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Global Legal Practice and GATS: A Bar Viewpoint

Jonathan Goldsmith*

Abstract

This article provides an inside look at how global legal practice policies are developed. It begins with a useful description of the different types of bar associations in the world and their differing functions. The article continues by explaining why all of these different kinds of bar associations have an interest in the ongoing negotiations at the World Trade Organization regarding the General Agreement on Trade in Services or GATS. The GATS has been signed by over 160 countries which are World Trade Organization members and was the first world trade agreement to apply not to goods, but to services. The GATS applies to legal services. This article identifies issues of interests to bars in each of the four "modes of supply" covered by the GATS. This section of the article correlates the traditional concerns of lawyers and bars to the GATS framework. The article continues by explaining how bars can implement their policies through the GATS process. It uses the CCBE (Council of Bars and Law Societies of the European Union) as an example and explains what the CCBE has done during the GATS negotiations, including procedural steps involving communication with trade officials and others and development of substantive policy positions. The article concludes that the GATS provides a framework for bars to address what most are experiencing in practice—the crossing of borders by foreign lawyers to practice law. The article includes as an appendix the CCBE's position on non-EU lawyers who are inbound to

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the EU.

Introduction

This article aims to give the perspective of a bar in relation to the current GATS round. There are many players in the negotiations—governments, the World Trade Organisation, lobby groups and NGOs. But I will focus on the role of the bar in advancing the interests of its members. As a result, the article will not be an overview of the GATS treaty, nor an explanation of the GATS negotiating process. For that, readers should look elsewhere—principally, I would recommend, to the IBA GATS handbook,¹ from which I shall quote on occasion during this article.

Overall, though, the GATS can be described as follows:

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

The GATS was the first multilateral trade agreement that applied to services, rather than goods. Accordingly, the GATS raises new issues that Member Bars may not previously have faced. As the WTO web page explains: “This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities is the most pertinent example.”²

What is a Bar?

I shall begin with a brief explanation of the notion of a “bar,” since they perform different roles in different jurisdictions. Essentially, there are two principal functions, to regulate the profession of lawyer and to promote the interests of lawyers. Sometimes, the two functions co-exist in the same body (the Paris Bar, the Law Society of England and Wales). Sometimes, they are divided into two separate bodies (the “kammer” or regulator, and the “verein” or promoter, in Germany). Again, there are varieties of levels of regulation or promotion. In some countries, there are national bodies that perform the functions of regulation/promotion for the whole country (Norway, Sweden), in others there are local or city

1. See GATS (General Agreement on Trade in Services) A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (International Bar Association, May 2002) available at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS Handbook].

2. IBA GATS HANDBOOK, *supra* note 1, at 6.

bars which are the regulator/promoters, coming together in an umbrella national body of uncertain power (Spain, France, Italy). And there may be different legal professions, too, as in the United Kingdom, which will each have its own regulator/promoter organization.

The aim of this article is not to define a bar in all its rich variety, which could be the subject of a separate article on its own. However, it is necessary to understand the basic differences in functions and levels of operation before seeing what interests a bar might have in the GATS negotiations.

The Interests of the Bars in the GATS Negotiations

Despite their differences, bars have a common interest in participating in the GATS negotiations. That is because the negotiations essentially involve lawyers and their work crossing borders, and bars, whether of the regulatory or promotion type, have an interest in movements in or out of the jurisdiction, for the reasons I will describe.

The GATS essentially describes four kinds of cross-border movement, as follows:

The four modes of supply are:

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

This can be put into easier-to-understand language as follows:

- the service crosses the border (Mode 1)
- the client crosses the border (Mode 2)
- the lawyer's office crosses the border and a branch is opened (Mode 3)
- the lawyer personally crosses a border (Mode 4)

3. See IBA GATS HANDBOOK, *supra* note 1, at 19.

In each of these modes, there are concerns for the bars. I will list some of these concerns under the individual modes. Sometimes, they are professional worries, sometimes commercial, as follows:

Mode 1 (the service crosses the border): Is the lawyer, whose service is coming into the jurisdiction, competent? Under what professional rules is the lawyer operating? Are those rules enforceable against the lawyer and, if so, how and by whom? What if there is a conflict with the local professional rules? What if the lawyer is not a lawyer at all, or has been struck off?

