LIBERALIZING TRADE IN LEGAL SERVICES: THE GATS, THE ACCOUNTANCY DISCIPLINES, AND THE LANGUAGE OF CORE VALUES

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I. INTRODUCTION

The practice of law has become big business.[1] The growth in law firm size and revenue has resulted, at least in part, from the increasingly global demands of clients.[2] As a result, more and more lawyers are traveling abroad to provide legal services.[3] Although few of these lawyers would probably consider themselves engaged in international trade, even when traveling abroad to counsel clients, the "international trade in legal services" has become an important and growing sector of many national economies.[4] For example, in 1986 cross-border legal services exports from the United States amounted to $97 million, while imports totaled $40 million. By 2001, cross-border exports

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1. Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 116 (2001). "Big, bigger, biggest. Corporate law firms have exploded in size in the last two decades. So have accounting firms and investment banks. Many are now mammoth entities with thousands of employees, billions in revenues, and offices throughout the world." *Id. See also* U.S. INT'L TRADE COMM'N, RECENT TRENDS IN U.S. SERVICES TRADE: 2003 ANNUAL REPORT 10-6 (2003) [hereinafter RECENT TRENDS] (noting that the largest law firm in the United States, Skadden, Arps, Slate, Meagher & Flom, employed 1,800 lawyers and earned $1.2 billion in revenue in 2001).

2. Thomas et al., *supra* note 1, at 127. "Over the past thirty years, clients have shifted toward asking firms to provide them with more and more services on a broader and broader geographic basis. For example, globalization has led many clients to ask firms to handle increasingly complex transactions across international borders." *Id.*

3. *See* World Trade Organization [hereinafter WTO] Council for Trade in Services, *Legal Services: Background Note by the Secretariat*, S/C/W/43 at ¶ 25 (July 6, 1998) [hereinafter *Legal Services Background Note*] (quoting an OECD study that found that by 1995, over 300,000 of the world's lawyers traveled abroad to provide legal services at least occasionally).

4. *Id.* ¶ 20 (noting that by "the early 1990s the output of legal services represented 14% of all professional services and 1.1% of the economy in a 'representative' industrialised country").

of legal services in the United States reached $3.1 billion and imports hit $755 million, yielding a $2.4 billion trade surplus.[5]

Despite these developments, many countries, including the United States, have failed to account for this "cross-border" practice in the regulation of their legal professions.[6] As a result, significant barriers to cross-border practice remain.[7] In order to ensure that these barriers advance legitimate regulatory interests and do not unduly burden the cross-border provision of legal services, forty-eight countries have made the cross-border elements of their legal services sectors subject to the provisions of an international trade agreement called the General Agreement on Trade in Services (GATS).[8]

The GATS is the first multilateral trade agreement devoted to the progressive liberalization of the laws and regulations that govern the cross-border provision of services.[9] The GATS, which is administered by the World Trade Organization (WTO),[10] governs a wide array of services, from banking to tourism, and even accounting and legal services.[11] Anytime a service or services provider crosses a national border, the provisions of the GATS might be implicated. The GATS only *might* be implicated in such cross-border circumstances because when it was signed in 1995, much of how the GATS will govern trade in services, including legal services, was left for future negotiation.

These GATS negotiations are currently ongoing. The importance of these negotiations for American lawyers should not be underestimated. The GATS is important even for those practitioners engaged exclusively in domestic practice because the GATS may eventually influence how lawyers are governed in the United States. In the give-and-take of the legal services negotiations,

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5. RECENT TRENDS, *supra* note 1, at 10-1.

6. *See* Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1384 (1998) ("[T]he *development* of cross-border practice throughout the world has vastly outpaced the *theory* of whether and how such practice should be regulated.") (italics in original); *see also* Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135, 1137 (2001) (noting that "[w]hile the practice of law has moved from being local to national to international in scope, the regulation of the profession in the United States remains largely localized").

7. *See Legal Services Background Note*, *supra* note 3, ¶¶ 30-56 (noting barriers to cross-border practice including, inter alia, nationality, experience, and residency requirements).

8. General Agreement on Trade in Services [hereinafter GATS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1168 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Apr. 6, 2005).

9. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 161 (1999) [hereinafter GUIDE TO THE URUGUAY ROUND AGREEMENTS].

10. *See* WTO Agreement, *supra* note 8.

11. *See* GATT Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991) (listing the services sectors covered by the GATS).

U.S. trade negotiators may be willing to grant foreign lawyers greater rights of practice than those enjoyed by domestic practitioners. This, in turn, could lead to calls from the American Bar to grant domestic lawyers interstate practice rights within the United States or even the right to participate in multidisciplinary partnerships (MDPs).[12] Put another way, there is a chance that U.S. trade negotiators might set in motion a chain of events that could affect the way that law is practiced in this country; and they may do so without the considered input of the profession itself.[13] Despite the profound impact that the GATS may have on U.S. lawyer regulations, the American Bar Association (ABA) has neither taken a public position on the current GATS negotiations, nor attempted to educate its members about the potential implications of the negotiations, as have other national bar associations.[14] This is unfortunate not

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12. The term "multidisciplinary partnerships" (MDPs) refers to partnerships between lawyers and nonlawyers, often accountants. For information regarding ethical rules that currently prohibit such partnerships in the United States, see MODEL RULES OF PROF'L CONDUCT R. 5.4 (2003) (providing that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," and detailing a few narrow exceptions). However, this prohibition does not exist in all countries, nor even are regulations consistent in different jurisdictions within the same country. *See, e.g.*, Steven Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173, 1195 (2001) (noting that New South Wales is the only Australian jurisdiction to permit MDPs). For a more comprehensive treatment of the issues surrounding MDPs, see Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMPLE L. REV. 869 (1999).

13. *See* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1085 (2001). Professor Terry's article is required reading for those interested in exploring the potential impact of the GATS on legal services. For those who are new to the GATS, see INT'L BAR ASS'N, GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002), *available at* http://www.ibanet.org/images/downloads/gats.pdf [hereinafter IBA GATS HANDBOOK] (providing an excellent introduction to the basic workings of the GATS and comprehensive explanations of the sometimes unfamiliar terms often employed in trade agreements).

14. *See generally* Laurel S. Terry, *A Challenge to the ABA and the U.S. Legal Profession to Monitor the GATS 2000 Negotiations: Why You Should Care*, Symposium Issue of PROF. LAW. (2001) [Terry, *Why You Should Care*]. Although the ABA Center for Professional Responsibility now has a website devoted to the GATS, in the view of this author, the site, which links to various GATS documents, fails to explain the issues surrounding the GATS negotiations in a cogent manner. Only through reading the primary GATS documents located on the website can one gain an appreciation of the issues at stake in the negotiations. Unfortunately, this would require an expenditure of time that few practitioners can spare. *See* Am. Bar Ass'n Ctr. for Prof'l Responsibility, *Materials About the GATS and Other International Agreements*, *at* http://www.abanet.org/cpr/gats/gats_home.html (n.d.) (last visited Apr. 14, 2005). The website also reports that "in 2003, ABA President A.P. Carlton appointed an ABA GATS Task Force. This Task Force is responsible for coordinating ABA efforts regarding the GATS," although little information is provided on the work of the Task Force to date. While these ABA developments may prove to be positive, this author remains skeptical that they will contribute to the enlightenment of the American bar. *See generally* Am. Bar Ass'n, *American. Bar Association*, *at* http://www.abanet.org (n.d.) (last visited Apr. 14, 2005). An exception to the general lack of enthusiasm for explaining the impact the GATS may have on American lawyers is the writing of Professor Laurel Terry. Professor Terry is "a liaison from

only for American lawyers, but, as will be highlighted below, the solutions to multijurisdictional practice issues that the ABA has proposed in the domestic context might provide a point of compromise in the GATS negotiations.[15]

Of the bar associations that are participating in the discussion of how the GATS rules will come to regulate the legal profession, many have been less than enthusiastic about some of the proposals put forward in the negotiations. This is understandable given that comprehensive GATS rules may impinge on the ability of national authorities to regulate all aspects of the legal profession within their respective jurisdictions. One of the principal criticisms of the GATS proposals from national bar groups and other legal professionals is that the proposals violate one or more of the "core values" of the legal profession.

It is typically the case that when new regulatory structures are proposed in response to the ever-changing realities of legal practice, the charge is advanced that the new rules violate one or more of these core values of the legal profession.[16] Reliance on core values can be seen as a strategy of sorts to preclude debate on certain topics; to place certain principles beyond the realm of negotiation. It is strategy, in other words, for protecting what the profession holds most dear. It must also be recognized, however, that core values arguments are subject to abuse. They may be deployed to squelch debate even where legitimate controversy exists and are a convenient method of protecting the regulatory prerogatives of entrenched interests.[17]

This Article proposes to evaluate the impact that core values arguments are likely to exert upon the prospects for a successful conclusion of the GATS legal services negotiations. In particular, this work seeks to highlight the potential for obstruction that reliance on core values presents. Part II of this Article begins by explaining the ways in which the GATS affects trade in legal services, providing the necessary background for an understanding of the negotiations currently underway to liberalize trade in legal services. These

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the ABA Center for Professional Responsibility to the ABA GATS Task Force," Laurel S. Terry, *Current Developments Regarding the GATS and Legal Services: The Cancun Ministerial GATS Negotiations*, B. EXAMINER 38 (Feb. 2004) [hereinafter Terry, *Cancun Ministerial*], and has written an excellent series of articles on the GATS legal services negotiations. These articles are available at http://www.abanet.org/cpr/gats/articles.html (last visited Apr. 14, 2005).

15. *See infra* Part VI.

16. In the United States, such charges were most forcefully promoted in the debate within the ABA over whether to amend the Model Rules of Professional Conduct to permit lawyers to participate in multidisciplinary partnerships (MDPs). Dale R. Harris, Remarks at the American Bar Association House of Delegates Debate on Multidisciplinary Partnerships (July 11, 2000), *available at* http://www.abanet.org/cpr/mdp_hod_transc.html (noting support for multidisciplinary partnerships "provided that they be done in a way to protect the public interest and preserve our core values") (last visited Apr. 6, 2005). In reaction to the MDP debate, the ABA adopted a resolution affirming the core values of the legal profession. AM. BAR ASS'N HOUSE OF DELEGATES RECOMMENDATION (July 2000), *available at* http://www.abanet.org/cpr/mdprecom10f.html (last visited Apr. 6, 2005) [hereinafter ABA CORE VALUES RECOMMENDATION].

17. As Sydney Cone has put it, "[n]ot infrequently, the local legal profession, in the name of protecting 'the public,' has done a mighty fine job of protecting itself." SYDNEY M. CONE III, INTERNATIONAL TRADE IN LEGAL SERVICES § 3:1 (1996).

negotiations are the focus of Part III. Part IV enumerates the key provisions of the prime negotiating document, the *Disciplines on Domestic Regulation in the Accountancy Sector*,[18] and explains the more forceful criticisms of those provisions offered by some national bar associations. Part V is devoted to evaluating the bar associations' critiques and to gauging the consequences of the core values arguments they advance. Finally, although the ABA has not expressed its view of the core values debate, Part VI considers how some "core values" arguments might be resolved under the ABA *Model Rules of Professional Conduct* and how recent developments within the ABA could provide a basis for compromise in the current GATS negotiations.

In the end, this Article concludes that the core values arguments promoted by some bar associations are most accurately seen as efforts by national authorities to maintain their traditional regulatory monopolies over legal professionals, and thus have the potential to foreclose the resolution of issues that are crucial to a successful conclusion of the legal services negotiations.

II. THE GENERAL AGREEMENT ON TRADE IN SERVICES: HOW THE GATS AFFECTS TRADE IN LEGAL SERVICES

The negotiation and signing of the GATS during the Uruguay Round trade negotiations signaled the large and growing importance of "trade in services" to the global economy.[19] Moreover, the centrality of the GATS in the international regulation of services regimes have led some to call the Agreement the most important development in the multilateral trading system since the General Agreement on Tariffs and Trade (GATT) became effective in 1948.[20] Nevertheless, these are still early days for the GATS and much of how its rules will govern trade in services has been left for future negotiations.[21] In

18. WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (Dec. 17, 1998) [hereinafter *Accountancy Disciplines*].

19. *See* WTO, INTERNATIONAL TRADE STATISTICS 2003 (2003), http://www.wto.org/english/res_e/statis_e/its2003_e/its2003_e.pdf (last visited Apr. 6, 2005). In 2002, the value of global services exports totaled $1,570 billion U.S.D., or nearly a quarter of all exports worldwide. *Id.* at 2. In order to get an idea of the magnitude of the growth of the services trade in recent years consider that exports of services rose six percent over the year 2001-2002, an increase that represents the same amount of growth over the ten year period 1990-2000. *Id.*

20. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 9, at 161.

