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CCBE RESPONSE TO THE WTO CONCERNING THE APPLICABILITY OF THE ACCOUNTANCY DISCIPLINES TO THE LEGAL PROFESSION

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ACCOUNTANCY DISCIPLINES

Introduction

In December 1998, a working party of the World Trade Organisation (WTO) completed 'Disciplines on Domestic Regulation in the Accountancy Sector'. Development of these disciplines was required by Article VI, paragraph 4 of the GATS. This provision requires the WTO, through its Council for Trade in Services, to develop disciplines whose aim should be to ensure that 'measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.' Article VI, paragraph 4 also states that such disciplines shall aim to ensure that these requirements are, inter alia:

> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

The Accountancy Disciplines are attached as Annex 1 to this paper.

The WTO Secretariat has now consulted the IBA on whether the Accountancy Disciplines can and should be extended to cover the legal profession as well, as follows:

"To help advance the work on professional services, three questions were suggested regarding the potential applicability of elements of the *Accountancy Disciplines* to other professions:

- Are there any elements of the disciplines which you consider are not appropriate for your profession? If so, please set out which and why you consider they are inappropriate. Please also suggest what changes would make them appropriate.
- Are there any points or areas which you consider are missing from the disciplines and which you feel should be included? If so, please indicate clearly what these are and why they should be included;
- Are there any elements of the disciplines which you feel need to be improved? If so, please set them out and why;"

In general, legal professions around the world have seen little problem with the disciplines, since they are general and mostly virtuous. However, there have been lurking concerns that the disciplines as drafted do not take account of the specific values and ways of practice of the legal profession, which are different to those of accountancy. As a result, this paper explores those differences, and recommends what changes, if any, should be made to the Accountancy Disciplines before they can be made applicable to lawyers. The paper recommends that lawyers should not be subject to the Accountancy Disciplines with a few phrases added on for lawyers, but that the changes require an entirely separate set of

disciplines for lawyers (albeit that there will be substantial overlap in content with the Accountancy Disciplines).

The authors are grateful to the Canadian Bar Association and the Federation of Law Societies of Canada for their useful submissions to the WTO on the Accountancy Disciplines which have provided insights into the conclusions of this paper. The authors are also grateful to the International Bar Association (IBA) whose WTO Working Group has provided the basic forum for discussion of many of the ideas in this paper.

- **In summary**, the paper recommends that the Disciplines can be extended to lawyers, but only if the changes proposed in it are incorporated into a special version for the legal profession. The full amendments suggested by the paper, taking account of all the proposals below, are incorporated into Annex 2 to this paper.

Core values and specific characteristics of the legal profession

The general feeling of lawyers is that the core values and specific characteristics of their 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 would agree that they include the following: independence, confidentiality, and the avoidance of conflict of interest. The core values are themselves translated into practice through two of the specific characteristics of the profession: a binding code of conduct, and the enduring function of the lawyer as a key player in the administration of justice.

The three core values were recognised by the European Court of Justice as central to the legal profession, in its landmark judgement of 19 February 2002 in the case brought by the Dutch Bar in relation to multi-disciplinary partnerships - Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*. Interestingly, in that case, which concerned the applicability of competition law to measures taken by a bar, the Court held that, although competition law did apply to actions taken by bars, those measures which existed to protect the core values could escape the application of competition law. This is relevant because of the wording of the opening General Provisions of the Accountancy Disciplines, as follows:

> Art II(2): General Provisions
>
> 2. *"Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,[1] relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."*

There is a danger that the current wording of the General Provisions would cover neither the core values of the legal profession (which the European Court of Justice in the Dutch Bar case recognised explicitly as being different to those of accountants) nor its specific

[1] The text of GATS Articles XVI and XVII is reproduced in an appendix to this document.

characteristics. As a result, if the Disciplines are to be extended to lawyers, there are two phrases which need further definition in order to take account of the needs of the legal profession, as follows:

(1) Legitimate objectives

The definition of 'legitimate objectives' will have to be extended to cover the core values and specific characteristics, and the following wording is suggested:

'*As a result of the lawyer's function in the administration of justice, legitimate objectives are, inter alia, the protection of consumers (which includes all users of legal services and the public generally), the quality of the service, the protection of the independence of the profession, the protection of confidentiality and the professional secret, the avoidance of conflicts of interest, professional competence, and the integrity of the profession.'*

