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INTERNATIONAL BAR ASSOCIATION

Standards and Criteria for Recognition of the Professional Qualifications of Lawyers

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INTERNATIONAL BAR ASSOCIATION Standards and Criteria for Recognition of the Professional Qualifications of Lawyers

1. Purpose

This document sets forth the recommendations of the International Bar Association ('IBA') concerning the standards and criteria that should be applied by a Member of the World Trade Organization ('WTO') which has undertaken market access commitments relating to legal services under Article XVI of the General Agreement on Trade in Services ('GATS') in determining whether, to what extent and for what purposes to recognize the professional qualifications of persons authorized or licensed to practice law in the territory of another Member (the 'Home Jurisdiction') for purposes of authorizing or licensing such persons to practice law in the territory of the Member called upon to recognize such qualifications (the 'Host Jurisdiction'). The document also includes certain related recommendations regarding the contents of mutual recognition agreements as contemplated by Article VII of the GATS.

These recommendations are offered in the belief that one of the principal obstacles to such recognition is the fear, justified or not, that the recognition by a Member of the qualifications of lawyers qualified to practice in the territories of one or more other Members automatically entails an obligation to accord most-favored-nation treatment, as provided in Article II of the GATS, in respect of lawyers qualified to practice in the territories of all other Members. This fear tends to defeat the purpose of the most-favored-nation clause by inhibiting, rather than encouraging, liberalization. While recognizing that the same may also be said of other professional services subject to the GATS, the IBA strongly believes that the particular characteristics and role of the legal profession, and the important differences in legal systems and systems of professional regulation as reflected in the Background Note of July 6, 1998 on Legal Services prepared by the Secretariat of the WTO Council for Trade in Services, not only justify but indeed require a more nuanced approach to the question of recognition of qualifications than would be possible were most-favored-nation principles to be applied indiscriminately. It is believed that these recommendations are fully consistent with the spirit and intent of the GATS.

In advancing these recommendations, the IBA does not intend to detract from the process of continuing negotiation of further market access commitments regarding legal services within the framework of GATS 2000. Mutual recognition agreements are no substitute for progressive liberalization, on a most-favored-nation basis, of domestic regulations that continue to create undue barriers to cross-border and established provision of legal services. However, the IBA believes that a clarification of the standards and criteria that may be applied, without violating the relevant provisions of the GATS, in the recognition of professional qualifications will encourage Members to liberalize beyond the limits of their binding commitments, present and future, if and to the extent

they deem prudent in light of the important differentiating factors in the respective legal systems and professions of other Members. This voluntary liberalization can serve as a valuable complement to, and in the longer term will help to accelerate, the process of liberalization through further market access commitments. The IBA finds support in this respect in the Decision on Disciplines relating to the Accountancy Sector adopted by the WTO Council for Trade in Services on December 14, 1998. Item VI.21 notes the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

It is, accordingly, the hope of the IBA that these recommendations will be taken into account, not only in ongoing discussions within the WTO regarding the application to the legal profession of the current provisions of the GATS and the related commitments given by Members in the Uruguay Round negotiations, but also as a basis for the consideration of possible further liberalization of market access in respect of legal services, particularly as to those countries having made relatively fewer commitments as to legal services in the Uruguay Round, in the course of the GATS 2000 negotiations.

2. Relevant Provisions of the GATS

Article VI of the GATS deals with domestic regulation of trade in services. Article VI (1) provides that, in sectors where specific commitments are undertaken, each Member shall ensure that all measures affecting trade in services are administered in a reasonable, objective and impartial manner. Article VI (4) calls upon the Council for Trade in Services (the 'Council') of the WTO to develop disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services and that, in particular, such measures are (i) based on objective and transparent criteria, such as competence and the ability to supply the service; (ii) not more burdensome than necessary to ensure the quality of the service; and (iii) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Article VII of the GATS concerns recognition of professional qualifications. In derogation of the general 'most favored nation' provision contained in Article II of the GATS, Article VII (1) provides that a Member may, in connection with the authorization, licensing or certification of services suppliers, recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country and that such recognition may be based upon an agreement with that country or accorded autonomously. Article VII (3) provides that a Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers or a disguised restriction on trade in services. Finally, Article VII (5) provides that, wherever appropriate, recognition should be based on multilaterally agreed criteria and that, in appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition.

3. Considerations Unique to the Legal Profession

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

a) The Special Role of the Legal Profession

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

b) Heterogeneity of Substantive Knowledge

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

c) The Regulatory Structure of the Legal Profession

For historical reasons, regulation of the legal profession is carried out in many countries at the level of political subdivisions rather than at the national level. Even where the regulatory framework is established on a national basis, authority for admission to the profession and professional discipline frequently rests with local, state or provincial bodies, in some cases governmental and in others professional, acting pursuant to delegated authority. In consequence, implementation of the provisions of the GATS relative to legal services will necessarily involve cooperation between local, regional and national authorities of the Members involved. The term ‘competent authorities’ when used with reference to any Member must be read in this light.