21. *Id.* "The GATS rules are not quite complete, and are largely untested. This process of filling the gaps will require several more years of negotiations, and experience will no doubt show a need to improve some of the existing rules." *Id.* Professor Laurel Terry has described the GATS as an example of a "legislative-delegation model" of regulating the cross-border provision of services because it leaves the task of developing more detailed obligations to various WTO institutions. Terry, *supra* note 6, at 1392 (discussing the operation of such a model in the development of rules to govern the cross-border provision of legal services).

the meantime, we are left with the Agreement itself and the ways in which it currently constrains WTO members from erecting protectionist barriers to services markets.

The GATS obligations and derogations of WTO Member States are found in the following documents: (1) the "framework agreement"[22] made up of the twenty-nine articles and eight annexes[23] found in Annex 1B of the WTO Agreement;[24] (2) the Schedules of Specific Commitments[25] reflecting obligations assumed by WTO Member States in specific services sectors at the conclusion of the Uruguay Round negotiations;[26] and (3) lists of authorized exemptions from most-favored-nation (MFN) treatment filed by WTO Members with respect to certain services sectors.[27] Each of these sources will be considered in turn.

A. The Framework Agreement

Part I ("Scope and Definition") delineates the reach[28] of the Agreement and provides a rather broad definition of trade in services.[29] This definition includes the supply of services in any one of four different "modes." These

22. *See* CONE, *supra* note 17, § 2:15 (using the term "framework agreement" to describe the GATS itself).

23. GATS, *supra* note 8. Only one of these annexes, Annex on Article II Exemptions, is relevant to legal services. *See infra* notes 54-57 and accompanying text. The other annexes include: Annex on Movement of Natural Persons Supplying Services under the Agreement; Annex on Air Transport Services; Annex on Financial Services; Second Annex on Financial Services; Annex on Maritime Transport Services; Annex on Telecommunications; and Annex on Basic Telecommunications. *See* GATS, *supra* note 8. The Annex on Movement of Natural Persons Supplying Services under the Agreement would seem to apply to legal services. However, on March 1, 1995, the Council for Trade in Services effectively nullified the import of this Annex by adopting a conclusion of the Sub-Committee on Services that "what appears in the schedules of participants is sufficiently clear and . . . that there was no need for further multilateral work on this issue." WTO Council for Trade in Services, *Issues Relating to the Scope of the GATS: Report by the Chairman of the Sub-Committee on Services*, S/C/1 (Feb. 15, 1995); WTO Council for Trade in Services, *Report of the Meeting Held 1 March 1995: Note by the Secretariat*, S/C/M/1 (Mar. 22, 1995).

24. GATS, *supra* note 8.

25. WTO, *Guide to Reading GATS Schedules of Specific Commitments and the Lists of Article II (MFN) Exemptions*, *at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Feb. 21, 2005) [hereinafter Guide to Reading GATS Schedules]. "A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule." *Id.* For an excellent explanation of how GATS schedules developed and their foundation in the WTO request-offer system, *see* Terry, *supra* note 13, at 1004.

26. *See infra* notes 47-53 and accompanying text.

27. *See infra* notes 54-57 and accompanying text.

28. GATS, *supra* note 8, at art. I(1) ("This Agreement applies to measures by Members affecting trade in services.").

29. *Id.* at art. I(3)(b) ("'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority") (emphasis added).

include: (1) the "cross-border" supply of services;[30] (2) the "consumption abroad" of services;[31] (3) the "commercial presence" of foreign services suppliers;[32] and (4) the temporary "presence of natural persons."[33] This multifaceted definition of "services" may, at first blush, seem rather complicated, but the four modes of supply form the categories in which WTO Member States schedule concessions.[34] The categorization of services in this way also permits meaningful comparisons of the varying restrictions that Member States may impose in particular services sectors.[35]

GATS obligations imposed on Member States come in two basic varieties, unconditional and conditional. Part II (entitled "General Obligations and Disciplines") contains the unconditional obligations; those undertakings that apply to all WTO Members regardless of whether they have scheduled commitments in specific services sectors.[36] The most important of these obligations is the duty to provide most-favored nation (MFN) treatment to services and service suppliers of other Members,[37] an undertaking already well

30. *Id.* at art. I(2)(a) ("from the territory of one Member into the territory of any other Member"). This mode of supply is implicated whenever the service itself crosses a border. *See* Terry, *supra* note 13, at 1008 ("Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the U.S. border to clients inside the United States.").

31. *Id.* at art. I(2)(b) ("in the territory of one Member to the service consumer of any other Member"). This provision speaks to the ability of a consumer from one Member State country to go to another Member State country and to buy services while there. *See* Terry, *supra* note 13, at 1008 ("Mode 2, or Consumption abroad, involves the ability of U.S. citizens to purchase abroad the services of foreign lawyers.").

32. *Id.* at art. I(2)(c) ("by a service supplier of one Member, through commercial presence in the territory of any other Member"). This is also commonly referred to as the "right of establishment." Terry, *supra* note 13, at 1008 ("Mode 3, or Commercial presence, involves the ability of foreign lawyers to set up a permanent presence in the United States, such as a branch office.").

33. *Id.* at art. I(2)(d) ("by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member"). *See* Terry, *supra* note 13, at 1008 ("Mode 4, or the presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter the United States in order to offer legal services.").

34. *See infra* notes 47-53 and accompanying text.

35. *Guide to Reading GATS Schedules*, *supra* note 25 ("The national schedules all conform to a standard format which is intended to facilitate comparative analysis.").

36. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 9, at 165 ("Part II sets out 'general obligations and disciplines.' These are basic rules that apply to all members and, for the most part, to all services.").

37. GATS, *supra* note 8, at art. II(1). "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country." *Id.*

familiar to students of the GATT. There are, however, other unconditional GATS commitments unknown to the GATT, including measures related to transparency,[38] recognition of academic and professional qualifications,[39] and provisions regulating internal licensing procedures, or domestic regulations.[40]

The conditional obligations of the GATS, which only apply to services sectors in which a member has undertaken specific commitments, [41] are two-fold and are found in Part III ("Specific Commitments"). The first of these obligations is the prohibition on market access restrictions found in Article XVI.[42] Specifically, this provision prohibits a Member from, for instance, placing quotas on the number of foreign services suppliers,[43] limiting the total value of foreign services transactions,[44] or restricting the number of foreign persons that may be employed in a particular services sector.[45]

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38. *See Id.* at art. III(1).

> Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

Id.

39. *See Id.* at art. VII(1).

> For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers . . . a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement with the country concerned or may be accorded autonomously.

Id.

40. The GATS domestic regulation provisions are comprehensively addressed *infra* at Part III.B.1.

41. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 9, at 171.

42. GATS, *supra* note 8, at art. XVI(1). "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." *Id.*

43. *Id.* at art. XVI(2)(a).

> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
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> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

Id.

44. *Id.* at art. XVI(2)(b) ("limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test").

45. *Id.* at art. XVI(2)(d) ("limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test").

The second undertaking placed upon scheduled services sectors is found in the national treatment, or non-discrimination, obligation of Article XVII.[46] Like the undertaking to provide MFN treatment, the GATS national treatment provision enforces obligations similar to analogous GATT provisions. So while it seems that the GATS is well on its way to injecting a measure of discipline into services regulations with tried and true liberalizing concepts, these undertakings are conditioned by the two other sources of GATS law: the Members' Schedules of Specific Commitments and the lists of Article II exemptions, both of which are addressed in the next section.

B. Derogating from the GATS: Schedules of Specific Commitments and Article II Exemptions

Although "scheduled" services sectors are subject to the more rigorous market access and national treatment obligations of the GATS, Member States were free to choose which sectors would be submitted to this enhanced discipline.[47] During the initial Uruguay Round negotiations, forty-eight Member States took the decision to submit their legal services sectors to the obligations inherent in Part III of the GATS.[48] Much of the sting of the market access and national treatment obligations was nonetheless removed by the content of Member States' schedules. Most of the Member States that included legal services on their Schedules of Specific Commitments did so by listing

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46. *Id.* at art. XVII.

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
> 3. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Id.

47. However, because inclusion or exclusion of particular services sectors was the subject of intense negotiations, some Member States scheduled services sectors that they might otherwise have sought to protect in order to gain concessions in other sectors and under different agreements. *See, e.g.*, CONE, *supra* note 17, at § 2:6-7 (explaining how Japan was persuaded to rejoin the GATS legal services negotiations in response to intense pressure by the United States and the European Community).

48. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 9, at 199 (including twenty-five developed countries, nineteen developing countries, and four transition economies). For individual Member States' GATS Schedules, see WTO Services Database, *at* http://tsdb.wto.org/wto/WTOHomepublic.htm (n.d.) (last visited Feb. 1, 2005).

their current regulations.[49] The legal effect of listing current laws in a GATS schedule is to effectively exempt those laws from the market access and national treatment obligations.[50] A Member State may not, however, impose regulations in a scheduled sector that are more onerous than the current regulations listed in that Member's GATS schedule.[51] This means that although few restrictions on trade in legal services were rolled back during the Uruguay Round, future regulations adopted by scheduling Member States can be no more restrictive than current regulations.[52] That is why the GATS is sometimes said to impose "standstill" or "grandfathered" obligations on Member States.[53]

Another means by which Member States were given the opportunity during the Uruguay Round to mitigate their obligations arising under the GATS was to submit lists of sectoral exemptions from MFN treatment.[54] If a Member State placed a particular sector on its list, it was no longer obligated to provide MFN treatment in that sector.[55] Although the Article II exemptions lists must be examined in determining the extent of Member States' obligations, very few

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49. *See* Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 967 (1995) (analyzing the submitted legal services schedules of WTO Members and concluding that "in most cases, the commitments merely preserved existing regulatory measures").

50. *See* GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 9, at 171 ("Service commitments resemble those in a GATT schedule at least in one very important respect: they are bindings which set out *the minimum, or worst permissible, treatment of the foreign service or its supplier*.") (emphasis added).

51. CONE, *supra* note 17, at § 2:32 ("Article XVII will prevent the adoption of any *additional* discriminatory measures that were not in effect on December 15, 1993, and not expressly covered by a Schedule of Specific Commitments or MFN list in a GATS offer in respect of legal services.").

52. Nevertheless, a Member State may have preserved its right to impose more restrictive regulations in the future by noting in its schedule that a particular sector or mode of supply is "unbound." For a detailed explanation of the terms used in scheduling commitments and the legal effect of those terms, see *Guide to Reading GATS Schedules*, *supra* note 25 ("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 or 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.").

53. *See, e.g.*, CONE, *supra* note 17, at § 2:31-32 (using the term "standstill" to describe scheduled obligations); Terry, *supra* note 13, at 1005 (noting that the GATS "grandfathers in" existing sets of regulations).

54. GATS, *supra* note 8, at Annex on Article II Exemptions.

55. *Id.* ¶ 1 ("This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.").

states included legal services on their respective Article II exemptions list.[56] Therefore, a fuller treatment of the issues surrounding these exemptions is beyond the scope of this Article.[57]

In summary, in order to determine a Member State's GATS undertakings in respect of legal services, or any other services sector, one must look to three sources of GATS obligations: (1) the unconditional commitments to which all WTO Members are subject, mostly found in Part II of the GATS framework agreement; (2) the commitments found in Member States' Schedules of Specific Commitments to which the market access and national treatment obligations of Part III apply; and (3) the MFN exemptions lists submitted during the Uruguay Round negotiations, which excuse Members from granting MFN treatment in specified services sectors.

As cumbersome as determining a Member State's GATS obligations is under this three-step procedure, it is only the starting point for investigating the true extent of how GATS may come to regulate legal services in the future. Given the incomplete nature of the GATS regime,[58] one must look to some of the negotiations that occurred soon after the GATS came into effect and to those that are currently ongoing in order to more fully comprehend how GATS obligations may constrain legal services regulators.[59] These negotiations are the focus of Part III.

III. DOMESTIC REGULATION AND THE WORKING PARTY ON PROFESSIONAL SERVICES: A BRIEF HISTORY OF THE POST-GATS NEGOTIATIONS

A. Progressive Liberalization and the Two-Track Negotiations

Article XIX of the GATS, entitled "Negotiation of Specific Commitments," provides for future liberalizing negotiations to begin no later than five years after the coming into force of the GATS.[60] In accord with this

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56. *See* CONE, *supra* note 17, at § 2:22 (listing GATS members that submitted MFN-exemption lists in legal services, including: Brunei Darussalam, China (which was still negotiating WTO membership at the time), Costa Rica, Cyprus, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Malta, Singapore, Turkey, and Venezuela).