(2) Necessary

The question also arises as to whether the word 'necessary' in the phrase 'not more trade-restrictive than necessary' needs further explanation in relation to the legal profession. It is understood that the
phrase itself is central to the GATS and cannot be changed (indeed it appears in Article VI quoted above), but it is arguable that there should be an explanatory sentence regarding lawyers. This is not baseless special pleading. Rather, it is inserted in recognition of the special place of lawyers in maintaining the rule of law and participating in the administration of justice and the upholding of a fair and democratic society, in which the core values of the profession play a crucial part. There are different traditions around the world regarding the interpretation of the core values, even though the principles are nearly everywhere equally recognised.

An area of reasonable discretion for a bar or law society is itself recognised in the European Court of Justice decision already quoted. It is expected that the kind of measures which would be unnecessary in relation to legal services would be licensing requirements related to health, colour, gender or age.

As a result, it is recommended that the following sentence be added to the General Provisions, before the new definition of 'legitimate objectives' as already detailed above:

'For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. For the purpose of defining what is "necessary" in the context of legal services, it is recognised that 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.'

*** In summary**, the whole of Article II (2) will now read as follows:

> *"Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,[2] relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures*

[2] The text of GATS Articles XVI and XVII is reproduced in an appendix to this document.

are not more trade-restrictive than necessary to fulfil a legitimate objective. For the purpose of defining what is necessary, 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. As a result of the lawyer's function in the administration of justice, legitimate objectives are, inter alia, the protection of the independence of the profession, the protection of confidentiality and the professional secret, the avoidance of conflicts of interest, the protection of consumers (which includes all users of legal services and the public generally), the quality of the service, professional competence, and the integrity of the profession."

Licensing Requirements

Section IV of the Accountancy Disciplines deals with licensing requirements. Article IV (8) states:

'8. Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective.'

This is very general, and may be satisfactory for the accountancy profession. It may also be satisfactory if the lawyer in question is to requalify in the host state under the host title. However, there are two other principal ways that lawyers' work may cross borders (if permitted by the host state) - either by way of temporary services under home title in a host country, or by way of permanent establishment under home title in a host country. It is believed that, in this way, practice in the legal profession differs from that of accountancy. These two ways usually require different systems of licensing, one for each form of practice. The present wording does not make it clear which form is being addressed by the Article in question in addition to requalification as a host lawyer. Accordingly, it is suggested that the following words be added to Article IV (8) at the end of the sentence: '*including licensing requirements in relation to temporary services provided under home title, and in relation to permanent establishment under home title, if permitted.*'

*** In summary**, Article IV (8) should now read as follows:

'*8. Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective, including licensing requirements in relation to temporary services provided under home title, and in relation to permanent establishment under home title, if permitted.'*

Professional Indemnity Insurance

Another area where changes should be introduced, to reflect the special experience of the legal profession, is in relation to Article IV, paragraph 12 on professional indemnity insurance. The Article states:

Article IV(12): Professional Indemnity**:**

12. Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant

jurisdiction in its territory and is consistent with the legislation of the host Member.

There are a few issues here, which need to be considered carefully, as follows:

(1) The European experience in relation to professional indemnity insurance

The EU has an Establishment of Lawyers Directive, Article 6 of which allows lawyers to bring with them their home professional indemnity insurance when establishing in another Member State, just as outlined in paragraph 12 above. It also permits Member States to require a top-up to the level mandated in the host Member State, which is doubtless what other countries will do if the Accountancy Disciplines are applied world-wide to lawyers. The simple phrase in paragraph 12 above brings with it, if the experience of European lawyers is replicated world-wide, a series of very complex problems, because of the following:

- the definition of lawyer varies according to different cultural traditions, and so the scope of practice, and the resultant activities covered by professional indemnity insurance, are widely different;
- lawyers bring with them insurance policies in their own language, which contain technical terms which are expensive and difficult to translate;
- bars and law societies arrange their affairs in different ways, so that activities are not always covered in the same way and by a single insurance policy.

In addition, there are protections within the EU as to insurance firms being used by lawyers. There are European directives which prescribe minimum standards for insurance firms operating within the EU. That will not necessarily be the case world-wide, where lawyers might bring with them insurance from unknown and possibly risky insurance companies. To protect against this risk, bars and law societies might want the power to set certain solvency requirements for the insurance companies of the migrant lawyers concerned.

