

The revised handbook about the

GATS

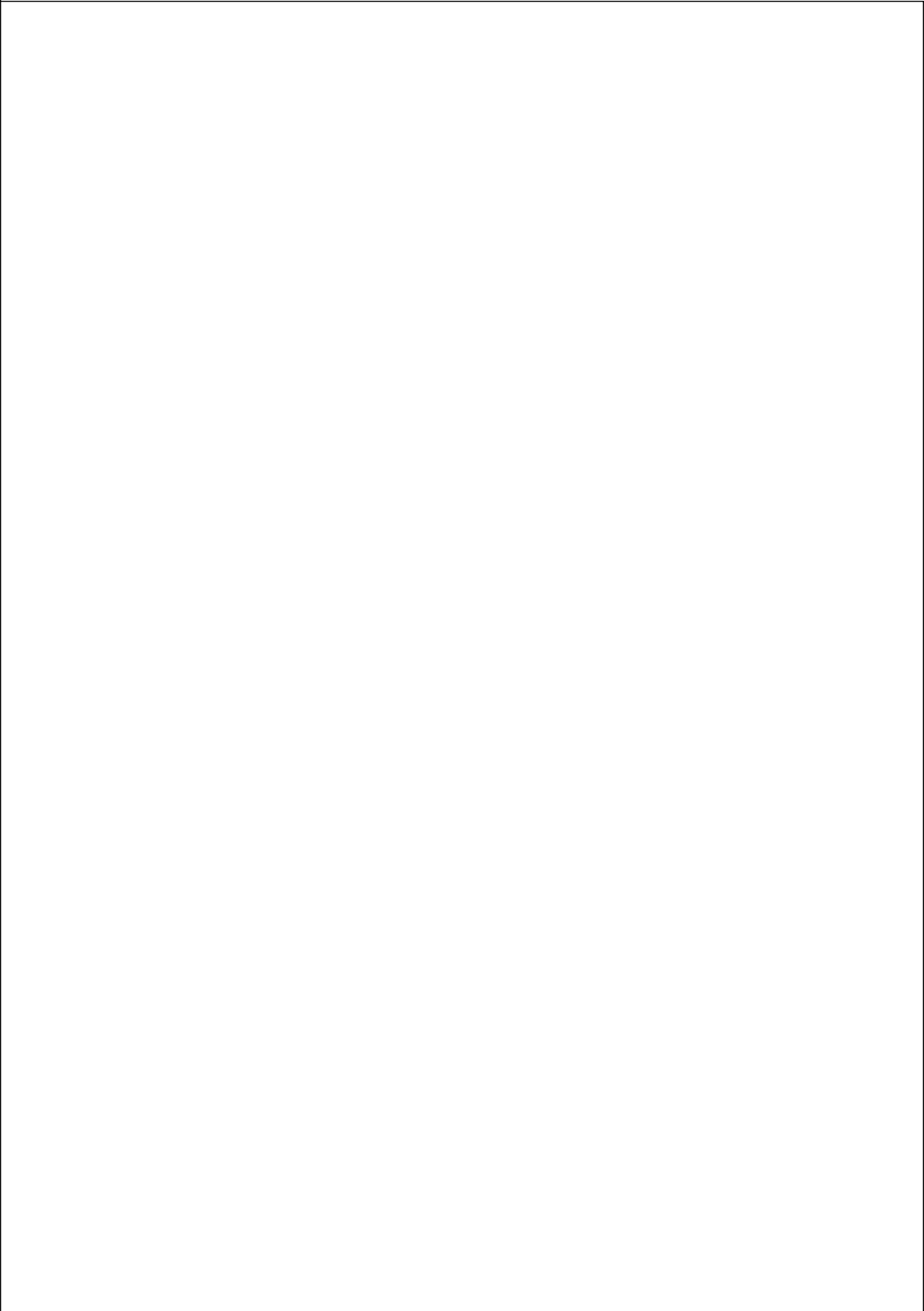
General Agreement on Trade in Services



for International Bar Association Member Bars

(By Laurel Terry)





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GATS

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FOREWORD TO THE REVISED EDITION:

On behalf of the International Bar Association (IBA), I am pleased to introduce the revised edition of our handbook on the General Agreement on Trade in Services (GATS).

The original Handbook, published 10 years ago, provided a clear overview of the requirements of the GATS as it relates to the legal services sector. But times have moved on and there are new developments to be considered, including a rise in interest in bilateral and regional trade agreements (see the new section (XIII)).

The IBA continues to urge its member bar associations to become involved in national discussions and negotiations that take place concerning the GATS, and many bars will have seen the significant impact of the implementation of GATS in their jurisdiction. The Bar Issues Commission's specialist 'International Trade in Legal Services' Committee also continues its work on resolutions and guidelines that support the legal sector in this area.

Please note that Sections X-XIII of the Handbook have entirely new content. The topics covered by these newly-rewritten sections include the following:

- GATS Implementation Efforts – GATS Track #1 and the Doha Round's Progressive Liberalization Negotiations
- GATS Implementation Efforts – GATS Track #2 and the Negotiations to Develop Disciplines on Domestic Regulation
- GATS Implementation Efforts - The Role of the IBA
- Other Developments of Interest (including the proliferation of bilateral and regional trade agreements)

I would like to thank Professor Laurel Terry for her invaluable work in preparing this revised edition of the Handbook.



Michael Reynolds
IBA President

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I EXECUTIVE SUMMARY

What Is the Purpose of the Revised Handbook?

This Handbook was written to help IBA Member Bars who may be approached by the trade negotiators from their own countries. These negotiators may ask Member Bars questions such as:

- Do you want foreign lawyers to be able to practise here, and if so under what conditions? and
- Do the members of your bar want access to any foreign markets?

It is also possible that the trade negotiators may ask these questions in a much more technical fashion. They might, for example, ask questions such as:

- 1 In the current Doha round of negotiations, what is your bar's position about whether legal services should be included on your country's *Schedule of Specific Commitments*?
- 2 If legal services are already included on your country's *Schedule of Specific Commitments*, do you believe there should be any changes made to the way your country has described the legal services that it has "scheduled"?
- 3 What classification system should be used for new or revised legal services offers in the Doha Round of negotiations?
- 4 If legal services are already included on your country's *Schedule of Specific Commitments*, do you believe there should be any changes made to the way your country has "scheduled" legal services Modes 1 - 4 limitations in the *market access* and *national treatment* columns of your country's *Schedule*?
- 5 What is your bar's position about the proposed *Disciplines on Domestic Regulation* and whether they should be applied to the legal profession in your country?

This Handbook is intended to help IBA Member Bars answer these questions, regardless of the form in which they are asked. Even the seeming simple and casual questions ultimately will require someone to provide answers that are highly technical. This Handbook gives guidance on how these questions can be answered

As you might imagine, giving someone an "instant education" in trade law as applied to legal services does not make for fast or easy reading. This Handbook is dense and detailed in order to provide a single resource, tailored to legal services, that your bar can consult in order to respond to questions such as those posed on this page. This Handbook contains everything we can think of that a bar would need to know about:

- the substantive provisions of the GATS;
- how the GATS' substantive provisions apply in the context of legal services;
- what has happened since the adoption of the GATS and its relevance to legal services;
- where the debates have occurred with respect to legal services (and to give you a flavor for the disagreements); and
- the developments that IBA Member Bars might be asked to respond to.

This Executive Summary section is intended to provide the information necessary for bar leaders who want to know the “big picture” about the GATS and legal services but do not want or need to understand the specific terminology and detailed provisions. The remainder of the Handbook, however, is intended to provide, as simply and as clearly as possible, the information and detail that every IBA Member Bar likely will need to know in order to respond to questions such as those posed at the beginning of this section. Because of the technical nature of the GATS, each bar may want to establish a committee whose members will become comfortable with the more technical details of the GATS.

What Should Every Bar Leader Know about the GATS and Legal Services?

The World Trade Organization or WTO was established in January 1, 1995 pursuant to the *Agreement Establishing the World Trade Organization* which was signed in 1994. There were several agreements attached or “annexed” to the *Agreement Establishing the World Trade Organization*. Therefore, when a country decides to join the WTO (as more than 155 countries now have), that country also agrees to abide by the terms of the annexed agreements.

One of the agreements annexed to the *Agreement creating the World Trade Organization* is the *General Agreement on Trade in Services* or “GATS.” (The GATT and TRIPS are two other agreements, in addition to the GATS, that were “annexed” to the *Agreement Creating the WTO*. Many lawyers are familiar with the GATT, which focuses on trade in GOODS. The GATS focuses on trade in SERVICES.)

The GATS was the very first multilateral global trade agreement that applied to services, rather than goods. The GATS applies to all services, including legal services. Thus, health services, engineering services, accounting services, architecture services, tourism services, and all other kinds of services imaginable are covered by the provisions of the GATS.

The WTO Secretariat, which is based in Geneva, Switzerland, is the administrative body of the WTO. The WTO Secretariat has more than 6000 staff and is headed by a director general. It does not have branch offices outside Geneva. Unlike some other international bureaucracies, the Secretariat does not have a decision-making role. It is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics and preparing analyses.

In July 1998, the WTO Secretariat prepared a “sectoral analysis” of legal services. The Secretariat has prepared other analyses that are relevant to legal services and that are described in greater detail in the body of the Handbook. In 2010, the WTO Secretariat issued

an updated version of its legal services sectoral report. These documents are available on the WTO's website.¹

Currently, there are two different sets of events ongoing in Geneva of which member bars should be aware (and in which they may want to participate.) The first ongoing "track" or development of which IBA Member Bars should be aware is the Doha Round negotiations to further liberalize trade. IBA Member Bars should know that the GATS itself REQUIRED WTO Member States to engage in negotiations for progressive liberalization within five years of the effective date of the GATS. This new round of negotiations originally was referred to as either GATS 2000 or as the "built-in agenda" negotiations. These negotiations are currently referred to as the Doha Development Agenda negotiations, the Doha Round, or simply the market access negotiations. These negotiations have taken longer than expected and several deadlines have "slipped", including the original 2005 target date for completion. Although some think that the Doha negotiations may be permanently stalled, it is perhaps worth noting that the conclusion of the Uruguay Round happened very quickly after long delays.

WTO Members are also engaged in negotiations concerning domestic regulation disciplines. GATS Article VI(4) requires the WTO Members to consider the development of "any necessary disciplines" on domestic regulation. The goal of such disciplines would be to ensure, among other things, that certain licensing and qualification measures were not more burdensome than necessary to fulfill a legitimate objective and did not constitute barriers to trade. In 1998, the WTO adopted *Disciplines on Domestic Regulation for the Accountancy Sector* which will take effect at the conclusion of the Doha Round. There is currently a WTO entity called the Working Party on Domestic Regulation that is studying the disciplines issue. While WTO Members have agreed in principle that they want to adopt horizontal disciplines that will apply to multiple service sectors, including legal services, they have not yet been able to reach agreement on the content of all of such disciplines. Although there is some overlap between the WTO's market access/progressive liberalization negotiations and the WTO negotiations on domestic regulation disciplines, these two "tracks" or developments are different and Member Bars should be aware of both sets of developments.

As a result of these two sets of ongoing GATS developments, it is very important for lawyers around the world to understand that if their country is a WTO Member State, as most countries are, then their country's trade representatives will be engaged in negotiations about liberalization of the conditions under which foreign lawyers may practice in that WTO Member State. Because these negotiators often are not lawyers and because legal services may be "bundled" or swapped as part of a deal involving other goods or services, lawyers may want to begin educating their trade representatives about the nature of lawyers in their country and the desired regulation (and access to foreign markets.) Accordingly, the GATS raises issues that IBA Member Bars may not previously have faced.

1 Council for Trade in Services, Legal Services - Background Note by the Secretariat, S/C/W/318 (14 June 2010); Council for Trade in Services, Legal Services - Background Note by the Secretariat, S/C/W/43 (6 July 1998). These analyses are available on the WTO website in English French and Spanish. See http://www.wto.org/english/tratop_e/serv_e/legal_e/legal_e.htm (click on the link for the background note on legal services)

With respect to the substantive obligations contained in the GATS, it is important for Member Bars to understand that there are two different kinds of obligations created by the GATS: 1) some GATS provisions apply to every WTO Member State and every type of service provided in that country, including legal services; 2) other obligations, however, apply only if a country chose to “opt-in” and list legal services on a document called its “*Schedule of Specific Commitments*.” When a WTO Member State lists a particular service sector on its *Schedule* – such as legal services – it is generally permitted to set the conditions of its additional obligations. For each particular sector that it lists, a WTO Member State will have to comply with the market access and national treatment provisions found in GATS Articles XVI and XVII, EXCEPT AS OTHERWISE NOTED. In other words, each WTO Member State may set the conditions of these additional obligations. (The only exception is that a WTO Member State must comply with certain domestic regulation provisions, without derogation, for each service sector listed on its *Schedule of Specific Commitments*.)

The *Schedules of Specific Commitments* were completed by every WTO Member State when it joined the WTO. Each WTO Member State’s *Schedule of Specific Commitments* is different and unique. The *Schedules* contain two kinds of promises. First, the *Schedules* include promises that apply “horizontally,” that is, to all sectors. In addition, each country identifies those specific service sectors for which the country is willing to assume additional obligations. These additional obligations are assumed by listing a particular service sector – such as legal services – on a country’s *Schedule of Specific Commitments* and by listing in the market access or national treatment columns any exceptions or limitations that the WTO Member wants to include. These limitations are listed according to four “modes of supply” by which legal services may be provided.

According to a 2010 WTO Secretariat Report, seventy-six countries listed legal services on their *Schedules of Specific Commitments*. Unfortunately, however, the story is even more complicated. There are some obligations that will apply to legal services as soon as a country included legal services on its *Schedule*. Whether other obligations in the GATS apply, however, depends on the *manner* in which the country included legal services on its *Schedule*. In other words, when a country listed legal services on its *Schedule*, it could elect the degree to which it wanted to comply with certain obligations, such as *market access*, *national treatment* and certain *domestic regulation* obligations.

Thus, in order to understand what your country has promised or is being asked to promise with respect to legal services, you will need to be able to read and understand your country’s *Schedule of Specific Commitments*. In order to understand the *Schedule*, you will need to understand the terminology used in the *Schedules*, which includes references to legal services being delivered through Mode 1, Mode 2, Mode 3 and Mode 4. The sections that follow provide additional information about the items discussed in this Executive Summary.

II AN INTRODUCTION TO THE GATS

What is the WTO?

The WTO is the acronym used to refer to the World Trade Organization. The World Trade Organization was created by an agreement that was signed in 1994 and took effect on January 1, 2005. The document creating the WTO is called the *Agreement Establishing the World Trade Organization*.

What is the GATS?

“GATS” stands for General Agreement on Trade in Services. The GATS is one of the agreements that were signed in April 1994 when the *Agreement Establishing the WTO* was signed.

The GATS was the first multilateral global trade agreement that applied to services, rather than goods. Accordingly, the GATS raised new issues that Member Bars may not previously have faced. As the WTO web page explains: “This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities is the most pertinent example.”

When Was the GATS Created?

The GATS and other trade agreements emerged from a round of trade negotiations that are commonly referred to as the “Uruguay Round.” These multi-year negotiations concluded on December 15, 1993. The final documents were signed on April 15, 1994 in Marrakech, Morocco. Pursuant to these agreements, the WTO was established on January 1, 1995.

Are Legal Services Covered by the GATS and How are They Defined?

The short answer to the first question is “yes.” The GATS applies to all trade in services, including professional services and thus legal services.

Although it is clear that the GATS applies to all “legal services,” it is less clear what the term “legal services” covers. As is explained in greater detail on pages 13 and 39, *infra*, there has been a significant amount of variation in the ways in which individual WTO Members have defined the legal services for which they are making promises. The IBA has taken a leading role in suggesting how legal services should be defined during GATS negotiations

How Is the GATS Enforced?

An important fact to know about the GATS is that the WTO does not monitor or “police” a country’s regulations and that the GATS may not be enforced by individuals. It is a government-to-government agreement. It may only be enforced by governments, which may allege that another WTO Member State has not honored its commitments. Disputes are

handled in a multi-stage process pursuant to the Dispute Settlement Understanding (DSU), which was another one of the agreements annexed to the *Agreement Establishing the World Trade Organization*. The WTO maintains an extensive website devoted to the WTO Dispute Settlement process. See WTO: Dispute Settlement, www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Under the Dispute Settlement Understanding, the WTO Appellate Body has the ultimate right to resolve disputes and authorize retaliatory trade sanctions. As a result, this remedy may be cumbersome to invoke because a lawyer may have difficulty persuading his or her government to bring a claim. Once a claim is brought, however, this remedy is a powerful tool.

What are Some of the Misunderstandings that the WTO Has Sought to Correct?

The WTO website has a section on *GATS Fact and Fiction* in which it seeks to correct some of the misunderstandings and scare stories about the GATS. See www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf. This WTO webpage has said that one of the misunderstandings about the GATS is that the WTO has the power to impose its will on WTO Member States. This is incorrect because countries join the WTO voluntarily and the WTO agreements and documents are the result of consensus among governments. Further, any WTO Member State may withdraw from the WTO on six months' notice.

The WTO also points out that the GATS requires liberalization of restrictive trade rules, but not necessarily deregulation. Each WTO Member State is free to choose its own regulatory objectives. So long as a country's objectives are legitimate, the focus is on the *means* used to achieve those objectives and whether the means are more trade restrictive than necessary. Indeed, in some cases, trade liberalization could lead to the need for more regulation, rather than less regulation.

III THE KEY PROVISIONS IN THE GATS THAT ARE GENERALLY-APPLICABLE:

What Should IBA Member Bars Know About the Four-Part Structure of the GATS?

It is useful to think about the GATS as having a four-part structure. First, a Member Bar must learn which provisions of the GATS apply to trade in ALL legal services in all WTO Member States. Second, one must determine if a country exempted itself from the most-favored nation provision in the GATS (the *MFN Exemption List*). Third, one must consult the *Schedules of Specific Commitments* to find out what additional obligations in legal services, if any, the country agreed to (and whether the country listed any limitations or “standstill” provisions in its Schedule.) Fourth, one should recognize that two provisions in the GATS mandate ongoing work that is relevant to legal services.

This four-part analysis can be represented as follows:

Step 1:	Step 2:	Step 3:	Step 4:
Analyze the general commitments that a country assumes by virtue of joining the WTO and signing the GATS.	Has the country exempted itself from the MFN requirement that is part of the general commitments?	What does the country’s Schedule of Specific Commitments promise with respect to legal services?	What ongoing work does the GATS mandate?

The Handbook sections that follow will analyze each of these steps in turn so that the reader will understand the GATS provisions that apply during each stage of the analysis.

ANALYSIS STEP 1: What are the Most Important GENERALLY-APPLICABLE Provisions in the GATS For Legal Services?

There are certain GATS provisions that apply to every service sector in every WTO Member State. Thus, by agreeing to become a WTO Member State, a country agrees to abide by these provisions of the GATS. It is important for IBA Member Bars to realize that these generally-applicable GATS provisions apply to trade in legal services in every WTO Member State.

The FOUR generally applicable provisions that are usually considered the most important are:

- 1) the most-favored nation requirement (GATS art. II);
- 2) transparency (GATS art. III);
- 3) the procedural review section of the domestic regulation provision (GATS art. VI, para. 2); and
- 4) recognition (GATS art. VII).

What is the Most-Favored Nation Provision in the GATS?

The most-favored nation (MFN) requirement in GATS Article II applies to all WTO Member States and it represents one of the most fundamental ideas behind the GATS. With very few exceptions, the GATS MFN provision requires each country to accord *all* WTO Member States the same (“no less favourable”) treatment that it provides to *any* WTO Member State with respect to measures affecting trade in legal services. In other words, it is an “equal protection” type of provision that requires equal treatment as between foreign countries. (The MFN exceptions, which are very limited, are discussed on page 10, *infra*.)

What is the Transparency Requirement in the GATS?