57. For a discussion of the unsettled issues surrounding MFN exemptions, see Terry, *supra* note 13, at 1003-04.

58. *See supra* note 21 and accompanying text.

59. *See* Terry, *supra* note 13, at 1019 ("[O]ne must recognize that because GATS used a legislative-delegation model, one cannot fully understand the obligations imposed by the GATS until one examines the post-GATS developments.").

60. GATS, *supra* note 8, at art. XIX(1).

> In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all

mandate, on February 25, 2000, new services negotiations began.[61] These negotiations were often referred to as the "GATS 2000 negotiations"[62] or the "built-in agenda" negotiations.[63] On November 14, 2001, the WTO Ministerial Conference meeting in Doha, Qatar, adopted the Fourth Ministerial Declaration, which launched the current round of trade negotiations known as the Doha Development Agenda (DDA).[64] This "Doha Declaration" also endorsed the work that had been done in the GATS 2000 negotiations and subsumed its future work into the DDA negotiating framework.[65] These negotiations were scheduled to conclude no later than January 1, 2005,[66] and

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> participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

Id.

61. Press Release, WTO, Services Negotiations Formally Launched (Feb. 25, 2000), *at* http://www.wto.org/english/news_e/news00_e/servfe_e.htm (last visited Apr. 6, 2005).

62. *See, e.g.*, Director General Renato Ruggiero, Towards GATS 2000 – A European Strategy, Address to the Conference on Trade in Services, organized by the European Commission (June 2, 1998), *available at* http://www.wto.org/english/news_e/sprr_e/bruss1_e.htm (last visited Apr. 6, 2005).

63. *See, e.g.*, Terry, *supra* note 13, at 1050 n.193 (employing the term and explaining its meaning).

64. WTO Ministerial Conference, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (last visited Apr. 6, 2005).

65. *Id.* ¶ 15.

> The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement.

Id.

66. *Id.* ¶ 45 ("The negotiations to be pursued under the terms of this declaration shall be concluded not later than 1 January 2005."). The Doha negotiations, including the so-called "Track 1" GATS legal services negotiations, were temporarily abandoned in September 2003 at the Fifth WTO Ministerial Conference in Cancún, Mexico. For more information on the breakdown of the Cancún negotiations see Terry, *Cancun Ministerial*, *supra* note 14, at 38. The WTO Member States resumed the Track 1 negotiations and the rest of the Doha Work Programme pursuant to an August 1, 2004 decision of the WTO General Council. The decision did not set a revised deadline for conclusion of the services negotiations but did set a May 2005 deadline for the tabling of revised services offers. *See* WTO, *Doha Work Programme Decision Adopted by the General Council on 1 August 2004*, WT/L/579, at 3 & Annex C (Aug. 2, 2004). However, the "Track 2" or "disciplines" negotiations continued despite the collapse of the Track 1 negotiations at Cancún. 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 ST. INT'L L. REV. 695, 706 (2004) ("the WPDR continued its work on the Disciplines issues even when other Doha negotiations had collapsed following the September 2003 Ministerial Conference in Cancun, Mexico.").

are the kind of "request-offer" negotiations that have become familiar over the past fifty years within the GATT framework.[67] There is, however, another "track" of negotiations currently ongoing in Geneva that could more profoundly affect the way that GATS regulates trade in legal services.[68] These are the negotiations occurring in the Working Party on Domestic Regulation (WPDR), which is considering the feasibility of developing horizontal disciplines on domestic regulation.[69] Because of the importance of these "disciplines" negotiations to the future regulation of trade in legal services they will be the focus of the remainder of this section.

B. Article VI and the Accountancy Disciplines

In order to properly evaluate the proposals currently being advanced in the WPDR with respect to horizontal and sector-specific disciplines, it is necessary to become familiar with the GATS domestic regulation provisions and with post-GATS developments in the accountancy sector.

1. Article VI: Domestic Regulation

As used in the GATS, the term "domestic regulation" refers to any generally applicable measure that may have the potential to adversely affect the provision of trade in services for which a Member State has undertaken specific obligations.[70] Article VI of the GATS provides that these measures shall be administered in a "reasonable, objective and impartial manner."[71] More specifically, Article VI requires Member States to maintain judicial or administrative tribunals for review of decisions that affect trade in services.[72]

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67. *See id.* ¶ 15 ("Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.").

68. *Cf.* Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. J. INT'L & COMP. L. 361, 405-06 (2003) (analyzing Member State DDA proposals on legal services and noting a "very limited ambition for meaningful liberalization of legal services").

69. IBA GATS HANDBOOK, *supra* note 13, at 3.

> Currently there are two different sets of events ongoing in Geneva of which member bars should be aware (and may want to participate). The first ongoing activity is the development of horizontal disciplines on domestic regulation. The second development is the new Doha Round of negotiations for further liberalization of trade in services. Although there is some overlap between these two 'tracks' or developments, they are different and Member Bars should be aware of both.

Id.

70. GATS, *supra* note 8, at art. VI(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."). Note, however, that some provisions of Article VI, notably Article VI(2), *see infra* note 72, apply to all WTO Members whether or not they have scheduled services in a particular sector.

71. *Id.* at art. VI(1).

72. *Id.* at art VI(2).

The appropriate authorities are also obligated to promptly review any required applications for the supply of services within a Member State's jurisdiction.[73] These measures are likely to be very important for the regulation of trade in legal services because they address the kinds of requirements that are often used to restrict the practice of foreign legal practitioners, namely, licensing and qualification rules.[74]

In order to ensure that these domestic regulation measures are given their appropriate effect, Article VI also directs the Council for Trade in Services, or one of its subsidiaries, to develop more specific "disciplines" to govern the regulation of trade in services.[75] This provision has formed the basis of the

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(a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

Id.

73. *Id.* at art. VI(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.

Id.

74. Terry, *supra* note 13, at 1002 ("Domestic regulation is also potentially significant to legal services regulators because of its requirement that, for those including legal services on their Schedules, regulatory measures, such as admission, licensing, and discipline measures, be administered in a reasonable, objective, and impartial manner and that qualification requirements be not more burdensome than necessary to ensure the quality of the service."); *see also* Legal Services Background Note, *supra* note 3, ¶¶ 41, 47 (noting that "[q]ualification requirements often represent an insurmountable barrier to trade in legal services" and that "foreign legal consultants still face important regulatory barriers in particular with respect to licensing requirements").

75. GATS, *supra* note 8, at art. VI(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;

"disciplines" track of the current negotiations as well as the backdrop for much of the post-GATS progress towards liberalized markets in services.

2. The Working Party on Professional Services and the Accountancy Disciplines

In addition to the direction found in Article VI, the impetus to develop multilateral disciplines was provided by the Decision on Professional Services, adopted by the Ministerial Conference as part of the Final Act Agreements.[76] The Decision first directed the Council for Trade in Services to create a Working Party on Professional Services (WPPS) to oversee the development of the disciplines mandated by Article VI(4).[77] The Decision also directed the newly constituted WPPS to begin its work by elaborating disciplines for the accountancy sector.[78] As part of this mandate, the WPPS was given the further task of establishing guidelines for the recognition of qualifications.[79] The

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(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Id.

76. GATS, *supra* note 8.

77. *Id.* ¶ 1.

> The work programme foreseen in paragraph 4 of Article VI on Domestic Regulation should be put into effect immediately. To this end, a Working Party on Professional Services shall be established to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to the qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.

Id.

78. *Id.* ¶ 2.

> As a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector, so as to give operational effect to specific commitments. In making these recommendations, the Working Party shall concentrate on:
>
> (a) developing multilateral disciplines relating to market access so as to ensure that domestic regulatory requirements are (i) based on objective criteria, such as competence and the ability to supply the service; (ii) not more burdensome than necessary to ensure the quality of the service, thereby facilitating the effective liberalization of accountancy services;
>
> (b) the use of international standards and, in doing so, it shall encourage the cooperation with the relevant international organizations as defined under paragraph 5(b) of Article VI [referring to "international bodies whose membership is open to the relevant bodies of at least all Members of the WTO"], so as to give full effect to paragraph 5 of Article VII [relating to adoption of common international standards].

Id.

79. *Id.* ¶ 2 ("facilitating the effective application of paragraph 6 of Article VI of the Agreement [relating to the verification of professional competence] by establishing guidelines for the recognition of qualifications"). The Council for Trade in Services adopted the recognition guidelines developed by the WPPS on May 29, 1997. *See* Press Release, WTO, WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector (May 29, 1997), *available at* http://www.wto.org/english/news_e/pres97_e/pr73_e.htm (last visited Apr.

Council for Trade in Services implemented the Decision on Professional Services by adopting it verbatim at its first meeting on March 1, 1995.[80]

On December 4, 1998, almost four years after its creation and about one and one half years after issuing its *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*,[81] the WPPS completed its work on multilateral disciplines for the accountancy sector.[82] The Council for Trade in Services wasted little time in approving the work of the WPPS and ten days later, on December 14, 1998, adopted the disciplines as submitted by the working party.[83] Development of the *Accountancy Disciplines* was, however, to be the final achievement of the WPPS because on April 26, 1999, it was replaced by the WPDR.[84] The WPDR has continued the work of the WPPS, but its remit is wider, not being limited, as was the WPPS, to developing disciplines only for the professional services sectors.[85]

Several reasons have been advanced for the decision to disband the WPPS in favor of the WPDR. For instance, it has been suggested that the move was prompted by the desire to allow for greater participation of smaller countries that typically do not have the resources to engage in negotiations in more than one forum.[86] The view has also been expressed that the development of disciplines should proceed on a horizontal rather than a sectoral basis, and that the *Accountancy Disciplines* could provide a useful template for such an endeavor.[87] Whatever the motivation, given the wide definition of services

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6, 2005); *see also* WTO Council for Trade in Services, *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/38 (May 28, 1997). Although the development of these *Guidelines* was an important step in the post-GATS negotiations, a discussion of them is well beyond the scope of this Article. For an excellent treatment with reference to the relevant WTO documents, see Terry, *supra* note 13, at 1027-29.

80. WTO Council for Trade in Services, *Decision on Professional Services*, S/L/3 (Apr. 4, 1995).

81. *See supra* note 79.

82. Working Party on Professional Services, *Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector*, S/WPPS/4 (Dec. 10, 1998).

83. WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector*, S/L/63 (Dec. 15, 1998) [hereinafter *Decision on Accountancy Disciplines*]; *see also Accountancy Disciplines*, *supra* note 18.

84. *See* WTO Council for Trade in Services, *Decision on Domestic Regulation*, S/L/70 (Apr. 28, 1999).

85. *See id.* ¶ 2.

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

Id.

86. *See* Terry, *supra* note 13, at 1038 n.141 (reporting the views Bernard Ascher, Director of Service Industry Affairs for the Office of the United States Trade Representative).

87. *See* Working Party on Professional Services, *Note on the Meeting Held on 9 February*

adopted by the GATS,[88] and the nearly four years that it took the WPPS to develop the *Guidelines for Mutual Recognition Agreements* and the *Accountancy Disciplines*,[89] it simply might not be feasible to expect the WPDR to develop multilateral disciplines on a sectoral basis.

Not surprisingly then, most of the discussion in the WPDR since its creation has focused upon the feasibility of developing horizontal disciplines that could apply to multiple, or perhaps all, services sectors.[90] This development has drawn the ire of many lawyers and bar leaders from around the world.[91] They seem particularly hostile to the suggestion that the *Accountancy Disciplines* might form the basis for multilateral disciplines to govern trade in legal services.[92] These criticisms and the key provisions of the *Accountancy Disciplines* to which they refer are the focus of Part IV.

IV. THE DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR: KEY PROVISIONS AND CRITICISMS

A. The Legal Effect and Scope of the Accountancy Disciplines

Before considering their substantive provisions,[93] it is important to note two preliminary issues regarding the *Accountancy Disciplines*, namely their legal status within the GATS regime and the undertakings to which they apply. The legal effect of the *Accountancy Disciplines* was first taken up in the WPPS, which recommended that the *Disciplines* be implemented through a decision of the Council for Trade in Services.[94] Adopting the WPPS's proposed Decision verbatim,[95] the Council for Trade in Services accepted the *Accountancy Disciplines* as drafted by the WPPS, and made them applicable to all Members that placed accountancy services on their Schedules of Specific Commitments.[96] The full implementation of the *Disciplines* into the GATS

1999, S/WPPS/M/25 (Mar. 5, 1999) ("It was also the view of most speakers that work should proceed on a horizontal rather than a sectoral basis, and that the accountancy disciplines would provide a useful starting point for such work.").

