be applicable horizontally—generally.\(^\text{165}\)

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

3. Equivalence

Although the WPDR has indicated that the issues of necessity and transparency have been the focus of most of the discussions, the WPDR minutes also memorialize some discussion about “equivalency.”\(^\text{168}\) As the Secretariat explained, the “equivalency” doctrine is relevant to disciplines and domestic regulation because:

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

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

\(^{165}\) Id. ¶ 5.


\(^{169}\) *Article VI:4 of the GATS, supra* note 157.


\(^{171}\) Id.

\(^{172}\) Id.
4. International Standards

Although not the main focus of discussion, the WPDR has also discussed international standards, which was the fourth point in the Secretariat’s memo S/C/W/96. Article VII(5) of the GATS requires WTO Member States to “work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.”\footnote{173}{GATS, supra note 4, art. VII(5).}

When discussing international standards, the WPDR delegations identified as issues for further discussion the issues of voluntary versus mandatory standards and technical versus performance standards.\footnote{174}{Report on the Meeting Held on 17 May 1999, supra note 170, ¶ 10.} There was also some discussion among delegation members about the proper role of international professional organizations:

Canada and the United States stated their concerns that direct consultations with international professional organizations might cause misunderstandings over their participation in the development of future regulatory disciplines. They also inquired as to which professions would be consulted, the timing of consultation and the role of the Secretariat in respect to the information collected. The delegate of the European Communities stated she was somewhat less concerned about the possibility of referring to international bodies, as there would be a balance of interests. The delegate said the consultations should include all professions. . . . The Chairperson said that initial reactions by Members on the Hong Kong, China informal paper had been generally positive. Several issues had been raised which required further discussion, including the professions concerned, compilation of information and how international organizations would be approached.\footnote{175}{Id. ¶¶ 13, 15.}

In a subsequent meeting, the Secretariat indicated that consultations would occur in two stages—with the Secretariat consultations with international professional associations taking place on a slower track—and that the Secretariat was waiting for information from delegations concerning relevant international organizations.\footnote{176}{Note by the Secretariat, Report on the Meeting Held on 14 July 1999, supra note 155.}

5. Consultations with Domestic Organizations

As a result of a suggestion from Hong Kong, the WPDR decided that Members should consult on a voluntary basis with their domestic professional associations concerning the potential applicability of the
accountancy disciplines for their professions. The WPDR set a deadline of December 31, 1999 to complete these domestic consultations with the relevant professional organizations and until March 31, 2000 to notify the WTO of the results of the consultations. During a series of meetings in July 2000, the WPDR heard from WTO Member States about these consultations:

Several Members informed the working party on their consultations with domestic professional organizations regarding the applicability of the accountancy disciplines to other professions. In general, these organizations think the disciplines are useful and relevant and could apply, with some changes for each profession, to them.

The Members went on to discuss concepts relating to the development of regulatory disciplines based on a draft Secretariat Check-list of issues currently under discussion, focusing primarily on the concepts of necessity and transparency.

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

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

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

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180. See supra note 148, ¶ 4.
181. Working Party on Domestic Regulation, Report on the Meeting Held on 13 April 2000, Note by the Secretariat, S/WPDR/M/5 ¶¶ 11, 18 (May 18, 2000). This document states:

Before opening the floor for comments on the Secretariat compilation, the Chairperson observed that the agreed deadline for communicating the results of the Members' own consultations with domestic professional organizations was 31 March 2000. As no communications had yet been received as of the meeting, Members therefore needed to decide on the next steps to take. As part of that process, he urged Members to describe to the Working Party their progress to date. . . . The representative of the United States said they had
6. Should the Legal Profession Be Governed by Horizontal Disciplines or Subject to its Own Discipline?

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

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

Id.


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

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

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

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

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

\begin{footnotesize}
\begin{itemize}
\item Id.\textsuperscript{183}.
\item Id. at 17.
\item Id. at 9-15. The eight provisions that raised concerns included:
\begin{enumerate}
\item Art. I, para. 1, because of its prohibition on unnecessary barriers to trade, its requirement that measures not be more trade restrictive than necessary to a fulfill a legitimate objective and its non-exhaustive list of legitimate objectives:
\begin{enumerate}
\item Art. III, para. 2 regarding licensing requirements insofar as it requires member states to consider whether less restrictive means than residency requirements would suffice;
\item Art. III, para. 2 regarding licensing requirements insofar as it provides that if membership in a professional organization is required to fulfill a legitimate objective, members must ensure that the terms of membership are reasonable and do not include conditions unrelated to the fulfillment of the objective;
\item Art. III, para. 4, insofar as it provides that members ensure that the use of firm names is not restrictive unless in fulfillment of a legitimate objective;
\item Art. III, para. 5 insofar as it covers indemnity insurance and requires regulators to take into account the applicant’s existing coverage insofar
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In addition to these statements by bar associations, some of the official submissions prepared by WTO Member States also have expressed concerns about having the Disciplines for the Accountancy Sector apply to lawyers or having lawyers subject to generally-applicable horizontal disciplines. For example, Japan submitted a paper that takes the position that the legal profession should not be treated similarly to the accounting profession. At this point in time, it is not clear where the work of the WPDR will lead, whether it will issue horizontal disciplines, and whether those disciplines will apply to legal services. As the remarks of one of the principal U.S. negotiators makes clear:

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

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

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

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

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

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

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