Article III of the GATS is a transparency requirement. Similar to the MFN provision, Article III is “generally applicable” and applies to all services offered by all WTO Member States. This provision requires that all relevant measures be published or otherwise publicly available. Thus, Member Bars should work to ensure that all of the measures regulating legal services in its country are, or will be, published or publicly available. This may mean a change in the way your Bar undertakes rule-making and the publicity relating to rules made.

What is Paragraph 2 in the “Domestic Regulation” Provision in the GATS?”

A third “generally-applicable” provision is found in GATS Article VI, paragraph 2. GATS Article VI is the domestic regulation provision. Domestic Regulation provisions include some of a country’s licensing and qualification rules for its own lawyers. The Domestic Regulation article in the GATS has six subsections, only one of which is generally-applicable to all WTO Member States.

GATS Article VI, paragraph 2 requires each WTO Member State to maintain or institute procedures to have an objective and impartial review of any negative decisions by a country to exclude foreign service providers, in this case, foreign lawyers. Remedies must be available. Article VI, paragraph 2 expressly states, however, that it does not apply if it would be inconsistent with a country’s constitutional structure or the nature of its legal system. (The other five paragraphs of Domestic Regulation provision are discussed on pages 15–17 and 34–36)

What is the “Recognition” Provision in the GATS?

The fourth generally-applicable provision worth noting is GATS Article VII which is titled “Recognition.” Some regulators of legal services may decide that they are willing to “recognize” the qualifications of lawyers who are already licensed in another jurisdiction and permit those lawyers to practice in the Member State.

Article VII envisions that recognition issues may be handled through “Mutual Recognition Agreements” or MRAs negotiated between GATS Member States. This section creates a structure by which Member States can negotiate “Mutual Recognition Agreements” or MRAs. These are bilateral agreements and may seem a good way to avoid the MFN rule mentioned above. However, any WTO Member State that enters into an MRA with another must give

all WTO Member States the opportunity to participate on an equal footing in an MRA. The WTO has been notified of very few MRA's to date, and none, apparently, in the field of legal services.

V ANALYSIS STEP 2: THE MFN EXEMPTION

As explained above, Member Bars may find it useful to think about the GATS as having four parts: 1) the generally-applicable provisions of the GATS; 2) the MFN exemption provisions; 3) the GATS requirements that apply only if, and to the extent that, legal services are listed on a country's *Schedule of Specific Commitments*; and 4) the provisions that require ongoing work. This section addresses the second part of the analysis.

There are three circumstances in which the most-favored nation or MFN requirement need not be applied. First, when a country joined the WTO, it was possible for it to exempt itself from the MFN requirement. As is explained below, very few countries exempted themselves from this MFN requirement with respect to legal services. Second, GATS Article VII permits a WTO Member State to negotiate a "Mutual Recognition Agreement" with another country, provided that the WTO is notified at the onset of such negotiations and provided that each country is willing to offer the same MRA to all other WTO Member States. Third, provided notice is given, GATS Article V permits more favorable treatment resulting from Economic Integration agreements, such as the European Union and NAFTA agreements.

What is the MFN Exemption List?

As noted above, when a country joined the WTO, it had a one-time opportunity to opt out of MFN requirements. It could do so for an entire service sector or for part of a service sector. The WTO webpage lists those Member States that have chosen to exempt themselves from MFN requirements. See www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

Which Countries Have a MFN Exemption for Legal Services?

According to the WTO Secretariat, five Members have MFN exemptions in legal services, while five other Members have exemptions in professional services. The countries that have MFN exemptions for legal services are: Brunei Darussalam, Bulgaria, Dominican Republic, Lithuania, and Singapore. The countries that have MFN exemptions for professional services are: Costa Rica, Honduras, Panama, and Turkey.² A 2010 WTO Secretariat paper analyzing the legal services sector (cited on p. 3) states that two legal services-specific exemptions allow for MFN-inconsistent discretionary approval for the establishment of law firms. A third legal services-specific exemption covers all measures pertaining to the provision of legal services, and applies to all countries on the basis of reciprocity. A fourth WTO Member reserved the right to allow attorneys from foreign countries to participate as advocates in court only in accordance with bilateral agreements on legal assistance. The fifth exemption extends full national treatment for Modes 3 and 4 to companies and citizens of countries with which preferential arrangements exist. All of the professional services exemptions maintain reciprocity as a condition for authorizations to exercise professional activities, including legal services.

2 Paragraph 68 of the 2010 Secretariat paper states that there are five professional services MFN exemptions, but only lists four WTO Members in the footnote.

When Does the MFN Exemption Expire?

One of the unresolved issues in the GATS is the question of the duration of a country's MFN exemption. The WTO explains the issue as follows on its website:

“In principle, these exemptions should not last for more than ten years. As mandated by GATS, all these exemptions are currently being reviewed to examine whether the conditions which created the need for these exemptions in the first place still exist. And in any case, they are part of the current services negotiations.”

In sum, most Member States (including the major players involved in the export and import of legal services) have not put legal services on their MFN exemption list and thus will not be permitted to have a reciprocity requirement for foreign lawyers without violating the GATS, unless it is pursuant to an Economic Integration agreement or an MRA.

V Analysis Step 3: THE SCHEDULES OF SPECIFIC COMMITMENTS

In addition to the generally-applicable provisions in the GATS and the MFN exemption lists, Member Bars should also know that there are certain provisions in the GATS that apply only if a country listed legal services on its *Schedule of Specific Commitments*. In other words, there were GATS provisions that a country could “opt-in” to at the time it joined the WTO. These “opt-in” commitments are listed on the document called the country’s *Schedule of Specific Commitments*.

How Was Each Country’s *Schedule of Specific Commitments* Developed?

Each country’s *Schedule of Specific Commitments* was developed based on a request-offer system; countries exchanged information about their proposed *Schedules of Specific Commitments* during the Uruguay Round negotiations. This request-offer system of negotiations permitted a country to know, before it finalized its own *Schedule of Specific Commitments*, what it could expect from other countries. These *Schedules* were subject to fierce negotiations, with some countries saying *in essence* “I’ll include this service on my *Schedule* with these conditions if you will include that service on your *Schedule*.” At a certain specified deadline in December 1993, each country had to submit its final proposal, including its *Schedule of Specific Commitments*.

Where Can I Learn Whether a Particular Country Listed Legal Services on its Schedule and What Types of “Limitations” That Country Included on its Schedule Regarding its Regulation of Foreign Lawyers?

There are several different places where a Member Bar can see other countries’ *Schedules*. The WTO website now contains the *Schedules* of WTO Member States. See WTO, *Schedules of Commitments and lists of Article II exemptions*, at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (valid May 2012). This WTO website includes useful information, including a link to a document that explains how to read the schedules and what the GATS terminology means.

The *Schedules* are also available in other places. For example, the trade departments of WTO Member State governments often post their schedules. In the past, the WTO Secretariat generated “pre-defined reports” showing various types of specific commitments. Although the WTO no longer posts these predefined reports on its webpage, its search engine allows one to generate such a report (in pdf or excel format). See http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm

The predefined reports for legal services that were previously found on the WTO webpage are still available on this webpage: http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/uruguay.html

Did Many Countries Include Legal Services on Their *Schedules of Specific Commitments*?

Yes! Many countries have listed some or all types of legal services on their *Schedules* as a covered service. As a result, for many WTO Member States, these specified legal services are subject those additional “opt-in” provisions in the GATS which are described below.

According to ¶ 48 of the 2010 WTO Secretariat paper on Legal Services (cited on page 3) “a total of 76 Members have taken commitments in Legal Services. Separate schedules exist for Aruba and the Netherlands Antilles, bringing the number of schedules with commitments to 78.” Annex III of the 2010 Secretariat paper provided a list of the WTO Member States that had made specific commitments in legal services and noted the types of legal services for which commitments were made. The Secretariat paper summarizes some of the different ways in which WTO Member States described their legal services specific commitments. For example, approximately 60 Member States “scheduled” legal services involving advisory/consultancy services on home country (i.e. foreign) law and international law. Section V on page 14 of the 2010 Secretariat paper provides useful additional detail.

“The WTO Members who made some sort of legal services commitment include:

Albania, Antigua and Barbuda, Argentina, Armenia, Aruba, Australia, Austria, Barbados, Bulgaria, Cambodia, Canada, Cape Verde, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, European Communities, Estonia, Finland, FYR Macedonia, Gambia, Georgia, Guyana, Hungary, Iceland, Israel, Jamaica, Japan, Jordan, Kyrgyz Republic, Latvia, Lesotho, Liechtenstein, Lithuania, Malaysia, Moldova, Nepal, Netherlands Antilles, New Zealand, Norway, Oman, Panama, Papua New Guinea, Poland, Romania, Rwanda, Saudi Arabia, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, South Africa, Sweden, Switzerland, Chinese Taipei, Thailand, Tonga, Trinidad and Tobago, Turkey, Ukraine, United States, Venezuela, and Viet Nam. Russia has also made specific commitments in legal services that will take effect once its WTO membership takes effect.”

It is important to understand, however, that even though many countries included legal services on their *Schedules of Specific Commitments*, these legal services commitments are subject to the limitations contained in the “market access” and “national treatment” columns on each WTO Member’s *Schedule of Specific Commitments*. These limitations (or “standstill provisions” as they often are referred to) are discussed below.

What Additional Provisions of the GATS Apply Once a Country Has Listed Legal Services on its *Schedule of Specific Commitments*?

If a country has listed some or all types of legal services on its *Schedule of Specific Commitments*, then there are additional provisions that will apply to those legal services and that are important to know. These additional obligations are: 1) market access; 2) national treatment; 3) additional commitments, if any, and 4) certain aspects of the domestic regulation provision.

What is the “Market Access” Provision in the GATS?

Article XVI is the “market access” provision in the GATS. If a WTO Member lists a particular sector, such as legal services, on its *Schedule of Specific Commitments*, then that country has agreed to provide “market access” with respect to that legal services sector, subject to any limitations noted in its *Schedule of Specific Commitments*. In other words, the WTO Member is making GATS Article XVI “market access” commitments EXCEPT AS OTHERWISE NOTED ON ITS SCHEDULE.

GATS Article XVI is the “market access” provision. Except as otherwise noted in a country’s *Schedule of Specific Commitments*, this market access provision would forbid limitations on the number of service providers, for example by quotas, numerical limitations, or monopolies. The market access provision also requires that access to the legal services market not be provided in a manner less favorable than is set forth in the country’s *Schedule of Specific Commitments*. To state it differently, the market access provision focuses on what a WTO Member State may not do, employing a negative approach.

The market access provision could be important in countries that place a limit on the number of foreign lawyers who will be permitted to practice law in the country. The prohibition on “monopolies” might also be considered important. Virtually all countries that have made legal services commitments have included “except as otherwise noted” –types of limitations in their *Schedules*. Thus, when reading a *Schedule*, it is important to consider not only the nature of legal services commitments specified, but also the limitations contained in that Member’s *Schedule of Specific Commitments*.

What is the “National Treatment” Provision in the GATS?

Article XVII of the GATS is the national treatment provision. If a country lists all or part of a particular sector, such as legal services, on its *Schedule of Specific Commitments*, then that country has agreed to provide “national treatment” with respect to that sector, subject to any limitations noted in its *Schedule of Specific Commitments*. In other words, by listing legal services on its Schedule, a WTO Member is agreeing to provide “national treatment” EXCEPT AS OTHERWISE NOTED ON ITS SCHEDULE.

The “national treatment” provision is important because it acts as an equal protection clause for foreign lawyers as compared to domestic lawyers. If a country has “scheduled” legal services, this article would prohibit regulators from providing foreign lawyers with treatment that is less favorable than the treatment it accords to domestic lawyers, except as specifically noted in the *Schedule*.

Article XVII states that countries may meet the “national treatment” requirement either by according formally identical treatment or by according formally different treatment. The article explains that formally identical or formally different treatment shall be considered less favorable if it modifies the conditions of competition in favor of domestic lawyers.³

3 For additional information about national treatment, see *Legal and Economic Principles of World Trade Law : The Genesis of the GATT, the Economics of Trade Agreements, Border Instruments, and National Treatment, Report to the ALI* (April 2012)(Cambridge Press).

What is Meant By “Limitations” or the Term “Standstill” Provisions?

As was explained above, by listing some or all types of legal services in its *Schedule of Specific Commitments*, a country agrees to provide market access and national treatment for trade in legal services, *except as otherwise noted in the country’s Schedule*. These “except as otherwise noted” provisions can be “limitations” to the WTO Member’s market access commitments, national treatment commitments, or both. To state it differently, if a rule about legal services is listed in the “market access” or “national treatment” columns of a country’s *Schedule*, this means that the country reserves the right to continue using that rule, notwithstanding the “market access” and “national treatment” obligations that apply with respect to that sector. The rules that a country lists in its *Schedule* sometimes are referred to as “standstill” provisions because the country has not promised to liberalize these provisions, but may not retreat from these provisions, either. (GATS Article XX(2) states that if a limitation applies to both market access and national treatment commitments, it need only be listed once, in the market access column of that WTO Member’s *Schedule of Specific Commitments*.)

To summarize, if a country has listed legal services on its *Schedule*, then future laws and current laws not addressed in the *Schedule* governing legal services must comply with the market access and national treatment provisions in the GATS.

What are the “Additional Commitments” that May Appear in a Schedule?

GATS Article XVIII addresses the topic of “Additional Commitments.” As its name suggests, Article XVIII expressly authorizes WTO Member States to negotiate additional commitments for scheduled sectors. (Any such commitments would be “additional” to the market access, national treatment and domestic regulation commitments that a country assumes when it lists a particular service in its *Schedule*.)

“Reference papers” are one method that WTO Member States may use to indicate their additional commitments. A reference paper sets out the terms and conditions of liberalization (usually for a specified sector.) Once a reference paper is drafted, each WTO Member State may decide whether to accept those provisions. If Member States accept a reference paper, they will indicate this in the “additional commitments” column of their *Schedules*. A Member State may indicate that it accepts the Reference Paper minus certain provisions. One example of a reference paper is the Reference Paper on Telecommunications, which some WTO Member States included in the “additional commitments” column of their *Schedules*.

What are the Remaining “Domestic Regulation” Provisions?

As noted earlier, the Domestic Regulation provision of the GATS is found in Article VI. Four of its six paragraphs only apply to service sectors that are listed (or “scheduled”) in a country’s *Schedule of Specific Commitments*. The Domestic Regulation paragraphs that apply only to scheduled services are paragraphs 1, 3, 5 and 6, which state:

- “1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

...

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.
5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
 - (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
 - (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
- (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member. (The term “relevant international organizations” refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.)
6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.”

Thus, paragraphs 1, 3 and 6 of the Domestic Regulation provision apply, *without limitation* (i.e., without the possibility of derogation) if a country has listed legal services on its *Schedule of Specific Commitments*. In this respect, paragraphs 1, 3 and 6 differ from the market access and national treatment obligations because a country may not create “standstill provisions” with respect to these domestic regulation obligations or otherwise exempt itself from these three paragraphs.

Since many WTO Member States have included legal services in their *Schedules*, many Members will be obliged to comply with paragraphs 1, 3 and 6, regardless of any particular limitations included in their *Schedules of Specific Commitments*. Therefore, many WTO Member States will have to: 1) ensure that their measures of general application are *administered* in a reasonable, objective and impartial manner; 2) inform a lawyer from another WTO Member State within a reasonable time of any decision concerning the application and respond to requests about the status of the application; and 3) provide adequate procedures to verify the competence of lawyers from other Member States.

Paragraph 5 of the Domestic Regulation provision is different, however. Paragraph 5 has limitations both with respect to the time period during which it applies and with respect to the extent to which a WTO Member State is bound by its obligations. Paragraph 5 applies **ONLY** during the time period in which disciplines for the particular services sector have

not yet been developed. Because there are not yet disciplines applicable to legal services, paragraph 5 currently applies to legal services.

Moreover, unlike paragraphs 1, 3 and 6, the obligations owed under Paragraph 5 of Article VI may depend on the MANNER in which the WTO Member State scheduled legal services. This is because, on the one hand, Paragraph 5 prohibits WTO Member States from applying their domestic regulation provisions if it would “nullify or impair such specific commitments in a manner which does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c).” On the other hand, Paragraph 5 does not require the Member State to act in such a manner if it could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made. In determining what reasonably could have been expected, one presumably would examine the country’s specific commitments. As a result of this structure, Paragraph 5 might be viewed as creating the equivalent of a “standstill” provision. Paragraph 5(b), however, also specifies that “in determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.”

In sum, paragraphs 1, 3 and 6 of article VI’s domestic regulation provision apply without limitation once a country includes legal services on its *Schedule of Specific Commitments*, as many countries did. Paragraph 5, however, effectively creates a “standstill” provision because its requirements do not apply if these requirements could not reasonably have been expected of Members at the time that specific commitments in those sectors were made.

(Section XI of this Handbook, *infra*, explains in more detail the meaning of the Domestic Regulation article and the efforts that have been undertaken to implement Article VI, paragraph 4 and develop necessary disciplines.)

IV ANALYSIS STEP 4: TWO GATS PROVISIONS REQUIRE ONGOING WORK

The prior sections explained that some GATS provisions are generally applicable to the legal services in all WTO Member States, whereas other GATS provisions (notably the market access and national treatment provisions) apply only if a WTO Member voluntarily “opted in” to those provisions by “scheduling” legal services and only to the degree specified in that member’s *Schedule of Specific Commitments*. In other words, a WTO Member State was free to create “except as otherwise noted” provisions. Although these constitute the bulk of the provisions in the GATS, it is important for IBA Member Bars to be aware of two additional GATS provisions that require ongoing work on the part of WTO Member States. These provisions are described below.

What is the “Progressive Liberalization” Provision in the GATS?

GATS Article XIX is entitled “progressive liberalization.” This article is important because it REQUIRED that a new round of negotiations about services begin within five years of the establishment of the WTO on January 1, 1995. The new services negotiations were launched by the WTO in February 2000 and were originally referred to as the GATS 2000 or “built-in agenda” negotiations. As explained in more detail in Section X of the Handbook, these services negotiations were ultimately folded into a comprehensive set of negotiations that are now known as the Doha Development Agenda or Doha Round. The goal of these negotiations is to generate further trade liberalization.

What is the Obligation in Article VI, para. 4 to Develop “Disciplines”?

In addition to the ongoing work required by the “progressive liberalization” provision, the GATS requires ongoing work to develop “disciplines on domestic regulation.” GATS Article VI, paragraph 4 requires ongoing work because it directs the Council for Trade in Services (or its delegate) to develop “disciplines” to ensure that measures relating to qualification and licensing requirements do not constitute unnecessary barriers to trade. This paragraph states:

- “4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:
 - (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
 - (b) not more burdensome than necessary to ensure the quality of the service;
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

Sections X and XI of the Handbook explain the developments that have occurred in implementing GATS Articles VI(4) and XIX, both of which imposed ongoing obligations.

Recap: A Summary of the Key Provisions in the GATS

In sum, for Member Bars trying to master the key provisions in the GATS, it may be useful to remember that some of the GATS' provisions are generally-applicable, some provisions apply only if a country placed legal services on its *Schedule of Specific Commitments* and some provisions are the basis for the ongoing work at the WTO that is relevant to legal services.