88. *See supra* note 29 and accompanying text.

89. The WPPS was created on March 1, 1995, and the *Accountancy Disciplines* were adopted by the Council for Trade in Services on December 14, 1998. *See supra* notes 80-83 and accompanying text.

90. *See* Terry, *supra* note 13, at 1041 (citing minutes of WPDR meetings).

91. *See infra* Part IV.B.

92. *See infra* note 102 and accompanying text.

93. *See infra* notes 107-127 and accompanying text.

94. *See* Working Party on Professional Services, *supra* note 82, ¶ 6. "Members extensively discussed the question of potential legal forms for adoption of the accountancy disciplines. The outcome of the discussions is the attached draft Council Decision (Job No. 6481/Rev.1), which the WPPS now recommends for adoption." *Id.*

95. *Compare id.* ¶ *2 with Decision on Accountancy Disciplines*, *supra* note 83.

96. *Decision on Accountancy Disciplines*, *supra* note 83, ¶ 1. "The Council for Trade in Services . . . Decides as follows, to adopt the text of the Disciplines on Domestic Regulation in

was, nevertheless, delayed until completion of the current round of services negotiations.[97] Instead, the Council's Decision created an immediate standstill effect, which continues to prohibit Member States from adopting domestic regulations that are inconsistent with the *Disciplines*.[98]

Despite the broad language of this standstill paragraph, the *Accountancy Disciplines* were not intended to govern all Member State obligations under the GATS. The first paragraph of the *Disciplines* expressly states that theses measures only apply to "domestic regulations" and not to the market access and national treatment limitations enshrined in Members States' schedules.[99] While the distinction between domestic regulations and market access and national treatment obligations might be easy enough to state in the abstract, categorizing a regulation in a particular case may be exceedingly difficult.[100]

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the Accountancy Sector contained in document S/WPPS/W/21. These disciplines are to be applicable to Members who have entered specific commitments on accountancy in their schedules." *Id.*

97. *Id.* ¶ 2 ("No later than the conclusion of the forthcoming round of services negotiations, the disciplines developed by the WPPS are intended to be integrated into the General Agreement on Trade in Services (GATS).").

98. *Id.* ¶ 3 ("Commencing immediately and continuing until the formal integration of these disciplines into the GATS, Members shall, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines.").

99. *Accountancy Disciplines*, *supra* note 18, ¶ 1.

> The purpose of these disciplines is to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

Id. Accord Working Party on Professional Services, *Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector: Informal Note by the Chairman* (Job No. 6496), *attached to* S/WPPS/4 (Nov. 25, 1998) ¶ 2 [hereinafter Chairman's Note].

> In the course of work to develop multilateral disciplines on domestic regulation in the accountancy sector, pursuant to paragraph 4 of Article VI of the GATS, the WPPS addressed a wide range of regulatory measures which have an impact on trade in accountancy services. In discussing the structure and content of the new disciplines, it became clear that some of these measures were subject to other legal provisions in the GATS, most notably Articles XVI and XVII. *It was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty.* For this reason, a number of the suggestions for disciplines were excluded from the text.

Id. (emphasis added).

100. This much was recognized, and a justification for the distinction given, in Chairman's Note, *supra* note 99, ¶ 3:

> Although it was not in the mandate of the WPPS to provide an interpretation of GATS provisions, the important relationship between the new disciplines and Articles XVI and XVII was noted. While these two Articles relate to the scheduling of specific commitments on measures falling within their scope, the disciplines developed under Article VI:4 aim at ensuring that other types of regulatory measures do not create unnecessary barriers to trade. It has been

In fact, this overlap could serve to narrow the scope of the *Accountancy Disciplines* even further by allowing a Member State to make a colorable argument that what appears to be a domestic regulation provision is really a market access or national treatment limitation that it can maintain pursuant to the terms of its schedule. Much of this confusion perhaps arises from the uncertain parameters of the term "domestic regulation." Through GATT practice, Member States have a pretty good idea of the meaning of "market access" and "national treatment." Adding flesh to the bones of the "domestic regulation" concept may similarly have to await further GATS practice and interpretation of the term in the adjudicative bodies of the WTO.

B. The Accountancy Disciplines and Their Critics

As previously noted, since its inception, much of the work of the WPDR has focused on the feasibility of using the *Accountancy Disciplines* as a model for developing horizontal disciplines that could apply to all services sectors.[101] Many bar leaders have criticized this development, and some have expressed their dismay in position papers that catalogue misgivings about the appropriateness of applying the *Disciplines* to trade in legal services.[102] Three

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> noted that Article XVI (Market Access) covers the categories of measures referred to in paragraph 2 (a) to (f), whether or not any discrimination is made in their application between domestic and foreign suppliers. Article XVII (National Treatment) captures within its scope any measure that discriminates—whether *de jure* or *de facto*—against foreign services or service suppliers in favour of like services or service suppliers of national origin. A Member scheduling commitments under Articles XVI and XVII has the right to maintain limitations on market access and national treatment and inscribe them in its schedule. On the other hand, the disciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII. *However, it is also recognized that for some categories of measures the determination as to whether an individual measure falls under Article VI:4 disciplines or is subject to scheduling under Article XVII will require careful consideration.*

Id. (emphasis added). *But see* Terry, *supra* note 13, at 1073 (questioning whether a Member State could continue to rely on market access and national treatment standstill provisions in its Schedule of Specific Commitments if sectoral disciplines are adopted).

101. *See supra* note 90 and accompanying text.

102. *See, e.g.*, CAN. BAR ASS'N, SUBMISSION ON: THE GENERAL AGREEMENT ON TRADE IN SERVICES AND THE LEGAL PROFESSION: THE ACCOUNTANCY DISCIPLINES AS A MODEL FOR THE LEGAL PROFESSION (Aug. 2000), http://www.cba.org/cba/submissions/pdf/00-30-eng.pdf (last visited Apr. 6, 2005) [hereinafter CBA GATS Submission]; COUNCIL OF THE BARS & LAW SOCIETIES OF THE EUROPEAN UNION, CCBE RESPONSE TO THE WTO CONCERNING THE APPLICABILITY OF THE ACCOUNTANCY DISCIPLINES TO THE LEGAL PROFESSION (May 2003), http://www.ccbe.org/doc/En/ccbe_response_080503_en.pdf (last visited Apr. 6, 2005) [hereinafter CCBE Response]; FED'N OF LAW SOCIETIES OF CAN., MEETING CANADA'S CURRENT OBLIGATIONS FOR THE LEGAL PROFESSION UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) OF THE WORLD TRADE ORGANIZATION (WTO) (Feb. 24, 2001), http://www.flsc.ca/en/documents/2001wtoreport.doc (last visited Apr. 6, 2005) [hereinafter Meeting Canada's Current Obligations].

organizations in particular have been very active in expressing their concerns and encouraging their members to become involved in the GATS negotiations.[103] They include the Canadian Bar Association (CBA),[104] the Federation of Law Societies of Canada (FLSC),[105] and the Council of the Bars and Law Societies of the European Union (CCBE).[106] Their criticisms provide a measure of where compromise might be possible, and they also suggest the difficulty that lies ahead in reaching a consensus on appropriate disciplines for the legal services sector.

The provisions of the *Disciplines* that deal with the procedural aspects of licensing have been relatively uncontroversial.[107] These provisions have raised few concerns among bar associations largely because the prescribed practices are already followed by many licensing authorities.[108] Other provisions that fall into this category include Article V (Licensing Procedures)[109] and Article VII

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103. For a discussion of the failure of the U.S. legal community to take such an interest, see Terry, *Why You Should Care*, *supra* note 14, at 67.

104. "The Canadian Bar Association is a professional, voluntary organization which was formed in 1896, and incorporated by a Special Act of Parliament on April 15, 1921. Today, the Association represents some 38,000 lawyers, judges, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA." Can. Bar Ass'n, *About the CBA*, *at* http://www.cba.org/CBA/about/main/ (last visited Feb. 12, 2005).

105. "The Federation of Law Societies of Canada is the umbrella organization of the fourteen Law Societies in Canada. Each law society governs the legal profession within their respective province or territory." Fed'n of Law Societies of Can., *A Word From the President*, *at* http://www.flsc.ca/en/about/president.asp (last visited Feb. 12, 2005).

106. "The CCBE liaises between the Bars and Law Societies from the Member States of the European Union and the European Economic Area. It represents all such Bars and Law Societies before the European institutions, and through them some 500,000 European lawyers." Comm'n Consultative des Barreaux Européens, *What is the CCBE?*, *at* http://www.ccbe.org/en/ccbe/ccbe_en.htm (last visited Apr. 6, 2005). CCBE is the acronym for the Commission Consultative des Barreaux Européens, which, although later named the Council of the Bars and Law Societies of the European Community, was still known colloquially as the CCBE. CONE, *supra* note 17, at § 2:6.

107. *See, e.g.*, *Accountancy Disciplines*, *supra* note 18, ¶ 3 (on transparency). "Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e., governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations)." *Id.*

108. *See, e.g.*, Meeting Canada's Current Obligations, *supra* note 102, at 13. "Canadian Law Societies already comply with Discipline 3 as they do make publicly available the names and addresses of competent authorities who license and regulate lawyers within Canada. Such information can be obtained directly from the respective Law Society or from the Federation of Law Societies of Canada." *Id.*

109. *See, e.g.*, *Accountancy Disciplines*, *supra* note 18, ¶ 15.

> Application procedures and the related documentation shall not be more burdensome than necessary to ensure that applicants fulfill qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall

(Qualification Procedures).[110] Nevertheless, several other provisions have raised alarm among bar leaders.

The first discipline that has been singled out as raising some concern is found in Article II (General Provisions), which provides:

> Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, *MEMBERS SHALL ENSURE THAT MEASURES ARE NOT MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A LEGITIMATE OBJECTIVE.* Legitimate objectives are, *INTER ALIA*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.[111]

The principal criticisms of this discipline focus on use of the terms "necessary" and "legitimate objective." The CBA, in particular, is concerned that the WTO adjudicative bodies would rely on the WTO's interpretation of the word "necessary" under Article XX of the GATT in construing the obligation imposed on Member States in this discipline.[112] The CBA reads this Article XX jurisprudence as requiring a Member State to establish that there "were no alternative measure[s] consistent with the General Agreement, or less inconsistent with it" in order to maintain a challenged regulation.[113] Moreover, it worried because, "[i]n the dozen or so cases which have been decided under Article XX, a member state's measure has never been upheld on grounds of 'necessity'."[114] Interpretive discretion also motivates the CBA's concern over the notion of "legitimate objective." It opined: "Although the Article lists

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> be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

Id.

110. *See, e.g., id.* ¶ 22 ("Verification of an applicant's qualifications acquired in the territory of another Member shall take place within a reasonable time-frame, in principle within six months and, where applicants' qualifications fall short of requirements, shall result in a decision which identifies additional qualifications, if any, to be acquired by the applicant."); *see also* CBA GATS Submission, *supra* note 102, at 7-8 (describing Article V (Licensing Procedures) and Article VII (Qualification Procedures) as "provisions which do not raise concerns").

111. *Accountancy Disciplines*, *supra* note 18, ¶ 2 (emphasis added).

112. CBA GATS Submission, *supra* note 102, at 9-10.

113. *Id.* at 9. (quoting Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 223, ¶ 75 (1990)).

114. *Id.*

examples of legitimate objectives . . . we remain concerned that 'legitimate objective' can be interpreted broadly or narrowly by a dispute panel. More clarification is required to ensure the profession's self-regulating bodies retain a sufficient level of discretion."[115]

From the perspective of legal regulators perhaps the most nettlesome provision of the *Accountancy Disciplines* is found in Article VI (Qualification Requirements), which states in relevant part: 19. A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

> 19. The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.[116]

The reason that these two provisions have raised concern lies in the jurisdiction-specific nature of legal rules. For example, with respect to paragraph 19, the CBA believes that "[i]t is unlikely that foreign qualifications will be of great relevance to the practice of law in Canada. This is particularly true of those who intend to practice host-country law or represent clients before courts and tribunals."[117] This conviction has led the CBA to conclude that "[t]his provision . . . is out of place in the context of disciplines for the legal profession."[118] The CCBE, in contrast, has taken a more nuanced position with respect to paragraph 19, owing to its "experience . . . in relation to qualification requirements."[119] While it concluded that paragraph 19 is generally acceptable,[120] it nonetheless cautioned that an EC-style approach to recognition

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115. *Id.* at 10. *But see* Terry, *supra* note 13, at 1031, noting:

> In my view, one of the concrete accomplishments of the *Disciplines* is that it provides a definition of what constitutes a "legitimate objective." While some may disagree with this definition, the fact that a definition exists makes it more likely that countries will be using the same standards to explain their disagreements, even if they apply those standards differently.