Mode 2 (the client crosses the border): Why is the client crossing the border for legal services? Could those services be provided at home? Should those services be provided at home? Is there a problem if some of the legal services apply to activities at home?

Mode 3 (the lawyer's office crosses the border): Will the branch office have to be registered with the local bar? Are local lawyers allowed to go into partnership with a foreign lawyer or be employed by a foreign lawyer? What other kind of association with a foreign lawyer is permitted, and under what terms? Can the branch be known under the name of the foreign lawyer? What services can the branch office offer? With what lawyers? What about if the foreign firm is a multi-disciplinary partnership? What legal form can or must the branch office take? Will there be fair competition or is the foreign lawyer subject to unfair barriers or advantages?

Mode 4 (the lawyer crosses the border): What activities can the foreign lawyer undertake? Must the foreign lawyer register with the local bar? What criteria must be fulfilled for registration? Whose professional rules apply? If there is a conflict of professional rules, how are they resolved? How will the local bar know of any disciplinary proceedings, past or future, against the lawyer? Who has disciplinary power over the lawyer? Can the lawyer acquire the local title, and if so under what conditions? Can the foreign lawyer work with local lawyers, and if so under what conditions—employment by, or of, a local lawyer, partnership? Must the lawyer make clear the title under which he or she is practicing? What about professional indemnity insurance—can the lawyer bring it in from the home jurisdiction, will it be recognized, what if it is not enough, what if it does not cover practice in the local jurisdiction? What about social security arrangements, if those are undertaken through the local bar?

The concerns of the bars are usually seen in a defensive light. In other words, how can we prevent foreign lawyers from crossing our borders? Or if they do cross, how can we ensure that we regulate properly their activities? The offensive interests of lawyers in crossing borders has been seen traditionally as the preserve of a few Anglo-Saxon

jurisdictions—for instance, the United States, England and Wales, and Australia.

But, in recent years, even traditionally importing nations have begun to see themselves also as exporters. The activities of the large multi-national firms have started the process, given their policies of employing lawyers from many jurisdictions and sending them around the world. But, in addition, in numerous countries, there will always be at least one or two big firms who see it as in their interests to open an office in New York or London or Paris. In that way, the exporting process begins.

How Can Bars Implement Their Policies Through the GATS Process?

The bars are not themselves negotiating parties to the GATS. That is undertaken by members of the WTO, which are all governments. So, the first step for the bar is to ensure good connections to their governments, usually for the GATS process the Ministry of Trade, but the Ministry of Justice is also likely to have a say. A one-off meeting is likely to achieve nothing. What is important is a continuing dialogue and consultation as the negotiations proceed, taking in every step.

The bars should consider the issues of concern listed above, and decide what their policies might be in relation to them. Those policies should be relayed to the government departments and officials concerned. But the negotiations do not take place in a vacuum. There are steps—offers, requests, commitments—and it should be within that framework that the bar's government lobbying should take place. That is why it is important for the bars to understand the framework and timetable of the GATS process, so that they know when to make interventions and on what subject.

An Example: The CCBE

The Council of Bars and Law Societies of the European Union (CCBE) is the organization that represents the bars and law societies of the European Union, and through them their member lawyers who number more than 700,000, to the European institutions and the wider world. The CCBE is both a good and a bad example to use to illustrate the role of the bars in the GATS negotiations.

It is a bad example because it is not itself a bar, but a collection of bars, which is a different thing. However, it is a good example for a number of reasons. First, the GATS negotiations are dealt with in the European Union at the European level, not by national Member States. The Member States are observers to the process, and obviously feed in their views to the European Commission—indeed the views of the

governments will eventually collectively decide the European position—but they are not the key players on their own and in themselves. Second, the CCBE is in a position to see the reactions and views of a number of member bars and Member States, and so to have an overview of how different bars might react to the negotiations. And, finally, because it is a collection of bars from important Member States which on their own—never mind collectively—form some of the most important economies in the world, the CCBE has important bilateral connections with other bars and players in the GATS negotiations.