4. Standards and Criteria for Recognition

Apart from the need to take into account the general considerations set forth above, the standards and criteria for the recognition of the qualifications of foreign lawyers should be tailored to the specific regime or regimes employed in the Host Jurisdiction for the authorisation or licensing of foreign lawyers. These vary considerably from one country to the next, as reflected in the differing commitments undertaken by various WTO Members in relation to legal services. Some countries require compliance with all qualification requirements under Host Jurisdiction procedures in order to license a foreign lawyer to practice the law of the Host Jurisdiction but permit a more limited scope of practice, including practice of the law of the Home Jurisdiction, under less stringent conditions. Others permit qualification to practice the law of the Host Jurisdiction based upon compliance with more limited requirements that take into account the education, training and experience of the applicant as a qualified practitioner of the law of the Home Jurisdiction. Whatever system is in use, the standards and criteria that may be applied in the recognition process, whether by mutual recognition agreement or autonomously, are the following:

a) Home Jurisdiction Regulation and Discipline

In making the decision to permit a foreign-qualified lawyer to practice law, even within a limited scope, in its own territory, a Host Jurisdiction necessarily relies to a significant extent upon the integrity and effectiveness of the system of professional regulation and discipline in place in the Home Jurisdiction. It is the very fact that the lawyer has been admitted to practice and remains in good standing in the Home Jurisdiction that enables to the Host Jurisdiction to permit the lawyer to carry on any sort of law practice in its territory. The Host Jurisdiction may therefore need to satisfy itself, possibly in the context of the negotiation of a mutual recognition agreement, that it is able to rely on the professional regulatory rules and processes of the Home Jurisdiction as an effective means of ensuring that applicants qualified in that jurisdiction meet the ethical standards of the Host Jurisdiction. A mutual recognition agreement may also include provision for cooperation between the competent authorities in the Home Jurisdiction with those of the Host Jurisdiction in dealing with violations of rules of professional conduct that are common to both.

b) Character and Fitness

The unique nature and responsibilities of the legal profession require that anyone licensed to practice law be of the highest moral and ethical character. Even where the license applied for would authorise the applicant to practice law only within a restricted scope of practice, the Host Jurisdiction has a legitimate interest in determining whether the applicant meets these requirements. The competent authorities of the Host Jurisdiction should satisfy themselves, as a predicate for the conclusion of a mutual recognition agreement, that their needs in this regard can adequately be met by a certificate of good standing issued by the competent authorities of the Home Jurisdiction. In the absence of such an agreement, the Host Jurisdiction may condition recognition of the applicant's qualifications upon submission by the applicant of satisfactory evidence as to character and fitness for the practice of law, including full information regarding such matters as prior disciplinary proceedings and any civil or criminal proceedings involving the applicant.

c) Education and/or Practical Training

The extent to which education and/or practical training may be taken into account in evaluating the qualifications of an applicant will depend upon the scope of practice authorized by the license for which the applicant is applying. The following are elements that may be considered.

1. Level and Duration of Legal Education

Recognition may be conditioned upon the applicant's having completed a specified number of years of university-level education in legal studies, either graduate or post-graduate, at institutions of higher learning recognised for this purpose by the Host Jurisdiction. The recognition for these purposes of institutions of higher learning in the two jurisdictions may be one of the subjects covered by a mutual recognition agreement.

2. Extent of Practical Training

Practical training of a specified duration and content may be accepted in substitution for some portion of the education requirement where the competent authorities of the Host Jurisdiction are satisfied that the program of practical training is properly specified and supervised by the competent authorities of the Home Jurisdiction and, taken together with the university-level education that is required for licensure in the Home Jurisdiction, is substantially equivalent to the level and duration of university-level education required by the Host Jurisdiction. These matters are appropriately dealt with in connection with the negotiation and conclusion of mutual recognition agreements.

3. Similarity of Legal Systems

Where the authorization or license for which the applicant applies includes the right to practice the law of the Host Jurisdiction, recognition of all or any part of the applicant's qualifications may depend upon the degree of similarity between the legal system of the Home Jurisdiction and that of the Host Jurisdiction. The Host Jurisdiction may under these circumstances require fulfilment by the applicant of supplemental education or training requirements designed to cure deficiencies in the applicant's knowledge of the law of the Host Jurisdiction. The nature and extent of any such supplemental requirements may should be specified in any mutual recognition agreements.

4. Specialized Education or Training Requirements

Where the authorization or license for which the applicant applies includes the right to practice law other than that of the Home Jurisdiction, such as international law or the law of third countries, recognition may be conditioned upon completion of any education, training, experience or certification requirements imposed by the Host Jurisdiction upon members of its own legal profession as a condition of their right to engage in such practice.

d) Professional Experience

Recognition may be conditioned upon completion of a specified minimum period of experience in the practice of law. This period should not be longer than is reasonably necessary to establish the ability of the applicant to practice law competently and in accordance with the applicable rules of professional responsibility. The duration of this minimum period, and the circumstances under which such practice must be completed, are among the subjects that should be regulated by mutual recognition agreements.