Id.

116. *Accountancy Disciplines*, *supra* note 18, ¶¶ 19-20.

117. CBA GATS Submission, *supra* note 102, at 14.

118. *Id.*

119. CCBE Response, *supra* note 102, at 7 (referring to language in paragraphs 19 and 20 that reflects provisions in the European Community's own "Diplomas Directive"). *See generally* Council Directive 89/48/EEC, 1989 O.J. (L 19) 16 (Council Directive of December 21, 1988 on General System for the Recognition of Higher Education Diplomas).

120. CCBE Response, *supra* note 102, at 8 ("Paragraph 19, with its general duty to take account of foreign qualifications, should be deemed acceptable, and in any case it is unlikely that the WTO would ever consider it fair to have it excluded for lawyers.").

of qualifications is inappropriate given the diversity of educational and professional qualifications required of the world's legal professionals.[121]

The principal objection to paragraph 20, which deals with the scope of qualification requirements, is that many legal professions are not divisible into specific areas of practice. The CBA noted:

> Law societies in Canada and the governing bodies in many foreign jurisdictions qualify lawyers "at large" to practise in any field .... The "activity for which authorization is sought" is therefore to be a full member of the bar, not to be a business lawyer or a criminal lawyer or a labour relations lawyer. Indeed, this makes a good deal of sense, as there is a good deal of cross-pollination between areas of the law.[122]

Thus, once again, the CBA concluded that, "[i]n the context of the legal profession, this provision is not appropriate."[123]

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121. *Id.*

> The second comment is that the EU is accustomed to the notion of taking into account prior qualifications obtained in another EU Member State. The exercise is based on the assumption that lawyers qualify in similar ways, to a similar standard and with the same range of activities in all Member States. It may be safe to make that assumption in the EU, but it is a much more difficult assumption to make when the whole world is involved. In the EU, as a result, there is no trawling through the specific qualifications, subjects, university attended and results obtained from elsewhere in the EU, because of the underlying common assumption. If that were to be extended around the world, it would involve the bars and law societies in one of two options. Either, they would have to make the same common assumption that is made in the EU about the qualifications brought to them across borders. That is doubtless an unsafe assumption to make about the whole world. Or, they would have to establish a system whereby they could recognize each degree, each title, each university from each country. That is a very time-consuming and resource-rich exercise.

Id.

122. CBA GATS Submission, *supra* note 102, at 14; *accord* CCBE Response, *supra* note 102, at 7.

> The first comment is to stress that the phrase "limited to subjects relevant to the activities for which authorization is sought" is capable of meaning only one thing in the legal profession. It is not believed that anywhere in the world are foreign lawyers able to acquire a host qualification or title (as opposed to an ability to practise under home title) which is limited to a particular area. In other words, if a lawyer is going to requalify and acquire the host title, it is the whole of the host title of lawyer which is acquired on requalification, enabling the foreign lawyer to carry out all the activities of the host lawyer. There is no alternative, lesser activity which can be obtained.

Id.

123. CBA GATS Submission, *supra* note 102, at 14; *accord* CCBE Response, *supra* note 102, at 8 ("paragraph 20 sets an impractical standard for bars and law societies, and should be deleted").

Lastly, some bar associations have expressed their desire to modify the provisions in Article VIII (Technical Standards). This Article provides:

> 25. Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.
>
> 26. In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognized standards of relevant international organizations applied by that Member.[124]

The bar associations' difficulty with these provisions is part definitional. As the CCBE has noted, "the phrase 'technical standards' is the wrong one to apply to the legal profession. What lawyers have are ethical rules, competency requirements, and qualification requirements."[125] The CBA, however, further remonstrated against this provision by contending that standards of ethics and professional conduct "should not be subject to third-party review to determine whether they fulfil 'legitimate objectives,'" and that "given the jurisdiction-specific nature of laws and legal systems, there are no internationally recognized standards of relevant international organizations with respect to the practise of law."[126]

The three objections to the *Accountancy Disciplines* highlighted above, namely, those relating to the general scheme of the *Disciplines*, those relating to the provisions on qualifications requirements, and to those that might potentially regulate ethical standards and professional competence, are by no means the only criticisms that have been lodged.[127] They have been chosen for discussion, however, because they are the most prominent, and also because they represent areas of disagreement where the potential for compromise might be greatest. In fact, more significant than any particular objection to the *Accountancy Disciplines* is the manner in which those objections have been expressed. Specifically, bar associations have used the language of "core values" to express their concerns about the *Disciplines*. The consequences of this particular form of expression are addressed in Part V.

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124. *Accountancy Disciplines*, *supra* note 18, at ¶¶ 25-26.

125. CCBE Response, *supra* note 102, at 9.

126. CBA GATS Submission, *supra* note 102, at 15.

127. *See, e.g.*, CBA GATS Submission, *supra* note 102, at 11-14 (detailing the CBA's objections to the *Accountancy Disciplines*' limits on Member States' use of residency requirements, membership in professional organizations, and restrictions on use of firm names to circumscribe foreign lawyers' rights of practice).

V. THE ACCOUNTANCY DISCIPLINES AND THE LANGUAGE OF CORE VALUES: EVALUATING THE CRITICISMS OF NATIONAL BAR ASSOCIATIONS

There are at least two means by which the criticisms of national bar associations may be evaluated. First, they may be evaluated on their own terms; that is, one might inquire whether the bar associations' concerns are reasonable in light of WTO practice, national regulatory interests, and other factors that influence the regulation of trade in legal services. Second, one might ask whether the language employed by some national bar associations and their general approach to the domestic regulation negotiations serves to foster compromise, or whether their positions instead stifle meaningful debate. Both of these methods are employed below to assess the bar associations' critiques.

A. Do the Bar Association Critiques of the Accountancy Disciplines Reflect Legitimate Concerns?

The intent of this subsection is not to question the good-faith concerns that national bar associations possess with regard to the *Accountancy Disciplines* or to suggest that there is a "right" solution to any of these very difficult issues. Rather, it is intended to show that there is more room for compromise on most of the bar associations' specific concerns than is evident at first blush. For example, the CBA and the CCBE have raised concerns about the interpretation of the word "necessary" in the context of GATT Article XX.[128] They worry that interpretation of the term "necessary" in the *Accountancy Disciplines*[129] will require a regulatory measure to be the "least trade restrictive" available to national authorities. This concern may ultimately be borne out, but it ignores the Appellate Body's recent Article XX jurisprudence and the more nuanced approach that it has employed in interpreting the term "necessary."[130] In *KOREA – BEEF*,[131] the Appellate Body stated:

> We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is

128. *See supra* notes 112-115 and accompanying text.

129. *See Accountancy Disciplines*, *supra* note 18, at ¶ 2 ("Members shall ensure that measures . . . are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services.").

130. *See* CCBE Response, *supra* note 102, at 4-5. The CCBE position, which is essentially the same as that of the CBA, is assailable on these grounds because it was not released until May 2003, well after the cases considered below. *See infra* notes 131-32 and accompanying text. However, this omission can be excused in the case of the CBA GATS Submission given that it was released in August 2000, before the most recent Appellate Body cases on Article XX were decided.

131. WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R & WT/DS169/AB/R (Dec. 11, 2000).

> "indispensable" or "of absolute necessity" or "inevitable." Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean "making a contribution to."[132]

The point here is not that the bar associations' critiques are wide of the mark, but simply that there is another perspective from which to view these issues, and which may provide the "wiggle room" necessary to successfully complete the disciplines track negotiations.

The bar associations' position with respect to the disciplines on qualification requirements also admits of some room for negotiation. For example, the CBA has declared the discipline requiring governing bodies to "take into account . . . qualifications acquired in the territory of another"[133] inappropriate in the context of legal services.[134] This position, however, fails to account for the fact that Canada's law societies already take foreign qualifications into account in licensing foreign legal consultants.[135] As if to recognize that there is room for compromise on this issue, the CBA eventually concedes that "so long as it [is] clear [that] member states are merely required to 'take into account' foreign qualifications, this provision may not be overly problematic."[136] Likewise, the CBA's and CCBE's insistence on the full qualification of foreign lawyers[137] ignores the experience with foreign legal consultant rules over the past thirty years, virtually all of which permit practice in certain areas of the law while restricting it in others.[138]

Lastly, the bar associations' critique of the "technical standards" discipline bears some attention. The Federation of Law Societies of Canada has stated as apparent fact:

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132. *Id.* ¶ 161; *see also European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (applying its *Korea – Beef* analysis to the interpretation of Article XX(b), the Appellate Body upheld a French import ban on chrysotile asbestos products as "necessary to protect . . . human life or health").

133. *Accountancy Disciplines*, *supra* note 18, ¶ 19.

134. *See supra* note 118 and accompanying text.

135. *See* Meeting Canada's Current Obligations, *supra* note 102, at 18 ("Foreign Legal Consultants are licensed on the basis of their foreign credentials and their membership in good standing of a law society or bar association of another country.").

136. CBA GATS Submission, *supra* note 102, at 14.

137. *See supra* note 122 and accompanying text.

138. *See infra* Part VI.B (discussing the ABA Model Rule for the Licensing of Legal Consultants).

> There are no recognized relevant international organizations which set out internationally recognized standards for the legal profession, or recognized rules of professional conduct and standards of professional competence. . . . [T]his is in part a result of the differing underlying legal systems. . . . This Discipline is therefore of no application to the legal services sector.[139]

As the CCBE has recognized, such a position ignores "the CCBE's Code of Conduct for cross-border transactions in Europe, the IBA's Code of Conduct, plus doubtless [sic] other standards of international bodies dealing with single issues of arbitration or insolvency."[140] By raising the profile of these international efforts and by demonstrating to national regulators how these multilateral codes could help ensure the competence and professionalism of international legal practitioners, it might be possible to reach some common ground on this discipline as well.

As stated above, the point here is not to suggest that the bar associations are "wrong" in their criticisms of the *Accountancy Disciplines* from a normative standpoint. From a policy perspective, it is clear that the bar associations have expressed legitimate concerns and that reasonable people could disagree about the kinds of regulations that might best govern the international trade in legal services. In fact, given that the *Accountancy Disciplines* are once again the subject of negotiations in the WPDR it is entirely proper that there exists competing visions of how best to implement them in the various services sectors. Such a development will allow for the necessary "give and take" that may ultimately result in an appropriate accommodation.

B. Do the Accountancy Disciplines Undermine the Core Values of the Legal Profession?

The differences of opinion on specific provisions of the *Accountancy Disciplines* are not, however, the whole story. The bar associations have also suggested more broadly that the *Disciplines* fail to respect the "core values" of the legal profession. Whereas the differences of opinion noted in the previous

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139. Meeting Canada's Current Obligations, *supra* note 102, at 20; *see also* CBA GATS Submission, *supra* note 102, at 15 ("[G]iven the jurisdiction-specific nature of laws and legal systems, there are no internationally recognized standards of relevant international organizations with respect to the practise of law.").

140. CCBE Response, *supra* note 102, at 9. For a comprehensive discussion of the CCBE Code of Conduct, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993). For an argument that the CCBE Code of Conduct could provide a model for a worldwide ethics code, see John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1991-92).

section might serve to propel the negotiations forward, the differences of opinion that are seen to stem from "core values" are destructive of consensus and could undermine the disciplines track negotiations.

1. The Criticisms of National Bar Associations and the Language of "Core Values"

In cataloging the unique features of the legal profession that render the *Accountancy Disciplines* inappropriate for application to the legal services sector, the CCBE began by noting:

> The general feeling of lawyers is that the core values and specific characteristics of the profession are not taken into account in the present *DISCIPLINES.* Although there may be debate over what exactly the core values are, most lawyers around the world agree that they include the following: independence, confidentiality, and the avoidance of conflict of interest.[141]

To the "core values" recognized by the European Bar, the Canadian Bar has added competence,[142] self-regulation,[143] the duty of undivided loyalty,[144] and the solicitor-client privilege.[145] Further, the CBA has asserted that these

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141. CCBE Response, *supra* note 102, at 3; *accord* Meeting Canada's Current Obligations, *supra* note 102, at 6, 11 (suggesting that, "as currently drafted, the Disciplines are an inadequate expression of the culture and values inherent in the legal profession," and identifying the "unique values" of the legal profession as including independence, self-governance, client confidentiality, and conflict of interest).

142. CBA GATS Submission, *supra* note 102, at 3 ("[T]he public interest requires lawyers to be subject to standards of competence and professional conduct and demands an objective regulatory structure to ensure lawyers observe these standards.").