None of these reasons is in itself sufficient to counter the sense of paragraph 12 above. Nevertheless, the reasons are all sound for the protection of consumers and the pursuit of the legitimate objectives already mentioned. Therefore, for the legal profession there should be an additional phrase added at the end of the paragraph, as follows:

'*subject to Members being permitted to put the burden, including the costs of the exercise, on to foreign applicants to show the extent of their existing insurance, and the solvency of the company providing such insurance*.'

If the Accountancy Disciplines are extended to lawyers, with or without the extra phrase proposed above, those representing the international legal profession are recommended to establish a committee in conjunction with the global insurance industry (just as the CCBE has done with the European insurance industry to deal with the problems arising out of the Establishment Directive), to ensure that professional indemnity insurance crosses borders as easily and safely as possible.

(2) Pension and social security schemes

In some civil law countries, the bar runs compulsory pension and social security schemes for local lawyers, along with compulsory professional indemnity schemes. If a foreign lawyer registers with a host bar, that lawyer might be required to buy into the compulsory local pension and social security arrangements, regardless of home arrangements made in these areas. It is arguable that the same logic which applies to professional indemnity insurance

crossing borders should be applied also to pension and social security arrangements, to avoid duplication of cover.

As a result, the following sentence should be added to the end of paragraph 12:

'*The same principles shall apply to any existing pension or social security arrangements for which Members have requirements covering foreign applicants.*'

*** In summary**, paragraph 12, taking into account both (1) and (2) above, would now read as follows:

> *'Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member, subject to Members being permitted to put the burden, including the costs of the exercise, on to foreign applicants to show the extent of their existing insurance, and the solvency of the company providing such insurance. The same principles shall apply to any existing pension or social security arrangements for which Members have requirements covering foreign applicants.'*

Qualification Requirements

The European Union has experience of another area mentioned in the Accountancy Disciplines, in relation to qualification requirements, which introduces principles familiar from the 1989 Mutual Recognition of Diplomas Directive. This is what Articles 19 and 20 of the Accountancy Disciplines say:

> Article VI (19 and 20): Qualification Requirements
>
> *19. A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.*
>
> *20. The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought.*
>
> *Qualification requirements may include education, examinations, practical training, experience and language skills.*

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.

Although there may be particular qualifications within specific jurisdictions which host lawyers are able to obtain, it is not believed that these are open to foreign lawyers, who will always have to acquire the host title first. That means that the scope of the examination will always have to be relevant to the acquisition of the host title in full, entitling the requalifier to undertake all the activities of a host lawyer on requalification.

The second comment is that the EU is accustomed to the notion of taking into account prior qualifications obtained in another EU Member State. This 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 recognise each degree, each title, each university from each country. That is a very time-consuming and resource-rich exercise.

As a result, it is recommended that paragraph 20 be deleted in respect of lawyers. Paragraph 19, with its general duty to take account of foreign qualifications, should be deemed to be acceptable, and in any case it is unlikely that the WTO would ever consider it fair to have it excluded for lawyers. However, given that the only qualification that a foreign lawyer can aspire to obtain is the full host title, paragraph 20 should be removed, because it assumes that for every country, or possibly for groups of countries, bars will have special exams and qualification routes. Given that many bars, in Europe and elsewhere, are not rich, national bodies, but based on city jurisdictions, it is not reasonable to suppose that they will be able to undertake the research and assessment necessary to give effect to paragraph 20.

*** In summary**, and for the reasons stated, paragraph 20 sets an impractical standard for bars and law societies, and should be deleted.

Technical Standards

There is some doubt within the legal profession as to whether any technical standards exist for its practitioners. This is what the Accountancy Standards say about such standards:

> Article VII (25 and 26) – Technical Qualifications
>
> *25.Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.*
>
> *26.In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognized standards of relevant international organizations[4] applied by that Member.*

[4] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

It is probable that 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. If these were substituted for technical standards in the two paragraphs quoted above, then they would make some sense. In relation to paragraph 26, for instance, there is the CCBE's Code of Conduct for cross-border transactions in Europe, the IBA's Code of Conduct, plus doubtless other standards of international bodies dealing with single issues such as arbitration or insolvency. The footnote would not be relevant any longer (in relation to the definition of international organizations) because some of the Codes – such as that promoted by the CCBE – are regional, and by definition, therefore, not open to all Members of the WTO.