The chart below helps summarize this information. This four-part analysis can be represented as follows:

Step 1:	Step 2:	Step 3:	Step 4:
<p>Analyze the general commitments that a country assumes by signing the WTO Agreement, which includes the GATS:</p> <ul style="list-style-type: none"> • Most Favored Nation (MFN) treatment (art. II) • Transparency (art. III) • Domestic Regulation Review procedures (art. VI, para. 2) • Recognition (art. VII) 	<p>Has the country exempted itself from the MFN requirement that is part of the general commitments?</p> <ul style="list-style-type: none"> • Is the country one of the few that exempted legal services from its MFN obligations? 	<p>What does the country's Schedule of Specific Commitments promise with respect to legal services?</p> <ul style="list-style-type: none"> • Are legal services "scheduled"? • If legal services are scheduled, what limitations are included with respect to: <ul style="list-style-type: none"> - Market Access (art. XVI) - National Treatment (art. XVII) • For scheduled legal services, the WTO Member must comply with art VI, para. 1, 3 & 6 	<p>What ongoing developments does the GATS require?</p> <ul style="list-style-type: none"> • Progressive Liberalization (art. XIX) <p>[this is the basis for the Doha Round negotiations]</p> <ul style="list-style-type: none"> • Art. VI, para. 4 requires the Council (or its delegate) to consider the development of disciplines for domestic regulation <p>[this work currently is ongoing in the Working Party on Domestic Regulation]</p>

table continued

Step 1:	Step 2:	Step 3:	Step 4:
		<ul style="list-style-type: none"> • If legal services are scheduled and there are no applicable disciplines yet, what does art. VI, para. 5 require with respect to domestic regulation provisions? • Are there any “additional commitments” regarding legal services? (art. XVIII) 	

VII UNDERSTANDING THE “MODES OF SUPPLY” LANGUAGE THAT APPEARS ON A COUNTRY’S SCHEDULE OF SPECIFIC COMMITMENTS

In addition to the terminology used in the GATS’ substantive provisions, there is additional terminology with which Member Bars should become familiar. When each WTO Member State filed its *Schedule of Specific Commitments*, there was a specific format that it was required to use. This format required a country’s *Schedule of Specific Commitments* to distinguish among the four different “modes of supply” set forth in GATS Article I(2).

What are the Four “Modes of Supply” Referred to on a Country’s *Schedule of Specific Commitments*?

The four modes of supply by which legal services may be offered are:

- Mode 1 - Cross-border supply: the possibility for non-resident service suppliers to supply services cross-border into the Member’s territory.
- Mode 2 - Consumption abroad: the freedom for the Member’s residents to purchase services in the territory of another Member.
- Mode 3 - Commercial *presence*: the opportunities for foreign service suppliers to establish, operate or expand a commercial presence in the Member’s territory, such as a branch, agency, or wholly owned subsidiary.
- Mode 4 - Presence of natural *persons*: the possibilities offered for the entry and temporary stay in the Member’s territory of foreign individuals in order to supply a service.

What Would “Mode 1” Look Like for Legal Services?

In Mode 1, or Cross-Border Supply, the service itself crosses the border. Thus, Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the country to clients inside the country; this delivery may occur by means of mail, telephonically, or electronically. This is probably the most frequently used Mode, occurring numerous times daily across many of the world’s borders when lawyers offer advice to a client in a different country by phone, fax or e-mail. It does not usually give rise to complaints or problems, possibly because it is very difficult to restrict through regulation. If a WTO Member State has any foreign trade at all, there undoubtedly are domestic lawyers in the country who are engaged in Mode 1.

What Would “Mode 2” Look Like for Legal Services?

Mode 2, or Consumption Abroad, involves the purchase abroad by a country’s citizens of the services of foreign lawyers. There are no statistics for the frequency of use of this Mode, but it is most likely to apply in the business sphere following investment abroad.

What Would “Mode 3” Look Like for Legal Services?

Mode 3, or Commercial Presence, involves a foreign entity’s establishment of a permanent presence in a country, such as a branch office. This Mode is frequently thought about when the GATS is discussed among lawyers. It will usually involve the establishment of an office in a foreign country by one of the large commercial firms. It is frequently politically contentious, and many countries have barriers against foreign law firms being able to set up offices within their borders.

What Would “Mode 4” Look Like for Legal Services?

Mode 4, or the Presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter a country in order to offer legal services. This is frequently, but not necessarily, linked to Mode 3 since, if a law firm wishes to establish an office abroad, it will also often wish to staff the office with at least some lawyers from the home country. (The lawyers themselves would be an example of Mode 4.) It also applies if the foreign lawyer “flies in” temporarily and is physically present to provide services.

What is the Difference Between Mode 1 and Mode 4 for Legal Services?

It is easy to confuse Mode 1 and Mode 4. The difference is that Mode 1 applies to the legal services PRODUCT and Mode 4 applies to the PERSON who delivers the legal services. The difference between Mode 1 and Mode 4, then, is that in Mode 1, it is the service that crosses the border for example, in a “virtual” fashion by mailing, emailing, or faxing an “opinion letter” whereas in Mode 4, it is the service provider or lawyer who crosses the border. It may be of interest for you to know that the tax laws in some countries may treat the Mode 1 delivery of legal services differently than the country treats the Mode 4 delivery of legal services.

What Does the Term “Unbound” Mean When Used in a *Schedule of Specific Commitments*?

The term “unbound” frequently appears in the legal services section of Member States’ *Schedules of Specific Commitments*. This term may appear in either the “market access” or “national treatment” columns. When the term “unbound” appears, it means that the country has not agreed that legal services must comply with that particular GATS requirement. In other words, if the term “unbound” appears in the “market access” column of Mode 4, then the country has declined to provide market access for mode 4 provision of legal services (that is, physical delivery of services in the country by foreign lawyers). Similarly, if the term “unbound” appears in the “national treatment” column, then the country has declined to provide national treatment in Mode 4.

The WTO states: “All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.” It is important to note that the term “unbound” refers to a country’s minimum GATS commitments; the country is

free to, and often does, provide for a *better* level of treatment than is specified in its *Schedule of Specific Commitments*.

VIII PUTTING THE “MODES OF SUPPLY” AND “SCHEDULE OF SPECIFIC COMMITMENTS” TOGETHER

What Would a *Schedule of Specific Commitments* Actually Look Like?

The WTO has posted on its website a document called “WTO Guide to Reading Schedules;” this document is found at www.wto.org/english/tratop_e/serv_e/guide1_e.htm. Among other things, this WTO guide to reading *Schedules* states:

“The national schedules all conform to a standard format which is intended to facilitate comparative analysis. For each service sector or sub-sector that is offered, the schedule must indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained.

A commitment [for any particular sector or subsector] therefore consists of eight entries which indicate the presence or absence of market access or national treatment limitations with respect to each mode of supply. The first column in the standard format contains the sector or subsector which is the subject of the commitment; the second column contains limitations on market access; the third column contains limitations on national treatment. In the fourth column governments may enter any additional commitments which are not subject to scheduling under market access or national treatment.

In nearly all schedules, commitments are split into two sections: *First*, “horizontal” commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the *second section of the schedule*, commitments which apply to trade in services in a particular sector or subsector are listed.”

Reproduced on p. 26 is an excerpt from a portion of the European Union *Schedule* that addresses legal services. (When reading this *Schedule*, you would also want to remember to check the “horizontal commitments” portion of the European Union *Schedule*, particularly the portion concerning the movement of natural persons or Mode 4.) The left hand column identifies the legal services sector for which commitments are made. The second and third columns provide examples of market access and national treatment limitations. These columns also illustrate how the limitations are expressed according to “modes of supply.” The 1), 2) and 3) in these columns refer to particular modes of supply. In the EU Schedule of Specific Commitments, the letters “F,” “P,” “D,” and “Dk” refer to specific EU Member States.

Should I Expect to Find Any Mistakes as I Look at Various *Schedules of Specific Commitments*?

Yes! It is worth remembering that there are sometimes mistakes in the way in which countries have completed the legal services portion of their *Schedules of Specific Commitments*. The GATS was the first global agreement to cover services. There has been some confusion about which kinds of regulations should be scheduled as market access restrictions, which kind of regulations are national treatment limitations and which kinds of regulation are domestic regulation provisions. Therefore, you can expect to see mistakes in the *Schedules*.

Have I Learned Enough about the GATS to Understand How the GATS Might Affect the Regulation of Foreign Lawyers in My Country?

In order to understand a country's obligations about legal services under the GATS, one must go through several steps of analysis. **FIRST**, you should recognize that some provisions - including a key provision with respect to domestic regulation - apply to all trade in services, whether or not scheduled. **SECOND**, you must consult the MFN exemption list; if a country is among the overwhelming majority of WTO Members that has no MFN exemption for legal services, then the country must comply with the GATS' Most-Favored Nation provision. **THIRD**, you must consult that country's *Schedule of Specific Commitments* to determine whether the WTO Member "scheduled" legal services, which would mean that, except as otherwise noted on its *Schedule*, the WTO Member agreed to comply with the GATS market access and national treatment provisions. As part of this third point, you must be able to understand the distinctions in the modes of supply because a country's exceptions are listed as subsets of these four "modes of supply." **FINALLY**, you must understand that when the term "unbound" is used in a country's *Schedule* in the "market access" or "national treatment" columns, this means that the service in question need not comply with that particular GATS requirement with respect to the particular item that is listed as "unbound."

Modes of supply: 1) Cross-border supply 2) Consumption abroad
 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
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II SECTOR-SPECIFIC COMMITMENTS

Business Services <i>A. Professional Services</i>			
a) Legal advice home country law and public international law (excluding EC law)	<p>1) F, P: Unbound for drafting of legal documents.</p> <p>2) None</p> <p>3) D: Access subject to acceptance into a Bar Association according to the "Federal Lawyers Act" which requires establishment which is restricted to sole proprietorship or partnership only.</p> <p>F: Provision through SEL (anonyme, à responsabilité limitée ou en commandite par actions) or SCP only.</p>	<p>1) F, P: Unbound for drafting of legal documents.</p> <p>DK: Marketing of legal advice activities is restricted to lawyers with a Danish licence to practise and law firms registered in Denmark.</p> <p>2) None</p> <p>3) DK: Marketing of legal advice activities is restricted to law firms registered in Denmark. Only lawyers with a Danish licence to practise and law firms registered in Denmark may own shares in a Danish law firm. Only lawyers with a Danish licence to practise may sit on the board or be part of the management of a Danish law firm.</p>	<p>F: Host country law and international law (including EC law) are opened to the Members of the regulated legal and judicial profession.</p>

IX GATS IMPLEMENTATION EFFORTS - WTO SECRETARIAT PAPERS and OTHER RESOURCES

Has Anything Happened Since the GATS Was Signed and Do IBA Member Bars Need to Know about These Developments?

It is important for Member Bars to realize that much has happened since the GATS was signed in April 1994. As noted above, the GATS required WTO Members to commence progressive liberalization efforts within five years of the date the GATS took effect and to consider the development of any necessary disciplines on domestic regulation. These requirements, among others, are one reason why there has been a significant amount of what we will call GATS “implementation” efforts. An IBA Member Bar cannot fully understand the obligations imposed by the GATS until it examines these post-GATS developments.

This Handbook divides the GATS implementation efforts into four categories. While many of these developments occurred simultaneously, it is useful to think about them separately. The four post-GATS developments of which Member Bars should be aware include:

- Background and supporting work undertaken by the WTO Secretariat and others;
- GATS Track #1 developments, which involve the ongoing market access or Doha Round negotiations required by the progressive liberalization provision found in GATS Article XIX;
- GATS Track #2 developments, which involve the ongoing work of the WTO Working Party on Domestic Regulation to develop disciplines on domestic regulation that would apply to the legal profession
- The ongoing work of the International Bar Association.

Each of these four developments will be addressed below.

What Kinds of Analyses Has the WTO Secretariat Prepared that are Relevant to Legal Services?

The WTO Secretariat has collected data and prepared many background reports to aid WTO Member States in their work. (The key Secretariat papers are maintained on the Services: Analysis and Publications subpage of the WTO website: http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm (last visited May 23, 2012)).

The Papers on Legal Services

The WTO Secretariat has issued two papers on legal services, both of which contain useful information. As noted on p. 3, footnote 1, the first Secretariat paper was issued in July 1998. The title of this document is Council for Trade in Services, *Legal Services, Background Note by the Secretariat*, S/C/W/43 (July 6, 1998). The second paper is entitled Council for Trade in Services, *Legal Services - Background Note by the Secretariat*, S/C/W/318 (June 14, 2010).

Two Papers about Domestic Regulation that Have Been the Basis for the “Horizontal Disciplines” Discussion

In addition to the Secretariat’s Note on Legal Services, there are some other Secretariat papers that are relevant to the issue of legal services and disciplines for domestic regulation. In 1999, the WTO Secretariat prepared two papers that addressed “domestic regulation” and horizontal disciplines. These papers were issued one month before the new Working Party on Domestic Regulation was formed. Much of the early discussion about horizontal disciplines focused on the issues contained in these two Secretariat papers. The Secretariat’s papers identified four key issues: (1) necessity; (2) transparency; (3) equivalence; and (4) international standards. (The citations for these two papers are: Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, Note by the Secretariat, S/C/W/96 (Mar. 1, 1999); and Council for Trade in Services, *International Regulatory Initiatives in Services*, Note by the Secretariat, S/C/W/97 (Mar. 1, 1999)). Additional analyses are found here and through the document search facility: http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm and <http://docs.wto.org>.

Other Papers of Interest

Other papers of interest include an analysis of the economic effects of services liberalization and an analysis of “Mode 4” involving the “Presence of Natural Persons.” The titles of these papers are: Council for Trade in Services, *Economic Effects of Services Liberalization*, Background Note by the Secretariat, S/C/W/26 (Oct. 7, 1997) and Council for Trade in Services, *Presence of Natural Persons, (Mode 4)*, Background Note by the Secretariat, S/C/W/75 (Dec. 8, 1998)).

In addition to these WTO Secretariat papers, other entities have prepared documents that might be useful. For example, the Organization of Economic Cooperation and Development (OECD) has prepared several papers that might be of interest to IBA Member Bars. These include the OECD Trade Policy Working Paper No. 2, MANAGING REQUEST-OFFER NEGOTIATIONS UNDER THE GATS: THE CASE OF LEGAL SERVICES, TD/TC/WP(2003)40/FINAL (July 22, 2004) and Massimo Geloso Grosso and Rainer Lanz, SERVICES TRADE RESTRICTIVENESS: PROFESSIONAL SERVICES (OECD, Paris, July 2–3 2009).

Another document of interest might be the *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector* which the Council for Trade in Services approved on May 29, 1997. These *Guidelines* were prepared in order to facilitate the “Recognition” provision in the GATS. The *Guidelines* are nonbinding; the purpose of the *Guidelines* is to provide suggestions to WTO Member States about how they might negotiate bilateral or multilateral “recognition” agreements. Among other things, these *Guidelines* suggest the types of information that should be included within a “Mutual Recognition Agreement” (MRA), and they request notification to the WTO of the opening of negotiations concerning an MRA and the result.

As this section shows, there have been a number of developments since the GATS was signed that would be of interest to IBA Member Bars. Many of the relevant documents are listed in the Appendix to this Handbook.

X GATS IMPLEMENTATION EFFORTS – GATS TRACK #1 and the DOHA ROUND’S “PROGRESSIVE LIBERALIZATION” NEGOTIATIONS

What Is The Status Of The Doha Round Negotiations?

As noted above, GATS Article XIX required progressive liberalization negotiations to begin within five years of the time the GATS took effect. These negotiations began in 2000 and are still ongoing. These negotiations were originally known as “GATS 2000” negotiations; for over a decade they have been part of the Doha Development Agenda negotiations, which are also known as the Doha Round or the market access negotiations. The Doha Round negotiations were ongoing at the time this revised Handbook was written.

One goal of the Doha Round negotiations is for members to agree on further services liberalization, which would then be memorialized in revised GATS *Schedules of Specific Commitments*.

Has Anything Significant Happened During The Doha Round?

The Doha Round has not yet concluded but it has generated both procedural documents and substantive documents. The procedural documents have included items such as target deadlines (most of which have been missed) and agreements about topics to be covered and negotiation methods (such as the request-offer approach to revising one’s *Schedule*.) WTO Members have held a Ministerial Meeting approximately every two years. Many of these Ministerial Meetings have culminated in a document called a “Declaration” that sets forth any agreements reached during the Ministerial Conference. For example, the 2005 *Hong Kong Ministerial Declaration* included target deadlines and procedures; paragraphs 25-27 and Appendix C addressed Services, which would include legal services. In addition to these official WTO Member State documents, “procedural issues” have been addressed in some of the WTO Secretariat and other papers referred to in the prior section.

In addition to these “procedural” documents, WTO Members have – either individually or collectively – issued what might be considered to be more substantive documents. The WTO Council for Trade in Services adopted *Disciplines on Domestic Regulation in the Accountancy Sector* which will take effect upon the conclusion of the Doha Round. The WTO Council also endorsed the previously-mentioned *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*. As part of the Doha Round negotiations, individual WTO Members have prepared “requests” to other WTO Member States and have prepared “offers.” (On occasion, several WTO Members will act collectively and make a joint proposal.)

What Is The “Request-Offer” Negotiation Process?

Most of the Doha Round market access negotiations have taken place using the “request-offer” format. In this format, each WTO Member may send a “request” to another WTO Member

(country) in which the requestor asks for specific changes to the specific commitments found in that recipient's *Schedule of Specific Commitments*. Most requests are treated as confidential government documents. The original deadline for "requests" was June 30, 2002. Although many WTO Members treat their "requests" as confidential government-to-government documents, many of these requests were "leaked" and are available on the Internet.

In contrast to a GATS "request," a WTO Member's "offer" sets forth the commitments that Member is prepared to put on its revised *Schedule of Specific Commitments* if and when the Doha Round comes to a conclusion. Because of the MFN provision in the GATS, an offer extends the proposed liberalization to all WTO Members and not just a particular "requestor." At some point, WTO Members had agreed upon March 2003 and May 2005 as target deadlines for "offers," but WTO Members are free to update their Doha Round "offers" at any time and some have done so. Although some WTO Members treat their offers as confidential, many WTO Members did not and these WTO Members have posted their "offers" on government webpages and elsewhere. Moreover, even if a country treated its "offer" as confidential, it may have been "leaked" and placed on the Internet.

What Does the Concept of "Decoupling" Mean in the Context of GATS Negotiations?

One aspect of the Doha negotiations which may seem counter-intuitive to IBA Member Bars is the concept of "decoupling." The term "decoupling" refers to the idea that a country might have, in a particular services sector such as legal services, asymmetrical "requests" and "offers." In the past, it was common for a country to "request" more liberalization in a particular sector (for example in legal services) than that country is itself prepared to "offer" to other countries. Because of this past history, some governments have advised the bar associations and lawyer organizations to "decouple" their recommendations about the "requests" and "offers" for legal services and to consider "requesting" more than the bar would be prepared to "offer."

The reason why a country might choose to "request" more liberalization in a particular sector than it is prepared to "offer" is because the negotiations are not simply bilateral negotiations about a single sector. Because countries negotiate their entire "package" of services, they sometimes choose to request more liberalization in areas in which there is strong interest in their country, while making "offers" or concessions in different sectors in which other countries have particularly strong interests. Thus, when formulating their recommendations, IBA Member Bars should be aware of the possibility of "decoupling" their recommendations. IBA Member Bars may want to consider the desirability of asking their governments to "request" liberalization of legal services, even though the Member Bar is not prepared to recommend that an "offer" be made on the same conditions. Although this may seem both dishonest and bad negotiating tactics (because it may be thought that it will rebound on the Bar concerned when the negotiations begin in earnest), the tradition of "decoupling" is well-established in trade-talks. The rationale in favor of decoupling is that the legal services sector will not be negotiated on its own, and so questions of honesty and tactics have to be decided not sector-by-sector, but in terms of the overall negotiations, of which only the country's professional negotiators may have a clear view.

Has Anything Significant Happened During The Doha Round *With Respect To Legal Services?*

The Doha Round has included a number of developments that will be of particular interest to IBA Member Bars. First, it is worth noting that a number of countries have made Doha Round offers that include legal services. In some cases, a WTO Member has offered for the first time to include legal services on its *Schedule of Specific Commitments*. In other cases, a WTO Member may have already included legal services on its *Schedule*, but has now “offered” to revise the legal services portion of its *Schedule* in order to make it more liberal.⁴

A second important development is the “Legal Services Collective Request.” In December 2005 at their Hong Kong Ministerial Conference, WTO Members agreed to encourage members to try a new “plurilateral” or “collective” requests process in the hope that the new procedure might help achieve more progress for the services negotiation. In February 2006, a number of countries, informally known as the “Friends of Legal Services,” issued a “Collective Requests” document that identified items they would like to request from the others. This document included a cover page, an introductory section, a purpose section, the actual requests, and two model schedules. The requests paragraph contained three parts: the first section set forth the scope of the requests, the second section identified the limitations to be removed, and the third section asked that any MFN exemptions be removed.