143. *Id.* at 4 ("To ensure independence from state interference, the legal profession must be self-regulating.").

144. *Id.* at 5 ("Canadian lawyers owe a duty of undivided loyalty to their clients and do not serve, as do some professions, as instruments of the state's control or supervision of its citizens....").

145. *Id.* ("[E]xcept in the rarest of circumstances, the legal doctrine of solicitor-client privilege prevents third parties, including government authorities, from forcing the lawyer to reveal these confidential communications."); *see also* ABA Core Values Resolution, *supra* note 16.

> RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:
>
> 1. It is in the public interest to preserve the core values of the legal profession, among which are:
>   a. the lawyer's duty of undivided loyalty to the client;
>   b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
>   c. the lawyer's duty to hold client confidences inviolate;

values "do not simply derive from a set of rules laid down by a professional body. Rather, they are *centuries-old principles which have developed to ensure the proper functioning of the legal system.*"[146]

The lawyer's role in society is also cited as a distinguishing characteristic of the legal profession. The CBA notes that "[t]he legal profession has unique characteristics arising from its role as intermediary between the citizen and the law and between the citizen and the state."[147] In fact, the CBA believes that "the unique role of lawyers makes the obligations of the legal professional more of *a social imperative.*"[148] This position has led it to conclude, in rather grandiose language, that legal services "should not be covered by a common generic set of professional disciplines, as this would *threaten a central pillar in the kind of society Canadians have been striving to create and improve.*"[149]

Moreover, the value choices inherent in the jurisdiction-specific nature of legal rules are often advanced as another reason why horizontal disciplines may not be suitable for the legal profession:

> 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.*[150]

It might be tempting to dismiss these statements as merely hortatory language that is unlikely to have much effect on the current negotiations in the WPDR. But another way to look at them is as an assertion of regulatory independence; a shot across the bow in answer to the central question of these

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d. the lawyer's duty to avoid conflicts of interest with the client; and
e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
f. the lawyer's duty to promote access to justice.

Id.

146. CBA GATS Submission, *supra* note 102, at 5 (emphasis added).
147. *Id.* at 1.
148. *Id.* at 5 (emphasis added).
149. *Id.* at 3 (emphasis added).
150. INT'L BAR ASS'N, STANDARDS AND CRITERIA FOR RECOGNITION OF THE PROFESSIONAL QUALIFICATIONS OF LAWYERS 3 (June 2001), http://www.ibanet.org/images/downloads/Standards%20and%20Criteria%20for%20Recognition%20of%20Qualifications%20of%20Lawyers%2001.pdf (last visited Apr. 6, 2005).

negotiations: is law a business or a profession?[151] The terms that bar associations have used to express their positions could thus have a real impact on the disciplines negotiations.

2. The Consequences of Reliance on "Core Values"

The principal danger in the bar associations' reliance on the core values of the legal profession to oppose some aspects of the WPDR negotiations is that such language will be used to foreclose discussion on issues where there appears to be some room for compromise. As one commentator observed:

> How does one evaluate the claim that a proposed rule violates a core value of the profession? This issue is important because the term core value indicates a value that is central to what it means to be a lawyer, and not simply a policy choice between differing views of professional obligations. If a proposed rule violates a core value, it follows that the proposal must be rejected because it threatens a fundamental tenet of the profession.[152]

Thus, the bar associations' labeling of the *Accountancy Disciplines* as violative of the core values of the profession might have resulted from two alternative conclusions. On the one hand, bar leaders could legitimately have determined that the *Disciplines* are anathema to their profession and thus

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151. *See* Paton, *supra* note 68, at 395 (noting "the internal contradictions facing the legal profession on the broader question of liberalizing trade in services: is law a business or a profession?").

152. Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 749 (2001). Professor Crystal has suggested a two-step approach to determining whether a bar norm qualifies as a "core value" of the legal profession:

> First, define precisely the value at issue to eliminate ambiguities and uncertainties about the meaning and scope of the value. Second, analyze whether the value qualifies for treatment as a core value. In making this determination, one should consider both the history and the importance of the value to the professional role. History of the value is significant because it is to be expected that core values find expression early in the history of professional ethics. The importance of the value to the professional role is significant because a value that has only marginal or uncertain importance hardly qualifies as a core value.

Id. Professor Crystal then applied this analytical approach to four putative "core values" of the American legal profession: undivided loyalty, strict confidentiality, promotion of access to justice, and exclusive judicial authority to regulate the practice of law. *Id.* at 750-773. He concluded that none of these four values are "core values" of the American legal profession. *Id.* at 773. Professor Crystal's analysis could provide some much needed understanding in this area of professional ethics. Nevertheless, coming to a conclusion on whether a claimed value is in fact a core value of the profession seems counterproductive in the context of sensitive GATS negotiations. Therefore, the present analysis is more concerned with understanding the consequences of reliance upon core values on the prospects for successfully completing the disciplines track negotiations.

should be rejected. On the other hand, the assertion of core values might be seen as a strategy to allow bar associations to declare their regulatory independence and to walk away from the negotiating table should the talks fail to go their way. There are several statements in the bar associations' own position papers that make the latter view more persuasive than the former.

For instance, at the same time that the CBA was questioning whether international legal services disciplines might violate the core values of the legal profession,[153] it was also touting the Canadian legal profession's prospects for exporting legal services:

> International trade disciplines will likely increase opportunities for Canadian lawyers to practice international law and Canadian law abroad. Canadian law firms are uniquely placed in the international legal market. Canadian lawyers are directly exposed to the two major legal systems of the Western world (civil law in Quebec and common law in the remaining jurisdictions) and they practise in two globally important languages. Canada's legal culture is influenced by that of the United Kingdom and the United States, which are the principal players in the international legal market. Canadian lawyers are also competitive in the international market in terms of cost, skills and experience.[154]

One need not be too cynical to think that such advocacy substantially undermines the argument that the *Disciplines* violate the core values of the legal profession.[155] Instead, the arguments from core values are more accurately seen as bids by national authorities to maintain their traditional grip on regulatory power.[156] Several defiant statements of the Canadian Bar Association seem to confirm this reading of some bar associations' "core values" strategy. For example, in addressing the "necessary" requirement in Article II of the *Accountancy Disciplines*, the CBA stated, "[o]ur view is that

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153. *See generally* CBA GATS Submission, *supra* note 102.

154. CBA GATS Submission, *supra* note 102, at 3.

155. *See* Paton, *supra* note 68, at 411 (noting the "tension within the legal profession in Canada between 'protecting the guild' and desiring more open trade opportunities for exporting legal services . . .").

156. *See* Crystal, *supra* note 152, at 774 ("[T]he appeal to core values has been used in an effort to maintain professional independence from other regulatory forces and to help sustain a professional monopoly over the delivery of legal services."); *see also* Paton, *supra* note 68, at 363-64.

> Resistance to openness in various Canadian proposals and submissions is fundamentally anchored in the notion that the legal profession is unique, or different; that its 'core values' mean that it should lie beyond the scrutiny or attention of trade negotiators in all but a few inconsequential areas relating to the provision of foreign legal services within domestically regulated jurisdictions.

Id.

the legal profession should not have to prove the 'necessity' of rules which it is convinced are required to preserve its integrity and protect the public."[157] Further, it noted that its:

> overall concern is that law society rules concerning matters which relate to the public interest not be subject to review by a third-party dispute settlement body. . . . Such issues of public protection should not be left to a panel of "experts" from other countries with little or no familiarity of Canada's legal history and culture.[158]

So it appears that some bar associations are less concerned that the *Accountancy Disciplines* violate the core values of the legal profession, and are more concerned that they might lose their traditional monopolies over prescribing the precise means by which the core values may be given effect in their respective legal systems.[159]

The point here, once again, is not to make a normative judgment about the correctness of the bar associations' conclusions as to whether the *Accountancy Disciplines* in fact violate the core values of the legal profession, but instead to note that core values arguments present the potential for obfuscation of the underlying issues on the negotiating table.[160] Moreover, placing stock in core values arguments risks advancing the interests of national regulatory monopolies to the detriment of legal consumers.[161]

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157. CBA GATS Submission, *supra* note 102, at 10.

158. *Id.* at 17. *See also* CCBE Response, *supra* note 102, at 4. The CCBE , recommends the insertion of the following language to Article II(2) of the *Disciplines*:

> For the purpose of defining what is 'necessary' in the context of legal services, it is recognised that those entities involved in the regulation of lawyers have an area of reasonable discretion in making decisions which involve the protection of those core values of the profession which fall within legitimate objectives.

Id.

159. *See* Paton, *supra* note 68, at 399.

> [T]he CBA worried that the burden of establishing necessity falls upon the party imposing the restriction, which means that legal regulators would have to justify themselves to external dispute resolution panels, rather than merely having their usual carte blanche to regulate in whatever fashion they decided best served the public interest.

Id.

160. *See* Crystal, *supra* note 152, at 748 (opining that "reliance on core values of the legal profession in debates about legal ethics has rhetorical appeal but is fundamentally misleading").

161. *Id.* (noting that "at a deeper level, reliance on the core values of the profession often reflects an antimarket, anticompetitive attitude of the bar that impedes change in rules of professional conduct . . .").

VI. THE GATS, CORE VALUES, AND THE AMERICAN LAWYER: INTEGRATING MULTI-JURISDICTIONAL LEGAL PRACTICE AND NATIONAL ETHICAL STANDARDS

Although the American Bar Association (ABA) has been slow to stake out a public position on the current WPDR "disciplines" negotiations,[162] one is not without some evidence of how the ABA might weigh the core values of the American legal profession, on the one hand, against the relative benefits of liberalized legal services markets, on the other. The ABA *Model Rules of Professional Conduct*,[163] in many ways, forms the normative ethical basis for American lawyers, and suggests the U.S. legal community's views of its own core values.[164] Moreover, recent developments within the ABA, like the promotion of the ABA *Model Rule for the Licensing of Legal Consultants*,[165] could offer a point of compromise in the disciplines track negotiations by advancing the notion that greater liberalization of the legal services sector might be achieved through the bifurcation of lawyer regulatory regimes into domestic and cross-border elements. Some of the core values expressed in the Model Rules[166] and recent developments within the ABA are each considered below.

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162. *See supra* note 14 and accompanying text.

163. The Model Rules were adopted by the ABA House of Delegates on August 2, 1983. They have been amended several times since, most recently in August 2003. Most significantly for the purposes of this Article, the House of Delegates approved comprehensive changes to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) on August 12, 2002, as a result of the work of the ABA's Multijurisdictional Practice Commission. *Preface to the 2004 Edition* of MODEL RULES OF PROF'L CONDUCT, *available at* http://www.abanet.org/cpr/mrpc/preface.html (last visited Apr. 6, 2005) [hereinafter PREFACE]. The amendments to Model Rule 5.5 and the work of the Multijurisdictional Practice Commission are discussed *infra* Part VI.B.

164. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 4 (John S. Dzienkowski abridged ed., 2003-04).

> Although the ABA's codes of conduct have been influential in shaping the law of professional responsibility, they only have force as a body of rules with its voluntary members. However, the various states and the federal courts have looked to the ABA versions as a basis for regulating lawyers within the jurisdiction. Thus, the ABA's codes have been used as the basis for state and federal codes.

Id.

165. MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS (1993), *available at* http://www.abanet.org/cpr/mjp/201h.doc (last visited Feb. 21, 2005).

166. A comprehensive evaluation of the consistency of the Model Rules and the approach to cross-border practice expressed in the *Accountancy Disciplines* is well beyond the scope of this Article. Instead, the intent of this section is to suggest how the core values of the American legal profession, as embodied in the *Model Rules of Professional Conduct*, compare to the core values expressed above by the CBA, the FLSC, and the CCBE, see *supra* note 102 and accompanying text, and to suggest how the American legal profession's conceptions of its ethical responsibilities and regulatory horizons may be challenged by the GATS. Thus, although the goal of this section is comparatively modest, it does suggest that a wider inquiry into the consistency of the GATS and the *Model Rules of Professional Conduct* might yield enlightening results. *See generally* Terry, *supra* note 13, at 1075.

