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INTERNATIONAL BAR ASSOCIATION

Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector

Approved/Adopted by IBA Council
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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 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.

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, *such as 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, *such as 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 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 "full licensing" systems, which grant access to the full local title of lawyer and in "limited licensing" systems, should they exist, which grant access to something less than the full local title of lawyer, and for requirements (if any) that address temporary services provided under home title.*'

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. Delete Article VI (20)

6. Change Article VII so that it states:

'25. 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 to ethical rules and rules of professional conduct.*

26. 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 as ethical rules and rules of professional conduct*, of relevant international organizations[1] 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

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 required by Article VI, paragraph 4 of the GATS. This provision requires the WTO, through its Council for Trade in Services, to develop 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 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.[2]

***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. (The numbering in this Explanatory Memorandum reflects the order in which those attending the IBA GATS Forum considered these changes. They do not correspond to the numbers on Exhibit A.)

2 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 (November 2000), available at 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 24 February 2001) available at www.flsc.ca/en/pdf/2001wtoreport.pdf.

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 express the core values of the legal profession. The IBA Resolution on the Regulation of the Legal Profession dated 6 June 1998 states, inter alia:

'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 *JCJ Wouters, JW 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 **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 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 emphasised 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 recognising the important and unique role of the legal profession in maintaining the role of law and administration of justice around the world. For example, the UN 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 **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 **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:

  - 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;

> '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.'

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 provisions 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 provision 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. The 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.[3]

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 many Member States, lawyers play an essential role in protecting individual political, civil and economic*

3 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

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 additional language to Article IV(8) on licensing 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' 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 (eg, distance learning), alternative routes to gain a qualification (eg, through equivalences) and organising 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. Proposed addition to the disciplines

The IBA recommends that the following words be added to the end of Article 8 of the Accountancy Disciplines before they are applied to the legal profession:

> '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 qualification and licensing requirements and procedures for "full licensing" systems, which grant access to the full local title of lawyer and in "limited licensing" systems, should they exist, which grant access to something less than the full local title of lawyer, and for requirements (if any) that address temporary services provided under home title.'*

C. 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 minimise 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.

D. Conclusion

*__In summary__, Article IV(8) should now read as follows:

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

IV. Change 4 – 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 (ie, 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.'

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, the IBA recommends that 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 and fidelity funds for which Members have requirements covering foreign applicants.'

V. Change 5 – 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 non-lawyers 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 non-lawyer, 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 authorisation 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, specialisation 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

The IBA recommends that Article VI, paragraph 20 of the Accountancy Disciplines 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 ('qualification'). In the case of such 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. Section 3 of this Memorandum discussed the differences between the terms 'qualification' and 'license' and established the definitions used in this Memorandum. This section applies only to 'qualification' issues, not 'license' issues.)

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, given that the only qualification that a foreign lawyer can aspire to obtain is the full host title, 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 in the previous paragraph, 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.

VI. Change 6 – 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 of the definition 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 organizations[4] applied by that Member.

It is probable that the phrase 'technical standards' is the wrong one to apply to 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 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 analysing 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

4 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.

down rules of ethics or conduct to be observed by the auditor.[5]

B. Proposed addition to the Disciplines

The IBA respectfully suggests that before the Accountancy Disciplines are applied to the legal profession, they be amended as follows:

'Article VII (25 and 26) – Ethical and Other Standards

25. 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 to ethical rules and rules of professional conduct.*

26. In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of *any* internationally recognised 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 25 and 26 (the heading to which should be re-named 'Ethical and other standards') should be amended, as follows:

'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 *any* internationally recognised *ethical rules of rules of professional conduct* of relevant international organizations applied by that Member.'

5 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).

VII. Change 7 – add regulatory discipline to the transparency requirements in Article III (3)

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):

> *'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* (ie, governmental or non-governmental entities responsible for the licensing and/or disciplining of professionals or firms).'

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 section III (3) 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 (ie, governmental or non-governmental entities responsible for the licensing *and/or disciplining* of professionals or firms).'

VIII. Change 8 – add a reference to Disciplinary referral by the home state

A. 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, ie, 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.

B. Proposed addition to the Disciplines

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

> 'IV(8) Licensing requirements (ie, 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 addressing the concerns of lawyer regulators will contribute to greater mobility by lawyers.

C. Why the language 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

D. Conclusion

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

> IV(8) Licensing requirements (ie, 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".'

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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, [6] 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.

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

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

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 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 organizations [7] applied by that Member.

APPENDIX

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

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

7 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.

favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[8]

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

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

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

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[9]

(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;

(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.[10]

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.

8 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.

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

10 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.

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.

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,

1. 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).

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 prejudge 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)

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)