A third development is the growing consensus about the terminology that can be used when making legal services “offers.” Before the GATS was signed, the WTO Secretariat issued a “*Services Sectoral Classification List*” (document MTN.GNS/W/120), in which it provided recommendations to WTO Members about how they should list various services on their *Schedules of Specific Commitments*. In the WTO Sectoral Classification List, legal services were listed as a sub-sector of (1) business services and (A) professional services.

The WTO Sectoral Classification List divided legal services into six subcategories which were generally consistent with the classification system used in the then-current version of the United Nations Central Product Classification or CPC. In its *1998 Legal Services Paper*, however, the WTO Secretariat noted that most WTO Members had **not** in fact used the UN CPC classification system when “scheduling” legal services. The WTO Secretariat invited input from the legal profession and others on this legal services “classification” issue.

As Section XII, *infra*, explains, the International Bar Association accepted the WTO Secretariat’s invitation to do further work and held a day-long retreat in which it discussed these kinds of terminology issues. The IBA Council thereafter adopted a “Terminology” resolution that it recommended WTO Members consult when scheduling legal services. After this IBA resolution, a number of WTO Members submitted a paper which recommended that WTO Members “schedule” legal services using the terminology that substantially followed that set forth in the IBA resolution. See Communication from Australia, Canada, Chile, the European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory Of Taiwan, Penghu, Kinmen and Matsu and the United States, *Joint Statement on Legal Services*, TN/S/W/37, S/CSC/W/46 (24 February 2005), available from

4 An unofficial summary of legal services offers is available at this website <http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/derestricted.authcheckdam.pdf>.

the WTO website, <http://docs.wto.org>.

In addition to these three legal services-specific developments, the Doha Round negotiations have triggered numerous papers, programs and education sessions that have addressed the impact of the GATS on legal services. The IBA has sponsored a number of these sessions and they are discussed in Section XII, *infra*. Several others are listed on the Appendix attached to this Handbook.

Which Countries Have Submitted Negotiating Proposals Regarding Legal Services?

Early in the Doha Round, approximately nine WTO Members circulated negotiating proposals that addressed *directly or indirectly* legal services. Some of these countries, such as the United States and Australia, issued proposals that focused exclusively on legal services. Other Member States, such as the European Union and Canada, issued proposals directed toward professional services, which included legal services. Some countries, such as Japan and India, issued proposals that addressed legal services or professional services, even though the scope of the proposal was not apparent from the title of the document. In addition to the proposals directed towards specific sectors, such as legal services, some countries submitted proposals about negotiating procedures. Since then, a number of countries tabled offers that include legal services. The public offers include those from Australia, the European Union, Bulgaria, Canada, Chile, Colombia, Iceland, Japan, Korea, Liechtenstein, New Zealand, Norway, Pakistan, Turkey, the U.S.; see also Switzerland (public GATS 2000 proposal); Kenya (regarding MRAs and professional services).

How Can an IBA Member Bar Learn about Legal Services Negotiating Proposals?

There are several ways one can locate the Doha Round legal services proposals and “offers”. The WTO has a webpage that includes links to the negotiating proposals. This web page is found at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm. (The proposals concerning legal services may be listed under the topic of “professional services” proposals, or “legal services” proposals, or “business services” proposals or “movement of natural persons” proposals.) The easiest way to see the public legal services offers is to check the websites of groups that post this information.⁵

How Can a Member Bar Influence the Negotiating Proposals by its Country’s Representatives to the WTO?

In order for an IBA Member Bar to participate in the development of negotiation proposals, it must learn at least two things. First, it must find out which entity submits proposals to the WTO on behalf of its country. Once an IBA Member Bar has this contact information, it must determine the best method to provide guidance and input to that entity. This is not always easy to determine.

5 For example, both the European Services Forum and the American Bar Association include this information on their websites. See www.americanbar.org/content/dam/aba/migrated/cpr/gats/derestricted.authcheckdam.pdf and www.esf.be/new/wto-negotiations/doha-development-agenda/proposals/.

Summary

In sum, the outcome of the GATS Track #1 Doha Round market access negotiations remains uncertain. Although some WTO Members have circulated proposed changes to the legal services portion of their *Schedules*, the Doha Round has not yet concluded and none of these proposed changes has become effective. It is important to remember, however, that even if the Doha “progressive liberalization” negotiations collapse, WTO Members remain bound by their prior obligations (which took effect in January 1995 for most WTO Members).

X GATS IMPLEMENTATION EFFORTS – GATS TRACK #2 and the NEGOTIATIONS TO DEVELOP DISCIPLINES ON DOMESTIC REGULATION

Has Anything Significant Happened During The Doha Round On The Domestic Regulation Disciplines Issue?

As noted earlier, GATS Article VI(4) required WTO Members to consider the development of any necessary disciplines on Domestic Regulation. This ongoing obligation is sometimes described as GATS Track #2. There have been a number of implementation efforts that may be of interest to IBA Member Bars.

In December 1998, after several years of drafts and discussions, the WTO Council for Trade in Services adopted a document called *Disciplines for Domestic Regulation in the Accountancy Sector* (the “Accountancy Disciplines”). The Accountancy Disciplines are scheduled to take effect at the conclusion of the Doha Round of negotiations. The Accountancy Disciplines were developed by a body called the WTO Working Party on Professional Services (WPPS) and approved by the WTO Council, which consists of all WTO Member States.

Since the adoption of the Accountancy Disciplines, WTO Members (and others) have continued their discussions about whether and how to adopt disciplines that would apply to other service sectors, including legal services. This work is currently taking place under the auspices of the Working Party on Domestic Regulation (WPDR), which replaced the Working Party on Professional Services. The WPDR has held more than fifty meetings since it first met in 1999.

Will WTO Member States Definitely Adopt Generally-Applicable *Disciplines on Domestic Regulation*?

At this point in time, it is not entirely clear whether WTO Member States will adopt *Disciplines on Domestic Regulation* that apply to the legal profession. On the one hand, in 2005, in the Hong Kong Ministerial Declaration, WTO Member States expressed their agreement to adopt Disciplines on Domestic Regulation that would apply horizontally to all service sectors and thus include legal services. WTO Members have reaffirmed this agreement on several occasions. On the other hand, the Disciplines issue has generated significant disagreement. At the time this revised Handbook was written, it was not entirely clear whether WTO Member States would be able to reach an agreement concerning Disciplines on Domestic Regulation. WTO Member States have circulated a number of proposals. These proposals reveal some significantly different views among WTO Member States with respect to the scope of the proposed disciplines.

How Can IBA Member Bars Find Out the Current “State of Play” With Respect to the Domestic Regulation Disciplines Negotiations?

WTO Members have submitted a number of proposals to the Working Party on Domestic Regulation. Some of these documents are publicly available, but a number of these proposals have been “restricted” and thus are not publicly available unless they have been “leaked.”

If an IBA Member Bar wants to learn more about the “state of play” of the domestic regulation disciplines negotiations, it can consult the reports prepared by the Chair of the WTO Working Party on Domestic Regulation. These reports sometimes summarize the state of the negotiations and identify agreements and disagreements among WTO Member States. One can also consult the minutes of the meetings of the Working Party on Domestic Regulation and the annual reports from the Working Party to the Council for Trade in Services. All of these documents can be easily located by consulting the WTO Webpage devoted to the Services Council, its Committees and other subsidiary bodies, http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm. This webpage allows one to search for various kinds of WPDR documents, including annual reports, minutes, and working documents, which would include the Chair’s report. It may also be useful to see if there is a report summarizing the status of the Doha Round negotiations. For example, in 2011, Ambassador Fernando de Mateo prepared a summary of the current state of play and included a copy of the draft disciplines on domestic regulation. See NEGOTIATIONS ON TRADE IN SERVICES, Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee, TN/S/36 (21 April 2011). (The WPDR Chair’s April 2011 Progress Report, S/WPDR/W/45, also summarizes some of the areas of agreement and disagreement.)

At the time this revised Handbook was prepared, the most recent version of the WTO committee’s Draft Disciplines appears to be the version dated March 2009. The April 2011 Report to the Trade Negotiations Committee includes the March 2009 draft disciplines and indicates the paragraphs on which there is agreement and the paragraphs for which there have been alternative proposals. According to the October 2011 WPDR annual report, WTO Members continue to discuss these March 2009 draft disciplines. See Council for Trade in Services, Working Party on Domestic Regulation - Annual report of the Working Party on Domestic Regulation to the Council for Trade in Services (2011), S/WPDR/14 (24 Oct. 2011). As the 2012 WPDR Annual Report notes, during 2012, WTO Members focused on technical issues, with the assistance of several Secretariat notes. See Council for Trade in Services, Working Party on Domestic Regulation – Annual report of the Working Party on Domestic regulation to the Council for trade in Services (2012), S/WPDR/15 (5 Dec. 2012).

Has Anything Significant Happened on Domestic Regulation Disciplines *With Respect To Legal Services*?

There have been at least three legal services-specific developments worth noting. First, shortly after the WTO Council on Trade in Services adopted the *Accountancy Disciplines*, the WTO Secretariat sent a letter to various legal professional organizations, including the IBA, seeking input on whether the Accountancy Disciplines would be suitable to apply to the legal profession. As is described in the next section, the IBA held a retreat on this issue

and submitted a lengthy response. A number of other legal profession organizations also submitted responses to the WTO.⁶

The second noteworthy development is the fact that in 2005, Australia proposed a set of domestic regulation disciplines specifically for legal services. See *Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34 (5 Sept. 2005). Despite this proposal, the Working Party on Domestic Regulation discussions have focused on the development of horizontal disciplines applicable to all sectors.

A third development worth noting is the existence of various educational materials devoted to the topic of disciplines on domestic regulation. For example, in 2003, the WTO sponsored a domestic regulation conference in which legal services was one of the highlighted sectors. The OECD has also held a conference that focused on legal services and domestic regulation disciplines. In addition to these in-person events, the WTO Secretariat has issued a paper that includes possible definitions for the disciplines terms, a document that summarizes the consultations about disciplines with relevant professional organizations such as the IBA, and a document that summarizes WTO members' domestic consultations within their own countries about disciplines. The WTO Secretariat also has issued several versions of a document that provides examples of measures that might be subject to disciplines.⁷

What Happens if the WTO Fails to Adopt Disciplines on Domestic Regulation?

If WTO Members fail to adopt disciplines on domestic regulation, then GATS Article VI:5 applies. This paragraph imposes a modified form of disciplines even in the absence of an agreement by WTO Members:

- “5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c);
- and
- (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

6 For additional information and to see copies of the relevant documents, you can consult Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 Penn State Int'l L. Rev. 695 (2004), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=340745#show666142

7 Professor Laurel Terry has written an article that includes an appendix that presented, for comparison purposes, a legal-services specific set of examples. See Laurel S. Terry, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 Symposium The Professional Lawyer 83 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=591964.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.”

Thus, GATS Article VI:5 means that the issue of GATS Track #2 and disciplines is potentially very significant, even if WTO Members are not able to agree on horizontal disciplines.

XII GATS IMPLEMENTATION EFFORTS – THE ROLE OF THE IBA

What Efforts Has The IBA Undertaken With Respect to the GATS?

The International Bar Association has taken a leadership role in helping the legal profession understand and respond to the GATS. This section describes some of these efforts. For additional information, one can consult the webpage of the IBA Bar Issues Commission International Trade in Legal Services Committee: www.ibanet.org/PPID/Constituent/Legal_Profession_World_Orgs/BIC_ITILS_Working_Group/Projects.aspx

In addition to producing two editions of the GATS Handbook which you are reading, the IBA has held a number of educational programs on the GATS. The IBA WTO Working Group (now called the BIC International Trade in Legal Services Committee) has met in Geneva with the WTO Secretariat and WTO Member State representatives and has participated in WTO educational programs. The IBA has also adopted a number of resolutions..

Which IBA Resolutions Are Relevant to the GATS?

The earliest IBA resolution relevant to the GATS was the 1998 Resolution on GATS and Deregulation of the Legal Profession, which is sometimes referred to as the “core values” resolution. Given its importance, it is reprinted below:

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

- amending regulations no longer consistent with a globalised economy and
- securing the provision of legal services in an efficient manner and at competitive and affordable prices,

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

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

HEREBY RESOLVES

1 that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and

2 that any steps taken with a view to deregulating the legal profession should respect and observe the principles outlined above.”

The IBA has adopted three additional GATS-specific resolutions. In 2003, the IBA adopted its **RESOLUTION IN SUPPORT OF A SYSTEM OF TERMINOLOGY FOR LEGAL SERVICES FOR THE PURPOSES OF INTERNATIONAL TRADE NEGOTIATIONS** relevant to GATS Track #1 and the Doha Round market access negotiations. As noted earlier, the legal services “terminology” proposal tabled by several WTO Members appears to be based in large part on the IBA’s 2003 terminology resolution.

The second GATS resolution is the 2003 **COMMUNICATION TO THE WORLD TRADE ORGANIZATION ON THE SUITABILITY OF APPLYING TO THE LEGAL PROFESSION THE WTO DISCIPLINES FOR THE ACCOUNTANCY SECTOR**, which is relevant to GATS Track #2 and the WTO negotiations on domestic regulation disciplines. The third GATS resolution is the 2008 Resolution of the IBA Council on transfer of skills and liberalization of trade in legal services. This resolution was adopted after several years of discussion and debate. After explaining the rationales for the resolution, it continues by stating the “capacity building” conditions that developing jurisdictions in particular might want to include in their *Schedules of Specific Commitments* when making market access commitments:

“

- (1) Countries that so far have not been willing to open their legal services market to Foreign Lawyers, or that have done so to a limited extent only as regards the scope of practice rights or rights of association with Local Lawyers, may wish to grant Foreign Lawyers access to their legal services market, or to reduce or remove any existing restrictions on such access, subject to one or both of the following conditions:
 - (A) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction may be required by the Host Authority to participate, directly or indirectly, in the provision of formal continuing legal education and training programs sponsored or approved by the Host Authority or other bodies responsible for the development of the legal profession of the Host Jurisdiction and open to Local Lawyers generally.
 - (B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.

- (2) In order to be consistent with the general principles of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skills Transfer as contemplated by Paragraphs (1)(A) and (1)(B) of this resolution would need to be: (i) transparent; (ii) not unreasonably burdensome; (iii) non-discriminatory as between Foreign Lawyers and (iv) not adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.
- (3) Any measures taken pursuant to Paragraph (1)(A) of this resolution should not require a Foreign Lawyer to disclose information that is proprietary or confidential to the Foreign Lawyer, his/her firm or any client.”

What Additional IBA Resolutions Might IBA Member Bars Find Useful When Considering GATS-Related Issues?

In addition to the four GATS-specific resolutions, the IBA has adopted several resolutions that undoubtedly were informed by and are relevant to cross border legal practice, which is a topic that is also relevant to the GATS. These resolutions include the 1998 **Statement of General Principles for the Establishment and Regulation of Foreign Lawyers** and the 2001 **Standards and Criteria for Recognition of the Professional Qualifications of Lawyers**. All of these resolutions are available on the webpage of the IBA BIC ITILS Committee: http://www.ibanet.org/PPID/Constituent/Legal_Profession_World_Orgs/BIC_ITILS_Working_group/Default.aspx. The 2006 **General Principles of the Legal Profession** are also worth consulting.

XIII OTHER DEVELOPMENTS OF INTEREST (including the proliferation of bilateral and regional trade agreements)

Is the GATS the Only Trade Agreement IBA Member Bars Should Be Concerned With?

IBA Member Bars should understand that it is quite possible that their government has negotiated trade agreements beyond the GATS that apply to legal services. This is permitted by GATS Article V which applies to economic integration agreements.

As the Doha Round negotiations stalled, it became increasingly common for WTO Member States to negotiate bilateral or regional trade agreements. Many WTO Members have five or ten (or more) bilateral or regional free trade agreements. These agreements are usually listed on the webpage of the government department responsible for trade. Examples can be found at these webpages:

- Australia, www.dfat.gov.au/fta/
- Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d
- European Union, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_europe
- Japan, www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/index.html
- Korea, www.mofat.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m_20_80_10
- US www.ustr.gov/trade-agreements/free-trade-agreements

Conclusion

The purpose of this Handbook is to provide background information to IBA Member Bars about the GATS or General Agreement on Trade in Services and the ongoing negotiations about legal services. In particular, it is designed to assist Bars understand the history, process and the technical terms used in the context of the GATS. We hope you have found it useful.⁸

8 For additional information and more complete citations, see Laurel S. Terry, From GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 Akron L. Rev. 875 (2010). For a hard copy of this article, with complete citations, email LTerry@psu.edu. This article is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630566 .

APPENDIX:**XIV GLOSSARY OF TERMS**

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Offer	1, 8, 10, 12, 28-32
Presence of Natural Persons [Mode 4]	21-22, 24, 26, 28
Progressive Liberalization	3, 18-19, 27, 29, 33
Requests	29-31
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Request-Offer process	12, 28-29
Schedule of Specific Commitments	1, 4, 7, 10, 12-25, 29-31
Standstill Provisions	7, 13, 15-17
Transparency	7, 8, 19, 28
Unbound	22, 25, 26
Uruguay Round	3, 5, 12

XV APPENDIX: WEBSITES OF INTEREST

WTO WEBSITES

1. WTO Homepage
www.wto.org/
2. The GATS Agreement
www.wto.org/english/docs_e/legal_e/legal_e.htm#services
3. WTO Guideline to Reading a Schedule of Specific Commitments
www.wto.org/english/tratop_e/serv_e/guide1_e.htm
4. WTO Services Portal
www.wto.org/english/tratop_e/serv_e/serv_e.htm
5. WTO Webpage with Links to Countries' Schedules of Specific Commitments
www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm
6. WTO Page Listing MFN Exemptions
www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm
7. WTO Ministerial Declarations (including links to the Doha Declaration & other Declarations containing agreements and suggested timelines)
www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm
8. WTO Webpage Listing GATS Track #1 market access Doha negotiation proposals (check both legal services and professional services and websites listed on Handbook p. 32, n.5):
www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm
9. WTO Subsidiary Bodies (including documents of the WTO Working Party on Domestic Regulation, which is handling the GATS Track #2 Disciplines negotiations)
www.wto.org/english/tratop_e/serv_e/s_coun_e.htm
10. WTO Disciplines on Domestic Regulation for the Accountancy Sector
www.wto.org/english/news_e/pres98_e/pr118_e.htm

WEBSITES OF OTHER ORGANIZATIONS

11. IBA BIC International Trade in Legal Services Committee,

www.ibanet.org/PPID/Constituent/Legl_Profession_World_Orgs/BIC_ITILS_Working_Group/Default.aspx

12. CCBE GATS Committee

www.ccbe.org/index.php?id=94&cid_comite=9&L=0

13. European Services Forum Doha Round Webpage (monitors legal services developments)

www.esf.be/new/wto-negotiations/doha-development-agenda/

14. American Bar Association GATS Legal Services webpage

www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements.html

XVI APPENDIX: HOW TO LOCATE WTO DOCUMENTS:

The WTO webpage includes a search page that allows you to search for WTO documents in many different ways. See www.wto.org/english/res_e/res_e.htm. This webpage allows you to search for all documents with a particular phrase, such as “legal services.” If you are looking for a particular document or category of documents, you can use the “document symbol” function. See <http://docs.wto.org>.

For example, if one inserted S/C/M/24, one would retrieve the twenty-fourth set of minutes of the WTO Council for trade in services. If one inserted the term “S/C/M,” then one would retrieve all minutes of the Council for Trade in Services that are publicly available. If one inserted the term “S/C/,” then one would retrieve a list of all available Council documents. Once the search is completed and the list of relevant documents appears, you can select the documents *and language* to be downloaded.

What do the Symbols on WTO Documents Mean?

The examples listed above used WTO document symbols. It is helpful to realize that each WTO document has a unique set of numbers and letters assigned to it, which is its “name” or symbol. All documents related to the GATS begin with the letter “S.” The second letter designates the entity issuing the document: for example, “C” is used for the Council for Trade in Services; “WPPS” was used for the Working Party for Professional Services before it disbanded; and “WPDR” is used for the Working Party on Domestic Regulation. The third letter indicates the type of document: “M” designates minutes of meetings; “W” indicates a working paper submitted to the entity in question. If no letter is included, it means that the document is an “action” document, such as a *Decision* or *Report*. The fourth item listed is a number; these numbers are issued in chronological order so that S/C/M/24 indicates the twenty-fourth set of minutes issued by the Council for Trade in Services. “W” documents include comments and drafts submitted by Member States.