5. Compatibility with the Relevant Provisions of the GATS

In the view of the IBA, the application by a Member of the standards and criteria set out in Part IV above in determining whether and for what purposes to recognize the qualifications of lawyers admitted to practice in the territory of another Member is fully in accordance with the spirit of Article VII of the GATS. While those standards and criteria include factors not specifically mentioned in Article VII (1), their application in the context of Article VII is clearly justified by the unique role of the legal profession and the objective differences that exist among the legal systems and legal professions of the world, as described in Parts III and IV above. That being so, the IBA believes that differences in treatment based upon objective application of such standards and criteria do not violate the most-favored-nation principle enshrined in Article II of the GATS, which does not apply to recognition of professional qualifications pursuant to Article VII, whether such recognition is autonomous or pursuant to a mutual recognition agreement.

The granting of such recognition is, of course, subject to the provisions of Article VII (2) of the GATS. That Article requires that a Member that is a party to a mutual recognition agreement concerning the qualifications of lawyers must afford adequate opportunity to other interested Members to negotiate accession to such an agreement or negotiate comparable agreements providing for recognition of the qualifications of lawyers admitted to practice in their own territories. It also requires that, where a Member accords recognition autonomously, it must afford adequate opportunity to any other Member to demonstrate that the qualifications of lawyers admitted to practice in its own territory should be recognized. Moreover, as provided in Article VII (3) of the GATS, a Member must not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards and criteria. However, the IBA takes the view that differences in treatment based upon objective application of the standards and criteria set out in Part IV above should not be regarded as violating any of such provisions. The IBA also notes that differences in treatment resulting from the establishment of agreements among some Members liberalizing trade in services between or among the parties to such an agreement and otherwise qualifying under the provisions of Article V of the GATS, as in the cases of the European Union and NAFTA, would not violate the provisions of Article VII even if such differences were not based solely, or at all, on those standards and criteria.

6. General Considerations Regarding the Content of Mutual Recognition Agreements

The use of mutual recognition agreements can provide an effective means of resolving many of the potential difficulties of reconciling the economic benefits of market access in the field of legal services with the social imperative of preserving the integrity of the legal profession of each WTO Member. In addition to the subject matter referred to above, there are a number of other matters that can usefully be included in such mutual recognition agreements, among them the following:

a) Scope of Practice Limitations

Where one or more of the Members proposing to enter into a mutual recognition agreement generally grants authorizations or licenses to foreign-qualified lawyers to practice law within its or their territories only within a limited scope of practice, the activities in which lawyers from a Home Jurisdiction are to be permitted to engage in the territory of a Host Jurisdiction pursuant to such an authorization or license should be set out in detail in the mutual recognition agreement. In particular, the agreement should be specific as to whether the authorization or license to be granted includes the right to advise on matters of international law, regional supranational law and/or the law of third jurisdictions. It should also be made clear whether and under what circumstances holders of such authorizations or licenses may communicate to clients advice regarding the laws of the Host Jurisdiction given by lawyers qualified to practice the law of the Host Jurisdiction.

b) Forms of Association

Where one or more of the Members proposing to enter into a mutual recognition agreement generally restrict the forms in which lawyers qualified to practice law in their territories may associate with foreign-qualified lawyers who are not also fully qualified to practice in such Members' territories, the forms of association in which lawyers from a Host Jurisdiction are to be permitted to engage with lawyers from a Home Jurisdiction for the practice of law should be set out in the mutual recognition agreement. The agreement should be specific as to any limitations upon, or conditions to, the formation of partnerships or other associations, affiliations or cooperative arrangements and upon the sharing by such lawyers of fees, expenses, facilities and staff.

c) Regulatory and Disciplinary Matters

A mutual recognition agreement should contain provisions (i) delineating the circumstances under which the rules of professional conduct, as well as the disciplinary procedures, of the Host Jurisdiction will apply to members of the legal profession of the Home Jurisdiction who are authorized or licensed to practice law in the territory of the Host Jurisdiction and (ii) establishing rules, or procedures for consultation between regulatory authorities of the Home Jurisdiction and the Host Jurisdiction, to apply in the event that compliance with mandatory rules of the Host Jurisdiction entails a potential violation of the rules of the Home Jurisdiction.

d) Definition of Competent Authorities

Article VII of the GATS speaks of recognition by Members, which implies that mutual recognition agreements are to be concluded at the national level. However, in light of the decentralized regulatory structure of the profession in some countries, this may create practical problems, at least if the agreement is to be binding upon the governing bodies of the profession. These problems will have to be addressed on a case-by-case basis, in a manner compatible with the way in which the legal professions are organized and regulated in the territories of each of the Members party to a particular mutual recognition agreement, without prejudice to the right of a Member party to require that such agreement be operative throughout the territory(ies) of the other Member(s) party and that the other Member(s) party provide an assurance that the provisions of Article I(3)(a) of the GATS will apply to the undertakings of such other Member(s) party contained in that agreement.

7. Conclusion

The IBA respectfully commends the foregoing to the consideration of the WTO in the course of its study and deliberations regarding further liberalization in the field of professional services and, in particular, of legal services and will be pleased to consult on this subject with the WTO and its constituent bodies as and whenever that appears useful.