A. Core Values and the Model Rules of Professional Conduct

Perhaps the principal core value of the American legal profession is expressed in the first of the Model Rules, which addresses the duty of competent representation:[167]

> Model Rule 1.1. Competence
>
> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[168]

The assumption inherent in Model Rule 1.1 is that once a lawyer is admitted to practice in a particular jurisdiction she is competent to handle any type of legal problem.[169] Geoffrey Hazard and William Hodes have reported that this assumption of competence can be traced to the traditional view that a lawyer who has passed a state bar examination is presumed competent to practice law.[170] In fact, competence was not recognized as a matter of

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> One of the questions that I have not had time to examine is the effect of this [standstill] principle on the work of the ABA Ethics 2000 Commission [which proposed amendments to the Model Rules]. If the work of the Ethics 2000 Commission were adopted verbatim by a state regulator, I wonder whether any of the changes proposed by the ABA Ethics 2000 Commission might be considered "more restrictive" than the prior rule and might violate any of the agreements contained in the U.S. *Schedule of Specific Commitments*.

Id.

167. *See* Brand, *supra* note 6, at 1138-39. The author makes a strong argument that Model Rule 1.1 is the chief core value of the American legal profession:

> The placement of this Rule at the beginning of the Model Rules emphasizes the importance of the duty owed to the client. The focus of this duty indicates the fundamental importance of the interests of the client in the application of all the Model Rules. The further fact that this duty can rarely be waived by the client underscores its significance to the attorney-client relationship. Thus, by its very nature, *this Rule provides the fundamental test in the interpretation of every other Model Rule.* No other Rule should be interpreted in a manner that would result in devaluation of the duty of competence or of its goal of proper representation of the client, nor should any rule be interpreted in a manner that accepts any other goal (e.g., protection of the profession) over this one.

Id. (emphasis added).

168. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

169. *Id.* at cmt. 2

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.

Id.

170. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.2 (3d ed. Supp. 2003) [hereinafter HAZARD & HODES].

professional responsibility until the adoption of Canon 6 of the 1970 ABA *Model Code of Professional Responsibility*.[171] Before 1970, lawyer competence was almost exclusively policed through civil legal malpractice actions.[172] Unfortunately, the assumption of lawyer competence has not always proven sound.[173]

The assumption of lawyer competence enshrined in Model Rule 1.1, however, traditionally contained an important geographical limitation. That is to say that while a lawyer has historically been deemed competent in the jurisdiction in which he is admitted to practice, in most other jurisdictions, he is treated as a non-lawyer.[174] This "assumption of *incompetence*" is not directly embodied in the Model Rules, but is instead sanctioned in Model Rule 5.5, which prohibits the unauthorized practice of law:

> Model Rule 5.5. Unauthorized Practice of Law
>
> "A lawyer shall not:
>
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[175]

> In an era in which rules of discipline were rarely considered binding in any event the absence of a professional rule on competence could be traced to the unstated view than any lawyer who had successfully completed a bar examination and met other entrance criteria was, by definition, competent to practice law. Serious errors might be evidence of neglect or lack of diligence, but basic competence was assumed to be unassailable.

Id.

171. *Id. The Model Code of Professional Responsibility* was adopted by the ABA in 1969, and was superseded by the *Model Rules of Professional Conduct* in 1983. PREFACE, *supra* note 163.

172. HAZARD & HODES, *supra* note 170, at § 3.2.

173. *See, e.g.*, William H. Gates, *Lawyers' Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559, 562 (1986) (reporting that 43.8% of legal malpractice claims involve "substantive errors," such as failure to know or properly apply the law, inadequate investigation, planning error, and failure to know about a deadline).

174. HAZARD & HODES, *supra* note 170, at § 46.5 ("Legal restrictions in most jurisdictions treat lawyers who are licensed elsewhere almost as if they were lay persons for purposes of the 'unauthorized practice' rules.").

175. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2001) [hereinafter MODEL RULES 2001]. Note that this is not the current version of Model Rule 5.5. The current version of Model Rule 5.5 incorporates the concept of temporary practice by out-of-state lawyers. *See infra* Part VI.B. However, because only sixteen states have adopted multi-jurisdictional practice rules at least similar to the current version of Model Rule 5.5, the version of Model Rule 5.5 cited here is the one in effect in most states. *See* ABA Commission on Multi Jurisdictional Practice, State Implementation of ABA Model Rule 5.5 (Multi-jurisdictional Practice of Law), *available at*

It is accurate to say that Model Rule 5.5 merely sanctions disparate treatment of in-state lawyers and out-of-state lawyers because states are free to define the unauthorized practice of law within their respective jurisdictions.[176] Whatever gloss states may give to their unauthorized practice of law prohibitions, the purpose is ostensibly consumer protection.[177] Thus, the goal of Model Rule 5.5 is consonant with the duty of competence in Model Rule 1.1.[178] Given this identity of purpose between the duty of competence and the unauthorized practice of law, it is not immediately clear why this duty is expressed as a geographical limitation in Model Rule 5.5.[179] One answer may lay in the beneficial trade restrictive effects that a broad definition of the unauthorized practice of law may have for the local bar.[180] Nevertheless, taking stock of a lawyer's competence in rendering legal advice, regardless of geographical location, may better reflect the reality of interstate practice and may better serve clients by respecting their choice of counsel, even in matters

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http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf (last modified March 17, 2005) (last visited April 14, 2005) (including Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Maryland, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, and South Dakota in the list of states that have adopted a multijurisdictional practice rule similar to Model Rule 5.5).

176. *See* MODEL RULES 2001, *supra* note 175, at R. 5.5 cmt. ("The definition of the practice of law is established by law and varies from one jurisdiction to another."). The varying state approaches to defining the unauthorized practice of law is beyond the scope of this Article. For a comprehensive treatment, see Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (2003).

177. *See* MODEL RULES 2001, *supra* note, at R. 5.5 cmt. (2001) ("Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."); *see also* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 435 (2001) (noting the classic justification for entry regulations as "the protection of unsuspecting consumers from incompetent practitioners"). Professor Barton also notes that, "[t]his justification actually involves two connected claims: the legal market is subject to serious information asymmetries, and incompetent practitioners can inflict irreversible or irremediable harms upon clients." Barton, *supra.*

178. Brand, *supra* note 6, at 1143. "Whatever the definition may be, the purpose behind preventing unauthorized practice is the protection of the client. Thus, the goal of Model Rule 5.5 is consonant with the duty of competence in Model Rule 1.1." *Id.*

179. *See id.* at 1150.

> If, as noted above, the focus of Model Rule 5.5 on the unauthorized practice of law is the same as that of Model Rule 1.1—the duty of competence owed to the client—then the concern should be whether the representation is competently rendered, regardless of *where* it is rendered. Particularly in an age of instantaneous real and virtual delivery of services from any point on the globe, any focus on *where* the lawyer delivers services is only likely to lead to irrelevant legal fictions applied for the purpose of determining *where* the electronic transmission of those services occurs.

Id.

180. *See* HAZARD & HODES, *supra* note 170, at § 46.3 ("But the prohibition against unauthorized practice also functions, at least in part, as a trade restriction that precludes nonlawyers from legal tasks, however routine.").

with multijurisdictional elements.[181] In fact, Model Rule 1.1 would seem to call for just such an individualized appraisal of lawyer competence.[182]

In the end, one is left with two assumptions about the competence of legal practitioners in the United States. On the one hand, lawyers admitted to practice in a particular jurisdiction are presumptively competent to practice any kind of law in that jurisdiction, but on the other hand, states are free to regard out-of-state lawyers as presumptively *incompetent* to practice within that state's jurisdiction without any inquiry into individual lawyers' particular skills. This regime thus permits states to erect per se barriers to foreign lawyers practicing in the United States no matter how tangential that practice might be to a state's legitimate interest in protecting its consumers. Moreover, a restrictive view of the unauthorized practice of law would seem to undercut the very efficacy of GATS disciplines to govern the legal services sector because state unauthorized practice restrictions are not "based on objective and transparent criteria, *such as competence and the ability to supply the service*,"[183] and would have to yield if effective cross-border practice is to become a reality.

Although the Model Rules' permissive view of state lawyer unauthorized practice regulations might be inconsistent with the regulatory regime envisioned in the *Accountancy Disciplines*, recent developments within the ABA suggest an evolving awareness of the importance of multijurisdictional practice in both national and international practice, which might suggest some grounds for compromise. These developments are considered in the next section.

B. Foreign Legal Consultants and Temporary Practice: Bifurcating the Imperatives of Lawyer Regulation

The most significant developments within the ABA in the area of multijurisdictional practice over the last several years were products of the Commission on Multijurisdictional Practice, or the "MJP" Commission. The

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181. *See In re* Estate of Waring, 221 A.2d 193, 197 (N.J. 1966).
> Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion. While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by "technical restrictions which have no reasonable justification."

Id.

182. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2003).
> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question . . . .

Id.

183. GATS, *supra* note 8, at art. VI(4)(a) (emphasis added).

Commission was formed in July 2000,[184] with the mandate to report on the state of multijurisdictional practice in the United States and to make recommendations that would facilitate that practice in the public interest.[185] The MJP Commission ultimately made nine recommendations[186] to the ABA House of Delegates, which adopted all nine on August 12, 2002.[187] Three of these recommendations are relevant for the present purposes, including those relating to the Multijurisdictional Practice of Law (Recommendation 2), the Licensing of Legal Consultants (Recommendation 8), and the Temporary Practice of Foreign Lawyers (Recommendation 9).

Most significantly for the domestic practitioner, the MJP Commission's Recommendation 2 on the Multijurisdictional Practice of Law effected a significant change to Model Rule 5.5.[188] As discussed above,[189] Model Rule 5.5 prohibits a lawyer from practicing law in a jurisdiction where doing so would violate the regulation of the legal profession in that jurisdiction.[190] In addition to clarifying and strengthening the unauthorized practice prohibition in

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184. AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE vii (2002) [hereinafter MJP Report].

185. Comm'n on Multijurisdictional Practice of Law, Mission Statement, *available at* http://www.abanet.org/cpr/mjp-mission_statement.html (last visited Feb. 25, 2005).

> RESOLVED that the American Bar Association establish the Commission on the Multijurisdictional Practice to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The Commission shall analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions. The Commission shall make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other action as may be necessary to carry out its jurisdictional mandate. The Commission shall also review international issues related to multijurisdictional practice in the United States.

Id. For a comprehensive overview of the work of the Multijurisdictional Practice Commission, see Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002). Professor Gillers was a member of the Multijurisdictional Practice Commission.

186. *See* MJP Report, *supra* note 184, at 2-4. These recommendations addressed the following topics: Regulation of the Practice of Law by the Judiciary (Recommendation 1); Multijurisdictional Practice of Law (Recommendation 2); Disciplinary Authority (Recommendation 3); Reciprocal Discipline (Recommendation 4); Interstate Disciplinary Enforcement Mechanisms (Recommendation 5); *Pro Hac Vice* Admission (Recommendation 6); Admission by Motion (Recommendation 7); Licensing of Legal Consultants (Recommendation 8); Temporary Practice by Foreign Lawyers (Recommendation 9). *Id.*

187. Summary of Recommendations, American Bar Association House of Delegates, 2002 Annual Meeting, Washington D.C., Recommendations 201A-J, *available at* http://www.abanet.org/leadership/recommendations02/ summary.html (last visited Apr. 6, 2005) [hereinafter MJP Recommendations].

188. *See* MJP Report, *supra* note 184, at 19-34.

189. *See supra* note 175 and accompanying text.

190. *Id.*

Rule 5.5,[191] the amended rule would also provide certain "safe harbors" from charges of unauthorized practice of law for those practitioners engaged in legal work in more than one jurisdiction.[192] Amended Model Rule 5.5 has accordingly been re-titled to reflect its enhanced scope.[193]

Under amended Model Rule 5.5, an out-of-state lawyer may now practice with a local lawyer who is admitted to practice in that jurisdiction and who actively assists the out-of-state lawyer in pursuing the matter.[194] An out-of-state lawyer may also practice in a state where he has been admitted pro hac vice.[195]

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191. *See* MJP Report, *supra* note 184, at 24 ("Rule 5.5 would be clarified and strengthened by adoption of amended sections 5.5(a) and (b)."). Amended Rule 5.5(a) and (b) provides:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003).

192. *See* MJP Report, *supra* note 184, at 24 n.33 (reporting the Commission's decision not to use the term "safe harbor" in the amended version of Rule 5.5, but noting that "the term . . . has been a useful metaphor for conceptualizing the categories of legal work that a lawyer admitted in one jurisdiction may do in another jurisdiction"). The approach of amended Model Rule 5.5 is consistent with the approach endorsed by RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 3 (2000), which states in relevant part:

> § 3. Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client: . . .
>
> (1) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice [in a jurisdiction in which he is admitted].

Id.

193. *See* MJP Report, *supra* note 184, at 23 ("The MJP Commission proposes to re-title the Rule "Unauthorized Practice of Law; Multijurisdictional Practice of Law."). The pre-2002 title of Model Rule 5.5 was simply "Unauthorized Practice of Law." *See supra* note 175 and accompanying text.

194. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2003).

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter....

Id.

195. *Id.* at R. 5.5(c)(2) (". . . are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized . . ."). "Admission *pro hac vice*" is the temporary admission of an out-of-state lawyer admitted to practice before a particular court in a specific case. *See* BLACK'S LAW DICTIONARY 49 (7th ed. 1999).

Moreover, in proceedings that do not require admission pro hac vice, an out-of-state lawyer may practice in the host jurisdiction if the services rendered are related to an arbitration or other alternative dispute resolution so long as those proceedings arise out of the lawyer's practice in a state in which she is admitted to practice.[196] Where the practice does not fall within the above exceptions, but nonetheless arises out of or is reasonably related to a lawyer's home-state practice, the out-of state lawyer may be admitted on a temporary basis.[197] Lastly, amended Model Rule 5.5 provides an exception for multijurisdictional practice by corporate counsel.[198]

Pursuant to its mandate,[199] the MJP Commission also took account of the barriers to multijurisdictional practice within the United States by foreign practitioners. To this end, the Commission proposed and the House of Delegates adopted Recommendation 8, urging states to enact the ABA *Model Rule for the Licensing of Legal Consultants*.[200] This Model Rule permits a foreign lawyer who meets the licensing criteria[201] to practice on a regular basis

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196. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3).

> . . . are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission . . . .

Id.

197. *Id.* at R. 5.5(c)(4) (" . . . are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice"). On the content of the requirement that the matter in the host-state jurisdiction be "reasonably related" to the out-of-state lawyer's local practice, found in both subsection (c)(3) and (c)(4), see *Id.* at cmt. 14.

198. *Id.* at R. 5.5(d).

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Id. For more on multijurisdictional practice issues facing corporate or "in-house" counsel, *see generally* Needham, *supra* note 176.

199. *See supra* note 185 and accompanying text.

200. MJP Recommendations, *supra* note 187, at 201 H ("RESOLVED, that the American Bar Association encourage jurisdictions to adopt the ABA Model Rule for the Licensing of Legal Consultants, dated August 1993.").

201. MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS § 1 (General Regulation as to Licensing).

> In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:
>
> (b) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation by a duly constituted professional body or a public authority;
>
> (c) for at least five of the seven years immediately preceding his or her

within the host state without becoming a member of the state bar, but subject to certain limitations on her scope of practice.[202] The MJP Commission also

application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(d) possesses the good moral character and general fitness requisite for a member of the bar of this State;

(e) is at least twenty-six years of age; and

(f) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

Id.

202. *Id.* § 4 (Scope of Practice).

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

(a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule]);

(b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;

(c) prepare:

i. any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or

ii. any instrument relating to the administration of a decedent's estate in the United States of America;

(d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (other than by virtue of having been licensed under this Rule) to render professional legal advice in this State;

(f) be, or in any way hold himself or herself out as a member of the bar of this State; or

(g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:

i. his or her own name;

ii. the name of the law firm with which he or she is affiliated;

iii his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

iv. the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

Id. Twenty-four states presently have some scheme for the licensing of foreign legal consultants. *See* MJP Report, *supra* note 184, at 61 n.54. For a comprehensive review of state

recognized the need for rules to permit foreign lawyers who may not practice regularly in the United States, and thus would not qualify for legal consultant status,[203] by recommending the enactment of the ABA *Model Rule for Temporary Practice by Foreign Lawyers*.[204] This Model Rule simply extends the "safe harbor" concept of amended Model Rule 5.5 to foreign legal practitioners.[205] In fact, some of the provisions of the Temporary Foreign Practice Rule are identical to language found in amended Model Rule 5.5.[206]

The upshot of this recent ABA activity is the significant erosion of the basic presumptions that were identified in Part A above. There, it was noted that the Model Rules originally seemed to begin with two basic notions of competence. They seemed to suggest, first, that lawyers admitted to practice in a particular jurisdiction were presumptively competent to practice in that jurisdiction, and second, that lawyers licensed elsewhere were presumptively *incompetent* to practice in that jurisdiction.[207] With the inclusion of the "safe harbor" or "temporary practice" concept in the 2002 amendments to Model Rule 5.5, which permits U.S. lawyers to temporarily practice in states where they are not admitted to the bar, the latter proposition no longer appears sound. It is one matter to permit U.S. lawyers to practice temporarily in other U.S. jurisdictions, but the ABA has gone even further by sanctioning the temporary practice of *foreign* lawyers in the United States pursuant to the *Model Rule for*

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approaches, see generally Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

203. MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS § 1(e) ("intends to practice as a legal consultant in this State *and to maintain an office in this State for that purpose*") (emphasis added).

204. AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT TO THE HOUSE OF DELEGATES, MODEL RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS (2002) [hereinafter RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS], *reprinted in* MJP Report, *supra* note 184, at 67 (Recommendation 9).

205. *See* MJP Report, *supra* note 184, at 68.

> For example, a foreign lawyer who is negotiating a transaction on behalf of a client in the lawyer's own country may come to the United States briefly to meet other parties to the transaction and their lawyers or to review documents. Or a foreign lawyer conducting litigation in the lawyer's home country may come to the United States to meet witnesses. While it is not feasible for foreign lawyers in such circumstances to seek admission as foreign legal consultants, it should nevertheless be permissible for them to provide these temporary and limited services in the United States.

Id.

206. *Compare* RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS, *supra* note 204, at § (a)(1) *with* MODEL RULES OF PROF'L CONDUCT 5.5(c)(1) (2003).

> Such a lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services in this jurisdiction that: (1) *are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.*

RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS, *supra* note 204, at § (a)(1) (emphasis added); *see also* MJP Report, *supra* note 184, at 68 (noting that "[t]his language is identical to language in [amended] Rule 5.5(c)(1) of the ABA *Model Rules of Professional Conduct* for lawyers admitted in a United States jurisdiction").

207. *See supra* Part VI.A.

Temporary Practice by Foreign Lawyers. Moreover, if a foreign lawyer meets the criteria of the *Model Rule for Licensing of Legal Consultants*, she may even be able to practice on a regular basis in a particular jurisdiction.

Another way to conceive of this evolving liberalization of domestic multijurisdictional practice is to see it as a shift away from a regulatory default to a more market-oriented approach. Whether this is a "good" thing or a "bad" thing might depend on our conception of the "baseline" of professional regulation.[208] Professor Benjamin Barton has suggested that even in the domestic context, a market-oriented approach to lawyer regulation is to be preferred. Professor Barton opines that "[u]tilizing the market as the baseline is preferable for two reasons. First, there has long been a general American preference for the free market over government regulation. Second, even the strongest modern defenders of regulation do not argue that regulation should replace the free market on the whole."[209] If the argument for a market-oriented policy with respect to domestic multijurisdictional practice is at least defensible, then certainly the argument for a market-oriented approach to transnational multijurisdictional practice questions is considerably stronger.

The demand for transnational practitioners comes mostly from multinational corporations, large banks, and other large, institutional clients who wish to retain lawyers with the relevant experience or expertise in specific kinds of transactions, regardless of nationality or formal qualifications in particular jurisdictions.[210] Furthermore, as a general matter, most clients who

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208. *See* Barton, *supra* note 177, at 432 n.11.

> Admittedly, this approach implicitly assumes that regulation of an occupation or an industry must be justified, which assumes non-regulation and the free market to be the status quo. By contrast, one might argue that the discussion should begin with justifications for not regulating lawyers, that is, assume that government regulation of an occupation is the norm, and any deviation from regulation must be defended.

Id.

209. *Id.* (citations omitted).

210. *Legal Services Background Note*, *supra* note 3, at ¶ 23.

> Most of the demand for legal services in the fields of business law and international law comes from businesses and organizations involved in international transactions. These institutional actors will look for the legal services provider who gives them guarantees as to its knowledge of the firm's activities and of the place of business as well as of the quality of the service it can deliver, regardless of its place of origin.

Id. *See also* Bernard L. Greer, Jr., *The EEC and the Trend Toward the Internationalisation of Legal Services: Some Observations*, 15 INT'L BUS. LAW. 383, 383 (1987).

> Increasingly, clients base the selection of their lawyers upon factors other than their formal qualifications to practise law and the license they hold. The reason these lawyers are engaged is simply that their clients have decided that they are the best qualified to provide specific legal services in a timely and cost-effective manner. They have been chosen not for their nationality, formal qualifications or

regularly engage the services of transnational practitioners are sophisticated enough to ensure the competence of their attorneys.[211] As one commentator has put it, "it is disingenuous to argue that strict qualifications are needed to protect the likes of Mitsubishi Bank and IBM, as the consumers of legal services, from incompetent lawyers."[212] Even if principles of consumer protection should trump market principles in the regulation of the legal profession in the domestic context, it seems fairly clear that few such consumer protection concerns are presented in transnational practice and thus fewer regulatory barriers should be erected to the cross-border provision of legal services in this arena.

Many of the "core values" arguments that have been lodged at the *Accountancy Disciplines* stem from the notion that the legal profession is an indivisible entity with a single regulatory model.[213] Nevertheless, the ABA has shown through its adoption of the amended Model Rule 5.5, and especially of its endorsement of the *Model Rule for Licensing of Legal Consultants* and the *Model Rule for Temporary Practice by Foreign Lawyers*, that it is possible to bifurcate the imperatives of lawyer regulation by creating two regulatory regimes: one to govern cross-border practitioners, in which market considerations are paramount, and one to govern local practitioners, in which consumer protection concerns hold sway.

Undoubtedly it might be difficult at the margins to identify the regulatory sphere in which a particular activity might fall, as certainly there are gray areas inherent in the "temporary practice" concept, but such a scheme is preferable to one in which all outsiders to a particular jurisdiction are presumptively incompetent to practice in that jurisdiction merely because he is not a member of the local bar. This bifurcation would help to resolve many of the intractable issues surrounding bar association assertions of "core values" by giving the lie

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> the jurisdiction in which they are licensed, but rather for their experience and expertise. There is no reason to believe that we will not see more of this in the future.

Id.

211. Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 751 (1994). "The consumers are large, multinational corporations or financial institutions, which dominate their lawyers rather than vice versa. Most have house counsel fully capable of evaluating the quality of legal services and reviewing bills. Their relations with lawyers are continuous rather than episodic, so that purchasers are experienced." *Id.*

212. John Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape From Freedom*, 5 UCLA PAC. BASIN L.J. 1, 14 (1986).

213. *See, e.g.*, CCBE Response, *supra* note 102, at 7.

> The first comment is to stress that the phrase "limited to subjects relevant to the activities for which authorisation is sought" is capable of meaning only one thing in the legal profession. It is not believed that anywhere in the world are foreign lawyers able to acquire a host qualification or title (as opposed to an ability to practise under home title) which is limited to a particular area. *In other words, if a lawyer is going to requalify and acquire the host title, it is the whole of the host title of lawyer which is acquired on requalification, enabling the foreign lawyer to carry out all the activities of the host lawyer. There is no alternative, lesser activity which can be obtained.*

Id. (emphasis added); *see also supra* note 122 and accompanying text.

to the idea that both local and transnational practitioners are similarly situated. Thus, by adopting a dual regulatory structure, bar associations could give effect to the core values of the profession in the domestic sphere, while dismantling the barriers that currently exist to the effective delivery of cross-border legal services.

VII. CONCLUSION

This Article has explained the importance that the ongoing GATS "disciplines" negotiations may have for the future regulation of trade in legal services. Despite intense opposition from some national bar associations, there appears to be ample room for compromise on the central issue of the negotiations, namely, whether the *Accountancy Disciplines* could form the basis of multilateral disciplines in the legal services sector. Nevertheless, this Article has also suggested that reaching this common ground could be imperiled by national bar associations' criticisms of the *Accountancy Disciplines* as contrary to the "core values" of the legal profession. Labeling various bar norms as "core values" effectively takes these policy choices out of the realm of compromise and may be used to foreclose agreement on issues that are crucial to reaching a successful resolution of the negotiations. These arguments are most accurately seen as efforts by national bar regulators to retain their traditional monopoly over prescribing the means as well as the ends of legal practice in their respective jurisdictions. This Article has also suggested that recent efforts within the American Bar Association to adopt alternative regulatory structures that recognize temporary practice rights in foreign practitioners, while maintaining traditional domestic lawyer regulations, could provide a basis for compromise in the WPDR negotiations.

It is hoped that by seeing "core values" arguments for what they frequently are, assertions of regulatory prerogatives by national authorities, the negotiators in Geneva can move beyond rhetorical posturing and squarely address the real and difficult issues involved in regulating the international trade in legal services.