“W” documents also include Secretariat papers and analyses. As explained in the Executive Summary, the WTO Secretariat is based in Geneva and is the administrative body of the WTO. It is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics and preparing other analyses. The WTO Secretariat has more than 650 staff and is headed by a director general. It does not have branch offices outside Geneva.

“W” documents are non-public, restricted documents unless the author indicates otherwise. Sometimes documents are “derestricted” at a time point after they were first issued. Sometimes restricted documents are “leaked” and available on the Internet.

The symbol for each document appears in the upper right-hand corner of the first page of the document, together with the date on which the document was prepared. Reproduced below is the beginning of the 1998 Secretariat paper on legal services which includes the

document symbol information.

World Trade Organization

RESTRICTED

S/C/W/43
6 July 1998
(98-2691)

Council for Trade in Services

LEGAL SERVICES

Background Note by the Secretariat



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The revised handbook about the

GATS

General Agreement on Trade in Services

for International Bar Association Member Bars

(By Laurel Terry)

<http://tinyurl.com/IBA-GATS>



FOREWORD TO THE REVISED EDITION:

On behalf of the International Bar Association (IBA), I am pleased to introduce the revised edition of our handbook on the General Agreement on Trade in Services (GATS).

The original Handbook, published 10 years ago, provided a clear overview of the requirements of the GATS as it relates to the legal services sector. But times have moved on and there are new developments to be considered, including a rise in interest in bilateral and regional trade agreements (see the new section (XIII)).

The IBA continues to urge its member bar associations to become involved in national discussions and negotiations that take place concerning the GATS, and many bars will have seen the significant impact of the implementation of GATS in their jurisdiction. The Bar Issues Commission's specialist 'International Trade in Legal Services' Committee also continues its work on resolutions and guidelines that support the legal sector in this area.

Please note that Sections X-XIII of the Handbook have entirely new content. The topics covered by these newly-rewritten sections include the following:

- GATS Implementation Efforts – GATS Track #1 and the Doha Round's Progressive Liberalization Negotiations
- GATS Implementation Efforts – GATS Track #2 and the Negotiations to Develop Disciplines on Domestic Regulation
- GATS Implementation Efforts - The Role of the IBA
- Other Developments of Interest (including the proliferation of bilateral and regional trade agreements)

I would like to thank Professor Laurel Terry for her invaluable work in preparing this revised edition of the Handbook.



Michael Reynolds
IBA President

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I EXECUTIVE SUMMARY

What Is the Purpose of the Revised Handbook?

This Handbook was written to help IBA Member Bars who may be approached by the trade negotiators from their own countries. These negotiators may ask Member Bars questions such as:

- Do you want foreign lawyers to be able to practice here, and if so under what conditions? and
- Do the members of your bar want access to any foreign markets?

It is also possible that the trade negotiators may ask these questions in a much more technical fashion. They might, for example, ask questions such as:

- 1 In the current Doha round of negotiations, what is your bar's position about whether legal services should be included on your country's *Schedule of Specific Commitments*?
- 2 If legal services are already included on your country's *Schedule of Specific Commitments*, do you believe there should be any changes made to the way your country has described the legal services that it has "scheduled"?
- 3 What classification system should be used for new or revised legal services offers in the Doha Round of negotiations?
- 4 If legal services are already included on your country's *Schedule of Specific Commitments*, do you believe there should be any changes made to the way your country has "scheduled" legal services Modes 1 - 4 limitations in the *market access* and *national treatment* columns of your country's *Schedule*?
- 5 What is your bar's position about the proposed *Disciplines on Domestic Regulation* and whether they should be applied to the legal profession in your country?

This Handbook is intended to help IBA Member Bars answer these questions, regardless of the form in which they are asked. Even the seeming simple and casual questions ultimately will require someone to provide answers that are highly technical. This Handbook gives guidance on how these questions can be answered

As you might imagine, giving someone an "instant education" in trade law as applied to legal services does not make for fast or easy reading. This Handbook is dense and detailed in order to provide a single resource, tailored to legal services, that your bar can consult in order to respond to questions such as those posed on this page. This Handbook contains everything we can think of that a bar would need to know about:

- the substantive provisions of the GATS;
- how the GATS' substantive provisions apply in the context of legal services;
- what has happened since the adoption of the GATS and its relevance to legal services;
- where the debates have occurred with respect to legal services (and to give you a flavor for the disagreements); and
- the developments that IBA Member Bars might be asked to respond to.

This Executive Summary section is intended to provide the information necessary for bar leaders who want to know the “big picture” about the GATS and legal services but do not want or need to understand the specific terminology and detailed provisions. The remainder of the Handbook, however, is intended to provide, as simply and as clearly as possible, the information and detail that every IBA Member Bar likely will need to know in order to respond to questions such as those posed at the beginning of this section. Because of the technical nature of the GATS, each bar may want to establish a committee whose members will become comfortable with the more technical details of the GATS.

What Should Every Bar Leader Know about the GATS and Legal Services?

The World Trade Organization or WTO was established in January 1, 1995 pursuant to the *Agreement Establishing the World Trade Organization* which was signed in 1994. There were several agreements attached or “annexed” to the *Agreement Establishing the World Trade Organization*. Therefore, when a country decides to join the WTO (as more than 155 countries now have), that country also agrees to abide by the terms of the annexed agreements.

One of the agreements annexed to the *Agreement creating the World Trade Organization* is the *General Agreement on Trade in Services* or “GATS.” (The GATT and TRIPS are two other agreements, in addition to the GATS, that were “annexed” to the *Agreement Creating the WTO*. Many lawyers are familiar with the GATT, which focuses on trade in GOODS. The GATS focuses on trade in SERVICES.)

The GATS was the very first multilateral global trade agreement that applied to services, rather than goods. The GATS applies to all services, including legal services. Thus, health services, engineering services, accounting services, architecture services, tourism services, and all other kinds of services imaginable are covered by the provisions of the GATS.

The WTO Secretariat, which is based in Geneva, Switzerland, is the administrative body of the WTO. The WTO Secretariat has more than 6000 staff and is headed by a director general. It does not have branch offices outside Geneva. Unlike some other international bureaucracies, the Secretariat does not have a decision-making role. It is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics and preparing analyses.

In July 1998, the WTO Secretariat prepared a “sectoral analysis” of legal services. The Secretariat has prepared other analyses that are relevant to legal services and that are described in greater detail in the body of the Handbook. In 2010, the WTO Secretariat issued

an updated version of its legal services sectoral report. These documents are available on the WTO's website.¹

Currently, there are two different sets of events ongoing in Geneva of which member bars should be aware (and in which they may want to participate.) The first ongoing "track" or development of which IBA Member Bars should be aware is the Doha Round negotiations to further liberalize trade. IBA Member Bars should know that the GATS itself REQUIRED WTO Member States to engage in negotiations for progressive liberalization within five years of the effective date of the GATS. This new round of negotiations originally was referred to as either GATS 2000 or as the "built-in agenda" negotiations. These negotiations are currently referred to as the Doha Development Agenda negotiations, the Doha Round, or simply the market access negotiations. These negotiations have taken longer than expected and several deadlines have "slipped", including the original 2005 target date for completion. Although some think that the Doha negotiations may be permanently stalled, it is perhaps worth noting that the conclusion of the Uruguay Round happened very quickly after long delays.

WTO Members are also engaged in negotiations concerning domestic regulation disciplines. GATS Article VI(4) requires the WTO Members to consider the development of "any necessary disciplines" on domestic regulation. The goal of such disciplines would be to ensure, among other things, that certain licensing and qualification measures were not more burdensome than necessary to fulfill a legitimate objective and did not constitute barriers to trade. In 1998, the WTO adopted *Disciplines on Domestic Regulation for the Accountancy Sector* which will take effect at the conclusion of the Doha Round. There is currently a WTO entity called the Working Party on Domestic Regulation that is studying the disciplines issue. While WTO Members have agreed in principle that they want to adopt horizontal disciplines that will apply to multiple service sectors, including legal services, they have not yet been able to reach agreement on the content of all of such disciplines. Although there is some overlap between the WTO's market access/progressive liberalization negotiations and the WTO negotiations on domestic regulation disciplines, these two "tracks" or developments are different and Member Bars should be aware of both sets of developments.

As a result of these two sets of ongoing GATS developments, it is very important for lawyers around the world to understand that if their country is a WTO Member State, as most countries are, then their country's trade representatives will be engaged in negotiations about liberalization of the conditions under which foreign lawyers may practice in that WTO Member State. Because these negotiators often are not lawyers and because legal services may be "bundled" or swapped as part of a deal involving other goods or services, lawyers may want to begin educating their trade representatives about the nature of lawyers in their country and the desired regulation (and access to foreign markets.) Accordingly, the GATS raises issues that IBA Member Bars may not previously have faced.

1 Council for Trade in Services, Legal Services - Background Note by the Secretariat, S/C/W/318 (14 June 2010); Council for Trade in Services, Legal Services - Background Note by the Secretariat, S/C/W/43 (6 July 1998). These analyses are available on the WTO website in English French and Spanish. See http://www.wto.org/english/tratop_e/serv_e/legal_e/legal_e.htm (click on the link for the background note on legal services)

With respect to the substantive obligations contained in the GATS, it is important for Member Bars to understand that there are two different kinds of obligations created by the GATS: 1) some GATS provisions apply to every WTO Member State and every type of service provided in that country, including legal services; 2) other obligations, however, apply only if a country chose to “opt-in” and list legal services on a document called its “*Schedule of Specific Commitments*.” When a WTO Member State lists a particular service sector on its *Schedule* – such as legal services – it is generally permitted to set the conditions of its additional obligations. For each particular sector that it lists, a WTO Member State will have to comply with the market access and national treatment provisions found in GATS Articles XVI and XVII, EXCEPT AS OTHERWISE NOTED. In other words, each WTO Member State may set the conditions of these additional obligations. (The only exception is that a WTO Member State must comply with certain domestic regulation provisions, without derogation, for each service sector listed on its *Schedule of Specific Commitments*.)

The *Schedules of Specific Commitments* were completed by every WTO Member State when it joined the WTO. Each WTO Member State’s *Schedule of Specific Commitments* is different and unique. The *Schedules* contain two kinds of promises. First, the *Schedules* include promises that apply “horizontally,” that is, to all sectors. In addition, each country identifies those specific service sectors for which the country is willing to assume additional obligations. These additional obligations are assumed by listing a particular service sector – such as legal services – on a country’s *Schedule of Specific Commitments* and by listing in the market access or national treatment columns any exceptions or limitations that the WTO Member wants to include. These limitations are listed according to four “modes of supply” by which legal services may be provided.

According to a 2010 WTO Secretariat Report, seventy-six countries listed legal services on their *Schedules of Specific Commitments*. Unfortunately, however, the story is even more complicated. There are some obligations that will apply to legal services as soon as a country included legal services on its *Schedule*. Whether other obligations in the GATS apply, however, depends on the *manner* in which the country included legal services on its *Schedule*. In other words, when a country listed legal services on its *Schedule*, it could elect the degree to which it wanted to comply with certain obligations, such as *market access*, *national treatment* and certain *domestic regulation* obligations.

Thus, in order to understand what your country has promised or is being asked to promise with respect to legal services, you will need to be able to read and understand your country’s *Schedule of Specific Commitments*. In order to understand the *Schedule*, you will need to understand the terminology used in the *Schedules*, which includes references to legal services being delivered through Mode 1, Mode 2, Mode 3 and Mode 4. The sections that follow provide additional information about the items discussed in this Executive Summary.

II AN INTRODUCTION TO THE GATS

What is the WTO?

The WTO is the acronym used to refer to the World Trade Organization. The World Trade Organization was created by an agreement that was signed in 1994 and took effect on January 1, 2005. The document creating the WTO is called the *Agreement Establishing the World Trade Organization*.

What is the GATS?

“GATS” stands for General Agreement on Trade in Services. The GATS is one of the agreements that were signed in April 1994 when the *Agreement Establishing the WTO* was signed.

The GATS was the first multilateral global trade agreement that applied to services, rather than goods. Accordingly, the GATS raised new issues that Member Bars may not previously have faced. As the WTO web page explains: “This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities is the most pertinent example.”

When Was the GATS Created?

The GATS and other trade agreements emerged from a round of trade negotiations that are commonly referred to as the “Uruguay Round.” These multi-year negotiations concluded on December 15, 1993. The final documents were signed on April 15, 1994 in Marrakech, Morocco. Pursuant to these agreements, the WTO was established on January 1, 1995.

Are Legal Services Covered by the GATS and How are They Defined?

The short answer to the first question is “yes.” The GATS applies to all trade in services, including professional services and thus legal services.

Although it is clear that the GATS applies to all “legal services,” it is less clear what the term “legal services” covers. As is explained in greater detail on pages 13 and 39, *infra*, there has been a significant amount of variation in the ways in which individual WTO Members have defined the legal services for which they are making promises. The IBA has taken a leading role in suggesting how legal services should be defined during GATS negotiations

How Is the GATS Enforced?

An important fact to know about the GATS is that the WTO does not monitor or “police” a country’s regulations and that the GATS may not be enforced by individuals. It is a government-to-government agreement. It may only be enforced by governments, which may allege that another WTO Member State has not honored its commitments. Disputes are

handled in a multi-stage process pursuant to the Dispute Settlement Understanding (DSU), which was another one of the agreements annexed to the *Agreement Establishing the World Trade Organization*. The WTO maintains an extensive website devoted to the WTO Dispute Settlement process. See WTO: Dispute Settlement, www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Under the Dispute Settlement Understanding, the WTO Appellate Body has the ultimate right to resolve disputes and authorize retaliatory trade sanctions. As a result, this remedy may be cumbersome to invoke because a lawyer may have difficulty persuading his or her government to bring a claim. Once a claim is brought, however, this remedy is a powerful tool.

What are Some of the Misunderstandings that the WTO Has Sought to Correct?

The WTO website has a section on *GATS Fact and Fiction* in which it seeks to correct some of the misunderstandings and scare stories about the GATS. See www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf. This WTO webpage has said that one of the misunderstandings about the GATS is that the WTO has the power to impose its will on WTO Member States. This is incorrect because countries join the WTO voluntarily and the WTO agreements and documents are the result of consensus among governments. Further, any WTO Member State may withdraw from the WTO on six months' notice.

The WTO also points out that the GATS requires liberalization of restrictive trade rules, but not necessarily deregulation. Each WTO Member State is free to choose its own regulatory objectives. So long as a country's objectives are legitimate, the focus is on the *means* used to achieve those objectives and whether the means are more trade restrictive than necessary. Indeed, in some cases, trade liberalization could lead to the need for more regulation, rather than less regulation.

III THE KEY PROVISIONS IN THE GATS THAT ARE GENERALLY-APPLICABLE:

What Should IBA Member Bars Know About the Four-Part Structure of the GATS?

It is useful to think about the GATS as having a four-part structure. First, a Member Bar must learn which provisions of the GATS apply to trade in ALL legal services in all WTO Member States. Second, one must determine if a country exempted itself from the most-favored nation provision in the GATS (the *MFN Exemption List*). Third, one must consult the *Schedules of Specific Commitments* to find out what additional obligations in legal services, if any, the country agreed to (and whether the country listed any limitations or “standstill” provisions in its Schedule.) Fourth, one should recognize that two provisions in the GATS mandate ongoing work that is relevant to legal services.

This four-part analysis can be represented as follows:

Step 1:	Step 2:	Step 3:	Step 4:
Analyze the general commitments that a country assumes by virtue of joining the WTO and signing the GATS.	Has the country exempted itself from the MFN requirement that is part of the general commitments?	What does the country’s Schedule of Specific Commitments promise with respect to legal services?	What ongoing work does the GATS mandate?

The Handbook sections that follow will analyze each of these steps in turn so that the reader will understand the GATS provisions that apply during each stage of the analysis.

ANALYSIS STEP 1: What are the Most Important GENERALLY-APPLICABLE Provisions in the GATS For Legal Services?

There are certain GATS provisions that apply to every service sector in every WTO Member State. Thus, by agreeing to become a WTO Member State, a country agrees to abide by these provisions of the GATS. It is important for IBA Member Bars to realize that these generally-applicable GATS provisions apply to trade in legal services in every WTO Member State.

The FOUR generally applicable provisions that are usually considered the most important are:

- 1) the most-favored nation requirement (GATS art. II);
- 2) transparency (GATS art. III);
- 3) the procedural review section of the domestic regulation provision (GATS art. VI, para. 2); and
- 4) recognition (GATS art. VII).

What is the Most-Favored Nation Provision in the GATS?

The most-favored nation (MFN) requirement in GATS Article II applies to all WTO Member States and it represents one of the most fundamental ideas behind the GATS. With very few exceptions, the GATS MFN provision requires each country to accord *all* WTO Member States the same (“no less favourable”) treatment that it provides to *any* WTO Member State with respect to measures affecting trade in legal services. In other words, it is an “equal protection” type of provision that requires equal treatment as between foreign countries. (The MFN exceptions, which are very limited, are discussed on page 10, *infra*.)

What is the Transparency Requirement in the GATS?

Article III of the GATS is a transparency requirement. Similar to the MFN provision, Article III is “generally applicable” and applies to all services offered by all WTO Member States. This provision requires that all relevant measures be published or otherwise publicly available. Thus, Member Bars should work to ensure that all of the measures regulating legal services in its country are, or will be, published or publicly available. This may mean a change in the way your Bar undertakes rule-making and the publicity relating to rules made.

What is Paragraph 2 in the “Domestic Regulation” Provision in the GATS?”

A third “generally-applicable” provision is found in GATS Article VI, paragraph 2. GATS Article VI is the domestic regulation provision. Domestic Regulation provisions include some of a country’s licensing and qualification rules for its own lawyers. The Domestic Regulation article in the GATS has six subsections, only one of which is generally-applicable to all WTO Member States.

GATS Article VI, paragraph 2 requires each WTO Member State to maintain or institute procedures to have an objective and impartial review of any negative decisions by a country to exclude foreign service providers, in this case, foreign lawyers. Remedies must be available. Article VI, paragraph 2 expressly states, however, that it does not apply if it would be inconsistent with a country’s constitutional structure or the nature of its legal system. (The other five paragraphs of Domestic Regulation provision are discussed on pages 15–17 and 34–36)

What is the “Recognition” Provision in the GATS?

The fourth generally-applicable provision worth noting is GATS Article VII which is titled “Recognition.” Some regulators of legal services may decide that they are willing to “recognize” the qualifications of lawyers who are already licensed in another jurisdiction and permit those lawyers to practice in the Member State.

Article VII envisions that recognition issues may be handled through “Mutual Recognition Agreements” or MRAs negotiated between GATS Member States. This section creates a structure by which Member States can negotiate “Mutual Recognition Agreements” or MRAs. These are bilateral agreements and may seem a good way to avoid the MFN rule mentioned above. However, any WTO Member State that enters into an MRA with another must give

all WTO Member States the opportunity to participate on an equal footing in an MRA. The WTO has been notified of very few MRA's to date, and none, apparently, in the field of legal services.

V ANALYSIS STEP 2: THE MFN EXEMPTION

As explained above, Member Bars may find it useful to think about the GATS as having four parts: 1) the generally-applicable provisions of the GATS; 2) the MFN exemption provisions; 3) the GATS requirements that apply only if, and to the extent that, legal services are listed on a country's *Schedule of Specific Commitments*; and 4) the provisions that require ongoing work. This section addresses the second part of the analysis.

There are three circumstances in which the most-favored nation or MFN requirement need not be applied. First, when a country joined the WTO, it was possible for it to exempt itself from the MFN requirement. As is explained below, very few countries exempted themselves from this MFN requirement with respect to legal services. Second, GATS Article VII permits a WTO Member State to negotiate a "Mutual Recognition Agreement" with another country, provided that the WTO is notified at the onset of such negotiations and provided that each country is willing to offer the same MRA to all other WTO Member States. Third, provided notice is given, GATS Article V permits more favorable treatment resulting from Economic Integration agreements, such as the European Union and NAFTA agreements.