*** In summary**, it is proposed that paragraphs 25 and 26 (the heading to which should be re-named 'Ethical and other standards') should be amended, as follows:

> 'Article VII (25 and 26) – Ethical and Other Standards
>
> *25.Members shall ensure that measures relating to ethical rules, competency requirements, and qualification requirements 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 ethical rules, competency requirements, and qualification requirements of relevant international or regional organizations applied by that Member.*

Similarly, wherever 'technical standards' appears in the Accountancy Disciplines – for instance in Article III, 4 (a) and (c) on Transparency – they should be replaced by '*ethical rules, competency requirements, and qualification requirements*' in relation to the legal profession.

ANNEX 1: DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR

WORLD TRADE

ORGANIZATION

S/L/64
17 December 1998
(98-5140)

Trade in Services

DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR

Adopted by the Council for Trade in Services on 14 December 1998

I. OBJECTIVES

1. Having regard to the Ministerial Decision on Professional Services, Members have agreed to the following disciplines elaborating upon the provisions of the GATS relating to domestic regulation of the sector. The purpose of these disciplines is to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

II. GENERAL PROVISIONS

2. Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,[5] relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

III. TRANSPARENCY

3. Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of

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

competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations).

4. Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

(a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards;

(b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;

(c) information on technical standards; and

(d) upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.

5. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2.

6. When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption.

7. Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time-limits, if any, for requesting such a review.

IV. LICENSING REQUIREMENTS

8. Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective.

9. Where residency requirements not subject to scheduling under Article XVII of the GATS exist, Members shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions.

10. Where membership of a professional organisation is required, in order to fulfil a legitimate objective in accordance with paragraph 2, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfilment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.

11. Members shall ensure that the use of firm names is not restricted, save in fulfilment of a legitimate objective.

12. Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member.

13. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

V. LICENSING PROCEDURES

14. Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practise) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.

15. Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

16. Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

17. On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.

18. A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

VI. QUALIFICATION REQUIREMENTS

19. A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

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

21. Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

VII. QUALIFICATION PROCEDURES

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.

23. Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applicants, including foreign and foreign-qualified applicants. Applicants shall be allowed a reasonable period for the submission of applications. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

24. Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.

VIII. TECHNICAL STANDARDS

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[6] applied by that Member.

[6] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

APPENDIX

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

Article XVI

Market Access

1.With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[7]

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

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

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

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[8]

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

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

[7] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

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

Article XVII

National Treatment

1.In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[9]

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 favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[9] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service supplies.

ANNEX 2: CHANGES REQUIRED TO THE DISCIPLINES FOR THE LEGAL PROFESSION

1. The whole of Article II (2) will now read as follows:

"Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,[10] relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. For the purpose of defining what is necessary, 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. As a result of the lawyer's function in the administration of justice, legitimate objectives are, inter alia, the protection of consumers (which includes all users of legal services and the public generally), the quality of the service, the protection of the independence of the profession, the protection of confidentiality and the professional secret, the avoidance of conflicts of interest, professional competence, and the integrity of the profession."

2. Article IV (8) should now read as follows:

'*Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective, including licensing requirements in relation to temporary services provided under home title, and in relation to permanent establishment under home title, if permitted.'*

3. Paragraph 12 would now read as follows:

'Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member, subject to Members being permitted to put the burden, including the costs of the exercise, on to foreign applicants to show the extent of their existing insurance, and the solvency of the company providing such insurance. The same principles shall apply to any existing pension or social security arrangements for which Members have requirements covering foreign applicants.'

4. Paragraph 20 sets an impractical standard for bars and law societies, and should be deleted.

5. Paragraphs 25 and 26 (the heading to which should be re-named 'Ethical and other standards') should be amended, as follows:

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

[10] The text of GATS Articles XVI and XVII is reproduced in an appendix to this document.

25.Members shall ensure that measures relating to ethical rules, competency requirements, and qualification requirements 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 ethical rules, competency requirements, and qualification requirements of relevant international or regional organizations applied by that Member.

Similarly, wherever 'technical standards' appears in the Accountancy Disciplines – for instance in Article III, 4 (a) and (c) on Transparency – they should be replaced by '*ethical rules, competency requirements, and qualification requirements*' in relation to the legal profession.