What is the MFN Exemption List?

As noted above, when a country joined the WTO, it had a one-time opportunity to opt out of MFN requirements. It could do so for an entire service sector or for part of a service sector. The WTO webpage lists those Member States that have chosen to exempt themselves from MFN requirements. See www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

Which Countries Have a MFN Exemption for Legal Services?

According to the WTO Secretariat, five Members have MFN exemptions in legal services, while five other Members have exemptions in professional services. The countries that have MFN exemptions for legal services are: Brunei Darussalam, Bulgaria, Dominican Republic, Lithuania, and Singapore. The countries that have MFN exemptions for professional services are: Costa Rica, Honduras, Panama, and Turkey.² A 2010 WTO Secretariat paper analyzing the legal services sector (cited on p. 3) states that two legal services-specific exemptions allow for MFN-inconsistent discretionary approval for the establishment of law firms. A third legal services-specific exemption covers all measures pertaining to the provision of legal services, and applies to all countries on the basis of reciprocity. A fourth WTO Member reserved the right to allow attorneys from foreign countries to participate as advocates in court only in accordance with bilateral agreements on legal assistance. The fifth exemption extends full national treatment for Modes 3 and 4 to companies and citizens of countries with which preferential arrangements exist. All of the professional services exemptions maintain reciprocity as a condition for authorizations to exercise professional activities, including legal services.

2 Paragraph 68 of the 2010 Secretariat paper states that there are five professional services MFN exemptions, but only lists four WTO Members in the footnote.

When Does the MFN Exemption Expire?

One of the unresolved issues in the GATS is the question of the duration of a country's MFN exemption. The WTO explains the issue as follows on its website:

“In principle, these exemptions should not last for more than ten years. As mandated by GATS, all these exemptions are currently being reviewed to examine whether the conditions which created the need for these exemptions in the first place still exist. And in any case, they are part of the current services negotiations.”

In sum, most Member States (including the major players involved in the export and import of legal services) have not put legal services on their MFN exemption list and thus will not be permitted to have a reciprocity requirement for foreign lawyers without violating the GATS, unless it is pursuant to an Economic Integration agreement or an MRA.

V Analysis Step 3: THE SCHEDULES OF SPECIFIC COMMITMENTS

In addition to the generally-applicable provisions in the GATS and the MFN exemption lists, Member Bars should also know that there are certain provisions in the GATS that apply only if a country listed legal services on its *Schedule of Specific Commitments*. In other words, there were GATS provisions that a country could “opt-in” to at the time it joined the WTO. These “opt-in” commitments are listed on the document called the country’s *Schedule of Specific Commitments*.

How Was Each Country’s Schedule of Specific Commitments Developed?

Each country’s *Schedule of Specific Commitments* was developed based on a request-offer system; countries exchanged information about their proposed *Schedules of Specific Commitments* during the Uruguay Round negotiations. This request-offer system of negotiations permitted a country to know, before it finalized its own *Schedule of Specific Commitments*, what it could expect from other countries. These *Schedules* were subject to fierce negotiations, with some countries saying *in essence* “I’ll include this service on my *Schedule* with these conditions if you will include that service on your *Schedule*.” At a certain specified deadline in December 1993, each country had to submit its final proposal, including its *Schedule of Specific Commitments*.

Where Can I Learn Whether a Particular Country Listed Legal Services on its Schedule and What Types of “Limitations” That Country Included on its Schedule Regarding its Regulation of Foreign Lawyers?

There are several different places where a Member Bar can see other countries’ *Schedules*. The WTO website now contains the *Schedules* of WTO Member States. See WTO, *Schedules of Commitments and lists of Article II exemptions*, at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (valid May 2012). This WTO website includes useful information, including a link to a document that explains how to read the schedules and what the GATS terminology means.

The *Schedules* are also available in other places. For example, the trade departments of WTO Member State governments often post their schedules. In the past, the WTO Secretariat generated “pre-defined reports” showing various types of specific commitments. Although the WTO no longer posts these predefined reports on its webpage, its search engine allows one to generate such a report (in pdf or excel format). See http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm

The predefined reports for legal services that were previously found on the WTO webpage are still available on this webpage: http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/uruguay.html

Did Many Countries Include Legal Services on Their *Schedules of Specific Commitments*?

Yes! Many countries have listed some or all types of legal services on their *Schedules* as a covered service. As a result, for many WTO Member States, these specified legal services are subject those additional “opt-in” provisions in the GATS which are described below.

According to ¶ 48 of the 2010 WTO Secretariat paper on Legal Services (cited on page 3) “a total of 76 Members have taken commitments in Legal Services. Separate schedules exist for Aruba and the Netherlands Antilles, bringing the number of schedules with commitments to 78.” Annex III of the 2010 Secretariat paper provided a list of the WTO Member States that had made specific commitments in legal services and noted the types of legal services for which commitments were made. The Secretariat paper summarizes some of the different ways in which WTO Member States described their legal services specific commitments. For example, approximately 60 Member States “scheduled” legal services involving advisory/consultancy services on home country (i.e. foreign) law and international law. Section V on page 14 of the 2010 Secretariat paper provides useful additional detail.

“The WTO Members who made some sort of legal services commitment include:

Albania, Antigua and Barbuda, Argentina, Armenia, Aruba, Australia, Austria, Barbados, Bulgaria, Cambodia, Canada, Cape Verde, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, European Communities, Estonia, Finland, FYR Macedonia, Gambia, Georgia, Guyana, Hungary, Iceland, Israel, Jamaica, Japan, Jordan, Kyrgyz Republic, Latvia, Lesotho, Liechtenstein, Lithuania, Malaysia, Moldova, Nepal, Netherlands Antilles, New Zealand, Norway, Oman, Panama, Papua New Guinea, Poland, Romania, Rwanda, Saudi Arabia, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, South Africa, Sweden, Switzerland, Chinese Taipei, Thailand, Tonga, Trinidad and Tobago, Turkey, Ukraine, United States, Venezuela, and Viet Nam. Russia has also made specific commitments in legal services that will take effect once its WTO membership takes effect.”

It is important to understand, however, that even though many countries included legal services on their *Schedules of Specific Commitments*, these legal services commitments are subject to the limitations contained in the “market access” and “national treatment” columns on each WTO Member’s *Schedule of Specific Commitments*. These limitations (or “standstill provisions” as they often are referred to) are discussed below.

What Additional Provisions of the GATS Apply Once a Country Has Listed Legal Services on its *Schedule of Specific Commitments*?

If a country has listed some or all types of legal services on its *Schedule of Specific Commitments*, then there are additional provisions that will apply to those legal services and that are important to know. These additional obligations are: 1) market access; 2) national treatment; 3) additional commitments, if any, and 4) certain aspects of the domestic regulation provision.

What is the “Market Access” Provision in the GATS?

Article XVI is the “market access” provision in the GATS. If a WTO Member lists a particular sector, such as legal services, on its *Schedule of Specific Commitments*, then that country has agreed to provide “market access” with respect to that legal services sector, subject to any limitations noted in its *Schedule of Specific Commitments*. In other words, the WTO Member is making GATS Article XVI “market access” commitments EXCEPT AS OTHERWISE NOTED ON ITS SCHEDULE.

GATS Article XVI is the “market access” provision. Except as otherwise noted in a country’s *Schedule of Specific Commitments*, this market access provision would forbid limitations on the number of service providers, for example by quotas, numerical limitations, or monopolies. The market access provision also requires that access to the legal services market not be provided in a manner less favorable than is set forth in the country’s *Schedule of Specific Commitments*. To state it differently, the market access provision focuses on what a WTO Member State may not do, employing a negative approach.

The market access provision could be important in countries that place a limit on the number of foreign lawyers who will be permitted to practice law in the country. The prohibition on “monopolies” might also be considered important. Virtually all countries that have made legal services commitments have included “except as otherwise noted” –types of limitations in their *Schedules*. Thus, when reading a *Schedule*, it is important to consider not only the nature of legal services commitments specified, but also the limitations contained in that Member’s *Schedule of Specific Commitments*.

What is the “National Treatment” Provision in the GATS?

Article XVII of the GATS is the national treatment provision. If a country lists all or part of a particular sector, such as legal services, on its *Schedule of Specific Commitments*, then that country has agreed to provide “national treatment” with respect to that sector, subject to any limitations noted in its *Schedule of Specific Commitments*. In other words, by listing legal services on its Schedule, a WTO Member is agreeing to provide “national treatment” EXCEPT AS OTHERWISE NOTED ON ITS SCHEDULE.

The “national treatment” provision is important because it acts as an equal protection clause for foreign lawyers as compared to domestic lawyers. If a country has “scheduled” legal services, this article would prohibit regulators from providing foreign lawyers with treatment that is less favorable than the treatment it accords to domestic lawyers, except as specifically noted in the *Schedule*.

Article XVII states that countries may meet the “national treatment” requirement either by according formally identical treatment or by according formally different treatment. The article explains that formally identical or formally different treatment shall be considered less favorable if it modifies the conditions of competition in favor of domestic lawyers.³

3 For additional information about national treatment, see *Legal and Economic Principles of World Trade Law : The Genesis of the GATT, the Economics of Trade Agreements, Border Instruments, and National Treatment, Report to the ALI* (April 2012)(Cambridge Press).

What is Meant By “Limitations” or the Term “Standstill” Provisions?

As was explained above, by listing some or all types of legal services in its *Schedule of Specific Commitments*, a country agrees to provide market access and national treatment for trade in legal services, *except as otherwise noted in the country’s Schedule*. These “except as otherwise noted” provisions can be “limitations” to the WTO Member’s market access commitments, national treatment commitments, or both. To state it differently, if a rule about legal services is listed in the “market access” or “national treatment” columns of a country’s *Schedule*, this means that the country reserves the right to continue using that rule, notwithstanding the “market access” and “national treatment” obligations that apply with respect to that sector. The rules that a country lists in its *Schedule* sometimes are referred to as “standstill” provisions because the country has not promised to liberalize these provisions, but may not retreat from these provisions, either. (GATS Article XX(2) states that if a limitation applies to both market access and national treatment commitments, it need only be listed once, in the market access column of that WTO Member’s *Schedule of Specific Commitments*.)

To summarize, if a country has listed legal services on its *Schedule*, then future laws and current laws not addressed in the *Schedule* governing legal services must comply with the market access and national treatment provisions in the GATS.

What are the “Additional Commitments” that May Appear in a Schedule?

GATS Article XVIII addresses the topic of “Additional Commitments.” As its name suggests, Article XVIII expressly authorizes WTO Member States to negotiate additional commitments for scheduled sectors. (Any such commitments would be “additional” to the market access, national treatment and domestic regulation commitments that a country assumes when it lists a particular service in its *Schedule*.)

“Reference papers” are one method that WTO Member States may use to indicate their additional commitments. A reference paper sets out the terms and conditions of liberalization (usually for a specified sector.) Once a reference paper is drafted, each WTO Member State may decide whether to accept those provisions. If Member States accept a reference paper, they will indicate this in the “additional commitments” column of their *Schedules*. A Member State may indicate that it accepts the Reference Paper minus certain provisions. One example of a reference paper is the Reference Paper on Telecommunications, which some WTO Member States included in the “additional commitments” column of their *Schedules*.

What are the Remaining “Domestic Regulation” Provisions?

As noted earlier, the Domestic Regulation provision of the GATS is found in Article VI. Four of its six paragraphs only apply to service sectors that are listed (or “scheduled”) in a country’s *Schedule of Specific Commitments*. The Domestic Regulation paragraphs that apply only to scheduled services are paragraphs 1, 3, 5 and 6, which state:

- “1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

...

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.
5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
 - (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
 - (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
- (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member. (The term “relevant international organizations” refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.)
6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.”

Thus, paragraphs 1, 3 and 6 of the Domestic Regulation provision apply, *without limitation* (i.e., without the possibility of derogation) if a country has listed legal services on its *Schedule of Specific Commitments*. In this respect, paragraphs 1, 3 and 6 differ from the market access and national treatment obligations because a country may not create “standstill provisions” with respect to these domestic regulation obligations or otherwise exempt itself from these three paragraphs.

Since many WTO Member States have included legal services in their *Schedules*, many Members will be obliged to comply with paragraphs 1, 3 and 6, regardless of any particular limitations included in their *Schedules of Specific Commitments*. Therefore, many WTO Member States will have to: 1) ensure that their measures of general application are *administered* in a reasonable, objective and impartial manner; 2) inform a lawyer from another WTO Member State within a reasonable time of any decision concerning the application and respond to requests about the status of the application; and 3) provide adequate procedures to verify the competence of lawyers from other Member States.

Paragraph 5 of the Domestic Regulation provision is different, however. Paragraph 5 has limitations both with respect to the time period during which it applies and with respect to the extent to which a WTO Member State is bound by its obligations. Paragraph 5 applies **ONLY** during the time period in which disciplines for the particular services sector have

not yet been developed. Because there are not yet disciplines applicable to legal services, paragraph 5 currently applies to legal services.

Moreover, unlike paragraphs 1, 3 and 6, the obligations owed under Paragraph 5 of Article VI may depend on the MANNER in which the WTO Member State scheduled legal services. This is because, on the one hand, Paragraph 5 prohibits WTO Member States from applying their domestic regulation provisions if it would “nullify or impair such specific commitments in a manner which does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c).” On the other hand, Paragraph 5 does not require the Member State to act in such a manner if it could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made. In determining what reasonably could have been expected, one presumably would examine the country’s specific commitments. As a result of this structure, Paragraph 5 might be viewed as creating the equivalent of a “standstill” provision. Paragraph 5(b), however, also specifies that “in determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.”

In sum, paragraphs 1, 3 and 6 of article VI’s domestic regulation provision apply without limitation once a country includes legal services on its *Schedule of Specific Commitments*, as many countries did. Paragraph 5, however, effectively creates a “standstill” provision because its requirements do not apply if these requirements could not reasonably have been expected of Members at the time that specific commitments in those sectors were made.

(Section XI of this Handbook, *infra*, explains in more detail the meaning of the Domestic Regulation article and the efforts that have been undertaken to implement Article VI, paragraph 4 and develop necessary disciplines.)

IV ANALYSIS STEP 4: TWO GATS PROVISIONS REQUIRE ONGOING WORK

The prior sections explained that some GATS provisions are generally applicable to the legal services in all WTO Member States, whereas other GATS provisions (notably the market access and national treatment provisions) apply only if a WTO Member voluntarily “opted in” to those provisions by “scheduling” legal services and only to the degree specified in that member’s *Schedule of Specific Commitments*. In other words, a WTO Member State was free to create “except as otherwise noted” provisions. Although these constitute the bulk of the provisions in the GATS, it is important for IBA Member Bars to be aware of two additional GATS provisions that require ongoing work on the part of WTO Member States. These provisions are described below.

What is the “Progressive Liberalization” Provision in the GATS?

GATS Article XIX is entitled “progressive liberalization.” This article is important because it REQUIRED that a new round of negotiations about services begin within five years of the establishment of the WTO on January 1, 1995. The new services negotiations were launched by the WTO in February 2000 and were originally referred to as the GATS 2000 or “built-in agenda” negotiations. As explained in more detail in Section X of the Handbook, these services negotiations were ultimately folded into a comprehensive set of negotiations that are now known as the Doha Development Agenda or Doha Round. The goal of these negotiations is to generate further trade liberalization.

What is the Obligation in Article VI, para. 4 to Develop “Disciplines”?

In addition to the ongoing work required by the “progressive liberalization” provision, the GATS requires ongoing work to develop “disciplines on domestic regulation.” GATS Article VI, paragraph 4 requires ongoing work because it directs the Council for Trade in Services (or its delegate) to develop “disciplines” to ensure that measures relating to qualification and licensing requirements do not constitute unnecessary barriers to trade. This paragraph states:

- “4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:
 - (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
 - (b) not more burdensome than necessary to ensure the quality of the service;
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

Sections X and XI of the Handbook explain the developments that have occurred in implementing GATS Articles VI(4) and XIX, both of which imposed ongoing obligations.

Recap: A Summary of the Key Provisions in the GATS

In sum, for Member Bars trying to master the key provisions in the GATS, it may be useful to remember that some of the GATS' provisions are generally-applicable, some provisions apply only if a country placed legal services on its *Schedule of Specific Commitments* and some provisions are the basis for the ongoing work at the WTO that is relevant to legal services.

The chart below helps summarize this information. This four-part analysis can be represented as follows:

Step 1:	Step 2:	Step 3:	Step 4:
<p>Analyze the general commitments that a country assumes by signing the WTO Agreement, which includes the GATS:</p> <ul style="list-style-type: none"> • Most Favored Nation (MFN) treatment (art. II) • Transparency (art. III) • Domestic Regulation Review procedures (art. VI, para. 2) • Recognition (art. VII) 	<p>Has the country exempted itself from the MFN requirement that is part of the general commitments?</p> <ul style="list-style-type: none"> • Is the country one of the few that exempted legal services from its MFN obligations? 	<p>What does the country's Schedule of Specific Commitments promise with respect to legal services?</p> <ul style="list-style-type: none"> • Are legal services "scheduled"? • If legal services are scheduled, what limitations are included with respect to: <ul style="list-style-type: none"> - Market Access (art. XVI) - National Treatment (art. XVII) • For scheduled legal services, the WTO Member must comply with art VI, para. 1, 3 & 6 	<p>What ongoing developments does the GATS require?</p> <ul style="list-style-type: none"> • Progressive Liberalization (art. XIX) <p>[this is the basis for the Doha Round negotiations]</p> <ul style="list-style-type: none"> • Art. VI, para. 4 requires the Council (or its delegate) to consider the development of disciplines for domestic regulation <p>[this work currently is ongoing in the Working Party on Domestic Regulation]</p>

table continued

Step 1:	Step 2:	Step 3:	Step 4:
		<ul style="list-style-type: none"> • If legal services are scheduled and there are no applicable disciplines yet, what does art. VI, para. 5 require with respect to domestic regulation provisions? • Are there any “additional commitments” regarding legal services? (art. XVIII) 	

VII UNDERSTANDING THE “MODES OF SUPPLY” LANGUAGE THAT APPEARS ON A COUNTRY’S SCHEDULE OF SPECIFIC COMMITMENTS

In addition to the terminology used in the GATS’ substantive provisions, there is additional terminology with which Member Bars should become familiar. When each WTO Member State filed its *Schedule of Specific Commitments*, there was a specific format that it was required to use. This format required a country’s *Schedule of Specific Commitments* to distinguish among the four different “modes of supply” set forth in GATS Article I(2).

What are the Four “Modes of Supply” Referred to on a Country’s *Schedule of Specific Commitments*?

The four modes of supply by which legal services may be offered are:

- Mode 1 - Cross-border supply: the possibility for non-resident service suppliers to supply services cross-border into the Member’s territory.
- Mode 2 - Consumption abroad: the freedom for the Member’s residents to purchase services in the territory of another Member.
- Mode 3 - Commercial *presence*: the opportunities for foreign service suppliers to establish, operate or expand a commercial presence in the Member’s territory, such as a branch, agency, or wholly owned subsidiary.
- Mode 4 - Presence of natural *persons*: the possibilities offered for the entry and temporary stay in the Member’s territory of foreign individuals in order to supply a service.

What Would “Mode 1” Look Like for Legal Services?

In Mode 1, or Cross-Border Supply, the service itself crosses the border. Thus, Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the country to clients inside the country; this delivery may occur by means of mail, telephonically, or electronically. This is probably the most frequently used Mode, occurring numerous times daily across many of the world’s borders when lawyers offer advice to a client in a different country by phone, fax or e-mail. It does not usually give rise to complaints or problems, possibly because it is very difficult to restrict through regulation. If a WTO Member State has any foreign trade at all, there undoubtedly are domestic lawyers in the country who are engaged in Mode 1.

What Would “Mode 2” Look Like for Legal Services?

Mode 2, or Consumption Abroad, involves the purchase abroad by a country’s citizens of the services of foreign lawyers. There are no statistics for the frequency of use of this Mode, but it is most likely to apply in the business sphere following investment abroad.

What Would “Mode 3” Look Like for Legal Services?

Mode 3, or Commercial Presence, involves a foreign entity’s establishment of a permanent presence in a country, such as a branch office. This Mode is frequently thought about when the GATS is discussed among lawyers. It will usually involve the establishment of an office in a foreign country by one of the large commercial firms. It is frequently politically contentious, and many countries have barriers against foreign law firms being able to set up offices within their borders.

What Would “Mode 4” Look Like for Legal Services?

Mode 4, or the Presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter a country in order to offer legal services. This is frequently, but not necessarily, linked to Mode 3 since, if a law firm wishes to establish an office abroad, it will also often wish to staff the office with at least some lawyers from the home country. (The lawyers themselves would be an example of Mode 4.) It also applies if the foreign lawyer “flies in” temporarily and is physically present to provide services.

What is the Difference Between Mode 1 and Mode 4 for Legal Services?

It is easy to confuse Mode 1 and Mode 4. The difference is that Mode 1 applies to the legal services PRODUCT and Mode 4 applies to the PERSON who delivers the legal services. The difference between Mode 1 and Mode 4, then, is that in Mode 1, it is the service that crosses the border for example, in a “virtual” fashion by mailing, emailing, or faxing an “opinion letter” whereas in Mode 4, it is the service provider or lawyer who crosses the border. It may be of interest for you to know that the tax laws in some countries may treat the Mode 1 delivery of legal services differently than the country treats the Mode 4 delivery of legal services.

What Does the Term “Unbound” Mean When Used in a *Schedule of Specific Commitments*?

The term “unbound” frequently appears in the legal services section of Member States’ *Schedules of Specific Commitments*. This term may appear in either the “market access” or “national treatment” columns. When the term “unbound” appears, it means that the country has not agreed that legal services must comply with that particular GATS requirement. In other words, if the term “unbound” appears in the “market access” column of Mode 4, then the country has declined to provide market access for mode 4 provision of legal services (that is, physical delivery of services in the country by foreign lawyers). Similarly, if the term “unbound” appears in the “national treatment” column, then the country has declined to provide national treatment in Mode 4.

The WTO states: “All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.” It is important to note that the term “unbound” refers to a country’s minimum GATS commitments; the country is

free to, and often does, provide for a *better* level of treatment than is specified in its *Schedule of Specific Commitments*.

VIII PUTTING THE “MODES OF SUPPLY” AND “SCHEDULE OF SPECIFIC COMMITMENTS” TOGETHER

What Would a *Schedule of Specific Commitments* Actually Look Like?

The WTO has posted on its website a document called “WTO Guide to Reading Schedules;” this document is found at www.wto.org/english/tratop_e/serv_e/guide1_e.htm. Among other things, this WTO guide to reading *Schedules* states:

“The national schedules all conform to a standard format which is intended to facilitate comparative analysis. For each service sector or sub-sector that is offered, the schedule must indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained.

A commitment [for any particular sector or subsector] therefore consists of eight entries which indicate the presence or absence of market access or national treatment limitations with respect to each mode of supply. The first column in the standard format contains the sector or subsector which is the subject of the commitment; the second column contains limitations on market access; the third column contains limitations on national treatment. In the fourth column governments may enter any additional commitments which are not subject to scheduling under market access or national treatment.

In nearly all schedules, commitments are split into two sections: *First, “horizontal” commitments which stipulate limitations that apply to all of the sectors* included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the *second section of the schedule*, commitments which apply to trade in services in a particular sector or subsector are listed.”

Reproduced on p. 26 is an excerpt from a portion of the European Union *Schedule* that addresses legal services. (When reading this *Schedule*, you would also want to remember to check the “horizontal commitments” portion of the European Union *Schedule*, particularly the portion concerning the movement of natural persons or Mode 4.) The left hand column identifies the legal services sector for which commitments are made. The second and third columns provide examples of market access and national treatment limitations. These columns also illustrate how the limitations are expressed according to “modes of supply.” The 1), 2) and 3) in these columns refer to particular modes of supply. In the EU Schedule of Specific Commitments, the letters “F,” “P,” “D,” and “Dk” refer to specific EU Member States.

Should I Expect to Find Any Mistakes as I Look at Various *Schedules of Specific Commitments*?

Yes! It is worth remembering that there are sometimes mistakes in the way in which countries have completed the legal services portion of their *Schedules of Specific Commitments*. The GATS was the first global agreement to cover services. There has been some confusion about which kinds of regulations should be scheduled as market access restrictions, which kind of regulations are national treatment limitations and which kinds of regulation are domestic regulation provisions. Therefore, you can expect to see mistakes in the *Schedules*.

Have I Learned Enough about the GATS to Understand How the GATS Might Affect the Regulation of Foreign Lawyers in My Country?

In order to understand a country's obligations about legal services under the GATS, one must go through several steps of analysis. **FIRST**, you should recognize that some provisions - including a key provision with respect to domestic regulation - apply to all trade in services, whether or not scheduled. **SECOND**, you must consult the MFN exemption list; if a country is among the overwhelming majority of WTO Members that has no MFN exemption for legal services, then the country must comply with the GATS' Most-Favored Nation provision. **THIRD**, you must consult that country's *Schedule of Specific Commitments* to determine whether the WTO Member "scheduled" legal services, which would mean that, except as otherwise noted on its *Schedule*, the WTO Member agreed to comply with the GATS market access and national treatment provisions. As part of this third point, you must be able to understand the distinctions in the modes of supply because a country's exceptions are listed as subsets of these four "modes of supply." **FINALLY**, you must understand that when the term "unbound" is used in a country's *Schedule* in the "market access" or "national treatment" columns, this means that the service in question need not comply with that particular GATS requirement with respect to the particular item that is listed as "unbound."

Modes of supply: 1) Cross-border supply 2) Consumption abroad
 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
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II SECTOR-SPECIFIC COMMITMENTS

Business Services <i>A. Professional Services</i>			
a) Legal advice home country law and public international law (excluding EC law)	<p>1) F, P: Unbound for drafting of legal documents.</p> <p>2) None</p> <p>3) D: Access subject to acceptance into a Bar Association according to the "Federal Lawyers Act" which requires establishment which is restricted to sole proprietorship or partnership only.</p> <p>F: Provision through SEL (anonyme, à responsabilité limitée ou en commandite par actions) or SCP only.</p>	<p>1) F, P: Unbound for drafting of legal documents.</p> <p>DK: Marketing of legal advice activities is restricted to lawyers with a Danish licence to practise and law firms registered in Denmark.</p> <p>2) None</p> <p>3) DK: Marketing of legal advice activities is restricted to law firms registered in Denmark. Only lawyers with a Danish licence to practise and law firms registered in Denmark may own shares in a Danish law firm. Only lawyers with a Danish licence to practise may sit on the board or be part of the management of a Danish law firm.</p>	<p>F: Host country law and international law (including EC law) are opened to the Members of the regulated legal and judicial profession.</p>

IX GATS IMPLEMENTATION EFFORTS - WTO SECRETARIAT PAPERS and OTHER RESOURCES

Has Anything Happened Since the GATS Was Signed and Do IBA Member Bars Need to Know about These Developments?

It is important for Member Bars to realize that much has happened since the GATS was signed in April 1994. As noted above, the GATS required WTO Members to commence progressive liberalization efforts within five years of the date the GATS took effect and to consider the development of any necessary disciplines on domestic regulation. These requirements, among others, are one reason why there has been a significant amount of what we will call GATS “implementation” efforts. An IBA Member Bar cannot fully understand the obligations imposed by the GATS until it examines these post-GATS developments.

This Handbook divides the GATS implementation efforts into four categories. While many of these developments occurred simultaneously, it is useful to think about them separately. The four post-GATS developments of which Member Bars should be aware include:

- Background and supporting work undertaken by the WTO Secretariat and others;
- GATS Track #1 developments, which involve the ongoing market access or Doha Round negotiations required by the progressive liberalization provision found in GATS Article XIX;
- GATS Track #2 developments, which involve the ongoing work of the WTO Working Party on Domestic Regulation to develop disciplines on domestic regulation that would apply to the legal profession
- The ongoing work of the International Bar Association.

Each of these four developments will be addressed below.

What Kinds of Analyses Has the WTO Secretariat Prepared that are Relevant to Legal Services?

The WTO Secretariat has collected data and prepared many background reports to aid WTO Member States in their work. (The key Secretariat papers are maintained on the Services: Analysis and Publications subpage of the WTO website: http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm (last visited May 23, 2012)).

The Papers on Legal Services

The WTO Secretariat has issued two papers on legal services, both of which contain useful information. As noted on p. 3, footnote 1, the first Secretariat paper was issued in July 1998. The title of this document is Council for Trade in Services, *Legal Services, Background Note by the Secretariat*, S/C/W/43 (July 6, 1998). The second paper is entitled Council for Trade in Services, *Legal Services - Background Note by the Secretariat*, S/C/W/318 (June 14, 2010).

Two Papers about Domestic Regulation that Have Been the Basis for the “Horizontal Disciplines” Discussion

In addition to the Secretariat’s Note on Legal Services, there are some other Secretariat papers that are relevant to the issue of legal services and disciplines for domestic regulation. In 1999, the WTO Secretariat prepared two papers that addressed “domestic regulation” and horizontal disciplines. These papers were issued one month before the new Working Party on Domestic Regulation was formed. Much of the early discussion about horizontal disciplines focused on the issues contained in these two Secretariat papers. The Secretariat’s papers identified four key issues: (1) necessity; (2) transparency; (3) equivalence; and (4) international standards. (The citations for these two papers are: Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, Note by the Secretariat, S/C/W/96 (Mar. 1, 1999); and Council for Trade in Services, *International Regulatory Initiatives in Services*, Note by the Secretariat, S/C/W/97 (Mar. 1, 1999)). Additional analyses are found here and through the document search facility: http://www.wto.org/english/tratop_e/serv_e/sanaly_e.htm and <http://docs.wto.org>.

Other Papers of Interest

Other papers of interest include an analysis of the economic effects of services liberalization and an analysis of “Mode 4” involving the “Presence of Natural Persons.” The titles of these papers are: Council for Trade in Services, *Economic Effects of Services Liberalization*, Background Note by the Secretariat, S/C/W/26 (Oct. 7, 1997) and Council for Trade in Services, *Presence of Natural Persons, (Mode 4)*, Background Note by the Secretariat, S/C/W/75 (Dec. 8, 1998)).

In addition to these WTO Secretariat papers, other entities have prepared documents that might be useful. For example, the Organization of Economic Cooperation and Development (OECD) has prepared several papers that might be of interest to IBA Member Bars. These include the OECD Trade Policy Working Paper No. 2, MANAGING REQUEST-OFFER NEGOTIATIONS UNDER THE GATS: THE CASE OF LEGAL SERVICES, TD/TC/WP(2003)40/FINAL (July 22, 2004) and Massimo Geloso Grosso and Rainer Lanz, SERVICES TRADE RESTRICTIVENESS: PROFESSIONAL SERVICES (OECD, Paris, July 2–3 2009).

Another document of interest might be the *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector* which the Council for Trade in Services approved on May 29, 1997. These *Guidelines* were prepared in order to facilitate the “Recognition” provision in the GATS. The *Guidelines* are nonbinding; the purpose of the *Guidelines* is to provide suggestions to WTO Member States about how they might negotiate bilateral or multilateral “recognition” agreements. Among other things, these *Guidelines* suggest the types of information that should be included within a “Mutual Recognition Agreement” (MRA), and they request notification to the WTO of the opening of negotiations concerning an MRA and the result.

As this section shows, there have been a number of developments since the GATS was signed that would be of interest to IBA Member Bars. Many of the relevant documents are listed in the Appendix to this Handbook.

X GATS IMPLEMENTATION EFFORTS – GATS TRACK #1 and the DOHA ROUND’S “PROGRESSIVE LIBERALIZATION” NEGOTIATIONS

What Is The Status Of The Doha Round Negotiations?

As noted above, GATS Article XIX required progressive liberalization negotiations to begin within five years of the time the GATS took effect. These negotiations began in 2000 and are still ongoing. These negotiations were originally known as “GATS 2000” negotiations; for over a decade they have been part of the Doha Development Agenda negotiations, which are also known as the Doha Round or the market access negotiations. The Doha Round negotiations were ongoing at the time this revised Handbook was written.

One goal of the Doha Round negotiations is for members to agree on further services liberalization, which would then be memorialized in revised GATS *Schedules of Specific Commitments*.

Has Anything Significant Happened During The Doha Round?

The Doha Round has not yet concluded but it has generated both procedural documents and substantive documents. The procedural documents have included items such as target deadlines (most of which have been missed) and agreements about topics to be covered and negotiation methods (such as the request-offer approach to revising one’s *Schedule*.) WTO Members have held a Ministerial Meeting approximately every two years. Many of these Ministerial Meetings have culminated in a document called a “Declaration” that sets forth any agreements reached during the Ministerial Conference. For example, the 2005 *Hong Kong Ministerial Declaration* included target deadlines and procedures; paragraphs 25-27 and Appendix C addressed Services, which would include legal services. In addition to these official WTO Member State documents, “procedural issues” have been addressed in some of the WTO Secretariat and other papers referred to in the prior section.

In addition to these “procedural” documents, WTO Members have – either individually or collectively – issued what might be considered to be more substantive documents. The WTO Council for Trade in Services adopted *Disciplines on Domestic Regulation in the Accountancy Sector* which will take effect upon the conclusion of the Doha Round. The WTO Council also endorsed the previously-mentioned *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*. As part of the Doha Round negotiations, individual WTO Members have prepared “requests” to other WTO Member States and have prepared “offers.” (On occasion, several WTO Members will act collectively and make a joint proposal.)

What Is The “Request-Offer” Negotiation Process?

Most of the Doha Round market access negotiations have taken place using the “request-offer” format. In this format, each WTO Member may send a “request” to another WTO Member

(country) in which the requestor asks for specific changes to the specific commitments found in that recipient's *Schedule of Specific Commitments*. Most requests are treated as confidential government documents. The original deadline for "requests" was June 30, 2002. Although many WTO Members treat their "requests" as confidential government-to-government documents, many of these requests were "leaked" and are available on the Internet.

In contrast to a GATS "request," a WTO Member's "offer" sets forth the commitments that Member is prepared to put on its revised *Schedule of Specific Commitments* if and when the Doha Round comes to a conclusion. Because of the MFN provision in the GATS, an offer extends the proposed liberalization to all WTO Members and not just a particular "requestor." At some point, WTO Members had agreed upon March 2003 and May 2005 as target deadlines for "offers," but WTO Members are free to update their Doha Round "offers" at any time and some have done so. Although some WTO Members treat their offers as confidential, many WTO Members did not and these WTO Members have posted their "offers" on government webpages and elsewhere. Moreover, even if a country treated its "offer" as confidential, it may have been "leaked" and placed on the Internet.

What Does the Concept of "Decoupling" Mean in the Context of GATS Negotiations?

One aspect of the Doha negotiations which may seem counter-intuitive to IBA Member Bars is the concept of "decoupling." The term "decoupling" refers to the idea that a country might have, in a particular services sector such as legal services, asymmetrical "requests" and "offers." In the past, it was common for a country to "request" more liberalization in a particular sector (for example in legal services) than that country is itself prepared to "offer" to other countries. Because of this past history, some governments have advised the bar associations and lawyer organizations to "decouple" their recommendations about the "requests" and "offers" for legal services and to consider "requesting" more than the bar would be prepared to "offer."

The reason why a country might choose to "request" more liberalization in a particular sector than it is prepared to "offer" is because the negotiations are not simply bilateral negotiations about a single sector. Because countries negotiate their entire "package" of services, they sometimes choose to request more liberalization in areas in which there is strong interest in their country, while making "offers" or concessions in different sectors in which other countries have particularly strong interests. Thus, when formulating their recommendations, IBA Member Bars should be aware of the possibility of "decoupling" their recommendations. IBA Member Bars may want to consider the desirability of asking their governments to "request" liberalization of legal services, even though the Member Bar is not prepared to recommend that an "offer" be made on the same conditions. Although this may seem both dishonest and bad negotiating tactics (because it may be thought that it will rebound on the Bar concerned when the negotiations begin in earnest), the tradition of "decoupling" is well-established in trade-talks. The rationale in favor of decoupling is that the legal services sector will not be negotiated on its own, and so questions of honesty and tactics have to be decided not sector-by-sector, but in terms of the overall negotiations, of which only the country's professional negotiators may have a clear view.

Has Anything Significant Happened During The Doha Round *With Respect To Legal Services?*

The Doha Round has included a number of developments that will be of particular interest to IBA Member Bars. First, it is worth noting that a number of countries have made Doha Round offers that include legal services. In some cases, a WTO Member has offered for the first time to include legal services on its *Schedule of Specific Commitments*. In other cases, a WTO Member may have already included legal services on its *Schedule*, but has now “offered” to revise the legal services portion of its *Schedule* in order to make it more liberal.⁴

A second important development is the “Legal Services Collective Request.” In December 2005 at their Hong Kong Ministerial Conference, WTO Members agreed to encourage members to try a new “plurilateral” or “collective” requests process in the hope that the new procedure might help achieve more progress for the services negotiation. In February 2006, a number of countries, informally known as the “Friends of Legal Services,” issued a “Collective Requests” document that identified items they would like to request from the others. This document included a cover page, an introductory section, a purpose section, the actual requests, and two model schedules. The requests paragraph contained three parts: the first section set forth the scope of the requests, the second section identified the limitations to be removed, and the third section asked that any MFN exemptions be removed.

A third development is the growing consensus about the terminology that can be used when making legal services “offers.” Before the GATS was signed, the WTO Secretariat issued a “*Services Sectoral Classification List*” (document MTN.GNS/W/120), in which it provided recommendations to WTO Members about how they should list various services on their *Schedules of Specific Commitments*. In the WTO Sectoral Classification List, legal services were listed as a sub-sector of (1) business services and (A) professional services.

The WTO Sectoral Classification List divided legal services into six subcategories which were generally consistent with the classification system used in the then-current version of the United Nations Central Product Classification or CPC. In its *1998 Legal Services Paper*, however, the WTO Secretariat noted that most WTO Members had **not** in fact used the UN CPC classification system when “scheduling” legal services. The WTO Secretariat invited input from the legal profession and others on this legal services “classification” issue.

As Section XII, *infra*, explains, the International Bar Association accepted the WTO Secretariat’s invitation to do further work and held a day-long retreat in which it discussed these kinds of terminology issues. The IBA Council thereafter adopted a “Terminology” resolution that it recommended WTO Members consult when scheduling legal services. After this IBA resolution, a number of WTO Members submitted a paper which recommended that WTO Members “schedule” legal services using the terminology that substantially followed that set forth in the IBA resolution. See Communication from Australia, Canada, Chile, the European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory Of Taiwan, Penghu, Kinmen and Matsu and the United States, *Joint Statement on Legal Services*, TN/S/W/37, S/CSC/W/46 (24 February 2005), available from

4 An unofficial summary of legal services offers is available at this website <http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/derestricted.authcheckdam.pdf>.

the WTO website, <http://docs.wto.org>.

In addition to these three legal services-specific developments, the Doha Round negotiations have triggered numerous papers, programs and education sessions that have addressed the impact of the GATS on legal services. The IBA has sponsored a number of these sessions and they are discussed in Section XII, *infra*. Several others are listed on the Appendix attached to this Handbook.

Which Countries Have Submitted Negotiating Proposals Regarding Legal Services?

Early in the Doha Round, approximately nine WTO Members circulated negotiating proposals that addressed *directly or indirectly* legal services. Some of these countries, such as the United States and Australia, issued proposals that focused exclusively on legal services. Other Member States, such as the European Union and Canada, issued proposals directed toward professional services, which included legal services. Some countries, such as Japan and India, issued proposals that addressed legal services or professional services, even though the scope of the proposal was not apparent from the title of the document. In addition to the proposals directed towards specific sectors, such as legal services, some countries submitted proposals about negotiating procedures. Since then, a number of countries tabled offers that include legal services. The public offers include those from Australia, the European Union, Bulgaria, Canada, Chile, Colombia, Iceland, Japan, Korea, Liechtenstein, New Zealand, Norway, Pakistan, Turkey, the U.S.; see also Switzerland (public GATS 2000 proposal); Kenya (regarding MRAs and professional services).

How Can an IBA Member Bar Learn about Legal Services Negotiating Proposals?

There are several ways one can locate the Doha Round legal services proposals and “offers”. The WTO has a webpage that includes links to the negotiating proposals. This web page is found at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm. (The proposals concerning legal services may be listed under the topic of “professional services” proposals, or “legal services” proposals, or “business services” proposals or “movement of natural persons” proposals.) The easiest way to see the public legal services offers is to check the websites of groups that post this information.⁵

How Can a Member Bar Influence the Negotiating Proposals by its Country’s Representatives to the WTO?

In order for an IBA Member Bar to participate in the development of negotiation proposals, it must learn at least two things. First, it must find out which entity submits proposals to the WTO on behalf of its country. Once an IBA Member Bar has this contact information, it must determine the best method to provide guidance and input to that entity. This is not always easy to determine.

5 For example, both the European Services Forum and the American Bar Association include this information on their websites. See www.americanbar.org/content/dam/aba/migrated/cpr/gats/derestricted.authcheckdam.pdf and www.esf.be/new/wto-negotiations/doha-development-agenda/proposals/.

Summary

In sum, the outcome of the GATS Track #1 Doha Round market access negotiations remains uncertain. Although some WTO Members have circulated proposed changes to the legal services portion of their *Schedules*, the Doha Round has not yet concluded and none of these proposed changes has become effective. It is important to remember, however, that even if the Doha “progressive liberalization” negotiations collapse, WTO Members remain bound by their prior obligations (which took effect in January 1995 for most WTO Members).

X GATS IMPLEMENTATION EFFORTS – GATS TRACK #2 and the NEGOTIATIONS TO DEVELOP DISCIPLINES ON DOMESTIC REGULATION

Has Anything Significant Happened During The Doha Round On The Domestic Regulation Disciplines Issue?

As noted earlier, GATS Article VI(4) required WTO Members to consider the development of any necessary disciplines on Domestic Regulation. This ongoing obligation is sometimes described as GATS Track #2. There have been a number of implementation efforts that may be of interest to IBA Member Bars.

In December 1998, after several years of drafts and discussions, the WTO Council for Trade in Services adopted a document called *Disciplines for Domestic Regulation in the Accountancy Sector* (the “Accountancy Disciplines”). The Accountancy Disciplines are scheduled to take effect at the conclusion of the Doha Round of negotiations. The Accountancy Disciplines were developed by a body called the WTO Working Party on Professional Services (WPPS) and approved by the WTO Council, which consists of all WTO Member States.

Since the adoption of the Accountancy Disciplines, WTO Members (and others) have continued their discussions about whether and how to adopt disciplines that would apply to other service sectors, including legal services. This work is currently taking place under the auspices of the Working Party on Domestic Regulation (WPDR), which replaced the Working Party on Professional Services. The WPDR has held more than fifty meetings since it first met in 1999.

Will WTO Member States Definitely Adopt Generally-Applicable *Disciplines on Domestic Regulation*?

At this point in time, it is not entirely clear whether WTO Member States will adopt *Disciplines on Domestic Regulation* that apply to the legal profession. On the one hand, in 2005, in the Hong Kong Ministerial Declaration, WTO Member States expressed their agreement to adopt Disciplines on Domestic Regulation that would apply horizontally to all service sectors and thus include legal services. WTO Members have reaffirmed this agreement on several occasions. On the other hand, the Disciplines issue has generated significant disagreement. At the time this revised Handbook was written, it was not entirely clear whether WTO Member States would be able to reach an agreement concerning Disciplines on Domestic Regulation. WTO Member States have circulated a number of proposals. These proposals reveal some significantly different views among WTO Member States with respect to the scope of the proposed disciplines.

How Can IBA Member Bars Find Out the Current “State of Play” With Respect to the Domestic Regulation Disciplines Negotiations?

WTO Members have submitted a number of proposals to the Working Party on Domestic Regulation. Some of these documents are publicly available, but a number of these proposals have been “restricted” and thus are not publicly available unless they have been “leaked.”

If an IBA Member Bar wants to learn more about the “state of play” of the domestic regulation disciplines negotiations, it can consult the reports prepared by the Chair of the WTO Working Party on Domestic Regulation. These reports sometimes summarize the state of the negotiations and identify agreements and disagreements among WTO Member States. One can also consult the minutes of the meetings of the Working Party on Domestic Regulation and the annual reports from the Working Party to the Council for Trade in Services. All of these documents can be easily located by consulting the WTO Webpage devoted to the Services Council, its Committees and other subsidiary bodies, http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm. This webpage allows one to search for various kinds of WPDR documents, including annual reports, minutes, and working documents, which would include the Chair’s report. It may also be useful to see if there is a report summarizing the status of the Doha Round negotiations. For example, in 2011, Ambassador Fernando de Mateo prepared a summary of the current state of play and included a copy of the draft disciplines on domestic regulation. See NEGOTIATIONS ON TRADE IN SERVICES, Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee, TN/S/36 (21 April 2011). (The WPDR Chair’s April 2011 Progress Report, S/WPDR/W/45, also summarizes some of the areas of agreement and disagreement.)

At the time this revised Handbook was prepared, the most recent version of the WTO committee’s Draft Disciplines appears to be the version dated March 2009. The April 2011 Report to the Trade Negotiations Committee includes the March 2009 draft disciplines and indicates the paragraphs on which there is agreement and the paragraphs for which there have been alternative proposals. According to the October 2011 WPDR annual report, WTO Members continue to discuss these March 2009 draft disciplines. See Council for Trade in Services, Working Party on Domestic Regulation - Annual report of the Working Party on Domestic Regulation to the Council for Trade in Services (2011), S/WPDR/14 (24 Oct. 2011). As the 2012 WPDR Annual Report notes, during 2012, WTO Members focused on technical issues, with the assistance of several Secretariat notes. See Council for Trade in Services, Working Party on Domestic Regulation – Annual report of the Working Party on Domestic regulation to the Council for trade in Services (2012), S/WPDR/15 (5 Dec. 2012).

Has Anything Significant Happened on Domestic Regulation Disciplines *With Respect To Legal Services*?

There have been at least three legal services-specific developments worth noting. First, shortly after the WTO Council on Trade in Services adopted the *Accountancy Disciplines*, the WTO Secretariat sent a letter to various legal professional organizations, including the IBA, seeking input on whether the Accountancy Disciplines would be suitable to apply to the legal profession. As is described in the next section, the IBA held a retreat on this issue

and submitted a lengthy response. A number of other legal profession organizations also submitted responses to the WTO.⁶

The second noteworthy development is the fact that in 2005, Australia proposed a set of domestic regulation disciplines specifically for legal services. See *Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34 (5 Sept. 2005). Despite this proposal, the Working Party on Domestic Regulation discussions have focused on the development of horizontal disciplines applicable to all sectors.

A third development worth noting is the existence of various educational materials devoted to the topic of disciplines on domestic regulation. For example, in 2003, the WTO sponsored a domestic regulation conference in which legal services was one of the highlighted sectors. The OECD has also held a conference that focused on legal services and domestic regulation disciplines. In addition to these in-person events, the WTO Secretariat has issued a paper that includes possible definitions for the disciplines terms, a document that summarizes the consultations about disciplines with relevant professional organizations such as the IBA, and a document that summarizes WTO members' domestic consultations within their own countries about disciplines. The WTO Secretariat also has issued several versions of a document that provides examples of measures that might be subject to disciplines.⁷

What Happens if the WTO Fails to Adopt Disciplines on Domestic Regulation?

If WTO Members fail to adopt disciplines on domestic regulation, then GATS Article VI:5 applies. This paragraph imposes a modified form of disciplines even in the absence of an agreement by WTO Members:

- “5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c);
- and
- (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

6 For additional information and to see copies of the relevant documents, you can consult Laurel S. Terry, Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions, 22 Penn State Int'l L. Rev. 695 (2004), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=340745#show666142

7 Professor Laurel Terry has written an article that includes an appendix that presented, for comparison purposes, a legal-services specific set of examples. See Laurel S. Terry, But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services, 2003 Symposium The Professional Lawyer 83 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=591964.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.”

Thus, GATS Article VI:5 means that the issue of GATS Track #2 and disciplines is potentially very significant, even if WTO Members are not able to agree on horizontal disciplines.

XII GATS IMPLEMENTATION EFFORTS – THE ROLE OF THE IBA

What Efforts Has The IBA Undertaken With Respect to the GATS?

The International Bar Association has taken a leadership role in helping the legal profession understand and respond to the GATS. This section describes some of these efforts. For additional information, one can consult the webpage of the IBA Bar Issues Commission International Trade in Legal Services Committee: www.ibanet.org/PPID/Constituent/Legal_Profession_World_Orgs/BIC_ITILS_Working_Group/Projects.aspx

In addition to producing two editions of the GATS Handbook which you are reading, the IBA has held a number of educational programs on the GATS. The IBA WTO Working Group (now called the BIC International Trade in Legal Services Committee) has met in Geneva with the WTO Secretariat and WTO Member State representatives and has participated in WTO educational programs. The IBA has also adopted a number of resolutions..

Which IBA Resolutions Are Relevant to the GATS?

The earliest IBA resolution relevant to the GATS was the 1998 Resolution on GATS and Deregulation of the Legal Profession, which is sometimes referred to as the “core values” resolution. Given its importance, it is reprinted below:

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

- amending regulations no longer consistent with a globalised economy and
- securing the provision of legal services in an efficient manner and at competitive and affordable prices,

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

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

HEREBY RESOLVES

1 that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and

2 that any steps taken with a view to deregulating the legal profession should respect and observe the principles outlined above.”

The IBA has adopted three additional GATS-specific resolutions. In 2003, the IBA adopted its **RESOLUTION IN SUPPORT OF A SYSTEM OF TERMINOLOGY FOR LEGAL SERVICES FOR THE PURPOSES OF INTERNATIONAL TRADE NEGOTIATIONS** relevant to GATS Track #1 and the Doha Round market access negotiations. As noted earlier, the legal services “terminology” proposal tabled by several WTO Members appears to be based in large part on the IBA’s 2003 terminology resolution.

The second GATS resolution is the 2003 **COMMUNICATION TO THE WORLD TRADE ORGANIZATION ON THE SUITABILITY OF APPLYING TO THE LEGAL PROFESSION THE WTO DISCIPLINES FOR THE ACCOUNTANCY SECTOR**, which is relevant to GATS Track #2 and the WTO negotiations on domestic regulation disciplines. The third GATS resolution is the 2008 Resolution of the IBA Council on transfer of skills and liberalization of trade in legal services. This resolution was adopted after several years of discussion and debate. After explaining the rationales for the resolution, it continues by stating the “capacity building” conditions that developing jurisdictions in particular might want to include in their *Schedules of Specific Commitments* when making market access commitments:

“

(1) Countries that so far have not been willing to open their legal services market to Foreign Lawyers, or that have done so to a limited extent only as regards the scope of practice rights or rights of association with Local Lawyers, may wish to grant Foreign Lawyers access to their legal services market, or to reduce or remove any existing restrictions on such access, subject to one or both of the following conditions:

(A) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction may be required by the Host Authority to participate, directly or indirectly, in the provision of formal continuing legal education and training programs sponsored or approved by the Host Authority or other bodies responsible for the development of the legal profession of the Host Jurisdiction and open to Local Lawyers generally.

(B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.

- (2) In order to be consistent with the general principles of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skills Transfer as contemplated by Paragraphs (1)(A) and (1)(B) of this resolution would need to be: (i) transparent; (ii) not unreasonably burdensome; (iii) non-discriminatory as between Foreign Lawyers and (iv) not adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.
- (3) Any measures taken pursuant to Paragraph (1)(A) of this resolution should not require a Foreign Lawyer to disclose information that is proprietary or confidential to the Foreign Lawyer, his/her firm or any client.”

What Additional IBA Resolutions Might IBA Member Bars Find Useful When Considering GATS-Related Issues?

In addition to the four GATS-specific resolutions, the IBA has adopted several resolutions that undoubtedly were informed by and are relevant to cross border legal practice, which is a topic that is also relevant to the GATS. These resolutions include the 1998 **Statement of General Principles for the Establishment and Regulation of Foreign Lawyers** and the 2001 **Standards and Criteria for Recognition of the Professional Qualifications of Lawyers**. All of these resolutions are available on the webpage of the IBA BIC ITILS Committee: http://www.ibanet.org/PPID/Constituent/Leg1_Profession_World_Orgs/BIC_ITILS_Working_Group/Default.aspx. The 2006 **General Principles of the Legal Profession** are also worth consulting.

XIII OTHER DEVELOPMENTS OF INTEREST (including the proliferation of bilateral and regional trade agreements)

Is the GATS the Only Trade Agreement IBA Member Bars Should Be Concerned With?

IBA Member Bars should understand that it is quite possible that their government has negotiated trade agreements beyond the GATS that apply to legal services. This is permitted by GATS Article V which applies to economic integration agreements.

As the Doha Round negotiations stalled, it became increasingly common for WTO Member States to negotiate bilateral or regional trade agreements. Many WTO Members have five or ten (or more) bilateral or regional free trade agreements. These agreements are usually listed on the webpage of the government department responsible for trade. Examples can be found at these webpages:

- Australia, www.dfat.gov.au/fta/
- Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d
- European Union, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_europe
- Japan, www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/index.html
- Korea, www.mofat.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m_20_80_10
- US www.ustr.gov/trade-agreements/free-trade-agreements

Conclusion

The purpose of this Handbook is to provide background information to IBA Member Bars about the GATS or General Agreement on Trade in Services and the ongoing negotiations about legal services. In particular, it is designed to assist Bars understand the history, process and the technical terms used in the context of the GATS. We hope you have found it useful.⁸

8 For additional information and more complete citations, see Laurel S. Terry, From GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 Akron L. Rev. 875 (2010). For a hard copy of this article, with complete citations, email LTerry@psu.edu. This article is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630566 .

APPENDIX:**XIV GLOSSARY OF TERMS**

TOPIC	PAGE REFERENCE
Commercial Presence [Mode 3]	21-24, 26
Consumption Abroad [Mode 2]	21-24, 26
Cross-Border Supply [Mode 1]	21-24, 26
Decoupling	30
Disciplines for the Accountancy Sector	3, 29, 35, 36, 39
Doha Development Agenda Negotiations	1, 3, 18, 29-33
Domestic Regulation	1, 3-5, 7-8, 13, 15-19, 27-29, 34-36, 39
Equivalence	28
GATS 2000	3, 18, 29, 32
Guidelines for Mutual Recognition Agreements	28-29
Home Country Law	13, 26
Horizontal Disciplines	3, 28, 34-37
Host Country Law	26, 39-40
International Standards	16-17, 28, 37
Market Access	1, 3-4, 13-16, 18-19, 22, 24-27, 29, 33, 36, 39
Marrakech Agreement	5
MFN Exemption	7-8, 10-11, 12, 19, 25, 30-31
MFN	8-12, 19
Mode 1	4, 21, 22
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MRAs (Mutual Recognition Agreements)	8-10, 28, 32
Mutual Recognition	8, 10, 28-29
National Treatment	1, 4, 10, 13-16, 18-19, 22, 24, 25-26, 36

Offer	1, 8, 10, 12, 28-32
Presence of Natural Persons [Mode 4]	21-22, 24, 26, 28
Progressive Liberalization	3, 18-19, 27, 29, 33
Requests	29-31
Reciprocity	10-11
Request-Offer process	12, 28-29
Schedule of Specific Commitments	1, 4, 7, 10, 12-25, 29-31
Standstill Provisions	7, 13, 15-17
Transparency	7, 8, 19, 28
Unbound	22, 25, 26
Uruguay Round	3, 5, 12

XV APPENDIX: WEBSITES OF INTEREST

WTO WEBSITES

1. WTO Homepage
www.wto.org/
2. The GATS Agreement
www.wto.org/english/docs_e/legal_e/legal_e.htm#services
3. WTO Guideline to Reading a Schedule of Specific Commitments
www.wto.org/english/tratop_e/serv_e/guide1_e.htm
4. WTO Services Portal
www.wto.org/english/tratop_e/serv_e/serv_e.htm
5. WTO Webpage with Links to Countries' Schedules of Specific Commitments
www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm
6. WTO Page Listing MFN Exemptions
www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm
7. WTO Ministerial Declarations (including links to the Doha Declaration & other Declarations containing agreements and suggested timelines)
www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm
8. WTO Webpage Listing GATS Track #1 market access Doha negotiation proposals (check both legal services and professional services and websites listed on Handbook p. 32, n.5):
www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm
9. WTO Subsidiary Bodies (including documents of the WTO Working Party on Domestic Regulation, which is handling the GATS Track #2 Disciplines negotiations)
www.wto.org/english/tratop_e/serv_e/s_coun_e.htm
10. WTO Disciplines on Domestic Regulation for the Accountancy Sector
www.wto.org/english/news_e/pres98_e/pr118_e.htm

WEBSITES OF OTHER ORGANIZATIONS

11. IBA BIC International Trade in Legal Services Committee,

<http://tinyurl.com/IBA-GATS>

12. CCBE GATS Committee

www.ccbe.org/index.php?id=94&id_comite=9&L=0

13. European Services Forum Doha Round Webpage (monitors legal services developments)

www.esf.be/new/wto-negotiations/doha-development-agenda/

14. American Bar Association GATS Legal Services webpage

www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements.html

XVI APPENDIX: HOW TO LOCATE WTO DOCUMENTS:

The WTO webpage includes a search page that allows you to search for WTO documents in many different ways. See www.wto.org/english/res_e/res_e.htm. This webpage allows you to search for all documents with a particular phrase, such as “legal services.” If you are looking for a particular document or category of documents, you can use the “document symbol” function. See <http://docs.wto.org>.

For example, if one inserted S/C/M/24, one would retrieve the twenty-fourth set of minutes of the WTO Council for trade in services. If one inserted the term “S/C/M,” then one would retrieve all minutes of the Council for Trade in Services that are publicly available. If one inserted the term “S/C/,” then one would retrieve a list of all available Council documents. Once the search is completed and the list of relevant documents appears, you can select the documents *and language* to be downloaded.

What do the Symbols on WTO Documents Mean?

The examples listed above used WTO document symbols. It is helpful to realize that each WTO document has a unique set of numbers and letters assigned to it, which is its “name” or symbol. All documents related to the GATS begin with the letter “S.” The second letter designates the entity issuing the document: for example, “C” is used for the Council for Trade in Services; “WPPS” was used for the Working Party for Professional Services before it disbanded; and “WPDR” is used for the Working Party on Domestic Regulation. The third letter indicates the type of document: “M” designates minutes of meetings; “W” indicates a working paper submitted to the entity in question. If no letter is included, it means that the document is an “action” document, such as a *Decision* or *Report*. The fourth item listed is a number; these numbers are issued in chronological order so that S/C/M/24 indicates the twenty-fourth set of minutes issued by the Council for Trade in Services. “W” documents include comments and drafts submitted by Member States.

“W” documents also include Secretariat papers and analyses. As explained in the Executive Summary, the WTO Secretariat is based in Geneva and is the administrative body of the WTO. It is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics and preparing other analyses. The WTO Secretariat has more than 650 staff and is headed by a director general. It does not have branch offices outside Geneva.

“W” documents are non-public, restricted documents unless the author indicates otherwise. Sometimes documents are “derestricted” at a time point after they were first issued. Sometimes restricted documents are “leaked” and available on the Internet.

The symbol for each document appears in the upper right-hand corner of the first page of the document, together with the date on which the document was prepared. Reproduced below is the beginning of the 1998 Secretariat paper on legal services which includes the document symbol information.

**World Trade
Organization**

RESTRICTED

S/C/W/43
6 July 1998
(98-2691)

Council for Trade in Services

LEGAL SERVICES

Background Note by the Secretariat