What the CCBE Has Done During the GATS Negotiations

(1) GATS committee—it has formed a GATS committee. This is not a very surprising action, but an important one. The GATS negotiations are a technical process which follow the provisions of the GATS treaty. Some of its ways of working are counter-intuitive (for example, that you do not need to offer the same as what you request—that you can and should indeed de-couple your offer from your request—because countries will trade off different items in different ways). Many GATS policies mature only after a length of time. As a result, it is important to have people with interest and expertise in GATS to follow the negotiations continuously, because they are not something that can be picked up randomly, and then understood and followed. Any CCBE delegation that has an interest in GATS can send someone to our GATS meetings.

(2) Close contacts with the European Commission—the body that is responsible for the GATS negotiations on behalf of the European Union is the European Commission. Within its Trade Directorate General, there is someone who is responsible for professional services, under which lawyers fall. The CCBE invites this official regularly to its GATS meetings, to report on progress, to answer questions and for the official also to be briefed. Such a relationship is invaluable in ensuring that the needs of lawyers are looked after in the negotiations.

(3) Close contacts with bodies that are involved in the negotiations—the European Commission is not the only body involved. There is, for instance, at European level the European Services Forum (ESF), which brings together all European service industries involved in the GATS. Lawyers are, again, one of those service industries. Clearly, there is a very wide range of industries represented—film and TV, courier and post, marine, business consultancies, and so on. The advantage of the ESF is that it is treated as a partner by the European Commission, and so receives regular briefings from senior Commission officials, and holds regular meetings with those trade officials from

Member States who advise the Commission. It produces policy papers in which its members have an opportunity to express their views.

(4) Participation in international bar GATS work—the member bars of the CCBE are all members of the International Bar Association (IBA), and the CCBE has itself participated in the IBA's work on GATS. The IBA has a unique position in bringing together nearly all of the world's bars. This, in turn, allows the world's bars to have a forum for settling issues among themselves, in the hope of influencing the outcome of the GATS negotiations. The IBA has sent resolutions to the World Trade Organisation (WTO) on the terminology to be used in the negotiations, and on the applicability of the accountancy disciplines to lawyers.⁴ The IBA has also visited the WTO to speak to, and to instruct, trade negotiators about lawyers' interests in the negotiations. It is vital for the CCBE to be involved in such contacts. There are other international bar organizations, too, which have developed policies, such as the Union Internationale des Avocats.

(5) Contacts with other bars—the other major exporter of legal services, apart from Europe, is the United States. It is not surprising, therefore, that there is a continuing dialogue with U.S. bars (or some of them) about the GATS. Sometimes, this is with the ABA, which has its own experts, and now committee, to deal with the issue. Sometimes, it is with New York, where both the city and state have considerable export and import interests in the field of legal services. New York City is one of the key centers for the provision of international legal services, both outwards to the rest of the world and inwards through the many foreign lawyers who live and work there.

(6) Production of a common CCBE position—it may not seem surprising that the CCBE has a common position in the GATS negotiations, but, given its history, it is a major achievement. During the last GATS round, which ended in 1994, the CCBE did not manage to come up with a common view. That is because its member bars have both importing and exporting interests. Many countries are both importers and exporters, but traditionally countries see themselves as either one or the other—exporters (like the UK, even though London imports a great deal of foreign legal provision) or importers (like France, even though French lawyers are increasingly exporting their services abroad). The perception will bring in its train normally an offensive or defensive position to the opening of markets. There is also a cultural and philosophical difference of approach between EU Member States about how to deal with foreign lawyers within their borders—to integrate them

4. The IBA's resolutions are available at http://www.ibanet.org/aboutiba/IBA_Resolutions.cfm

within the host title (traditionally the French view) or to permit them to practice under home title (traditionally the UK view). There are different approaches to nearly all of the concerns listed earlier. Nevertheless, the CCBE came up with a common position on the treatment of foreign lawyers within the EU, which is given in the annex to this paper.

The Future

At the time of writing, WTO Member States had just recently agreed to resume the GATS negotiations, which had gone into a state of suspension as a result of the failure of the Cancun ministerial conference. The new deadline for tabling services offers is May 2005. As a result, bars would be advised to take advantage of this quiet period to prepare themselves for what the future might hold.

The GATS works by a process of offer and request, with subsequent intense negotiations on those offers and requests, and trade-offs against them before final commitments are made. Even if a bar has not contributed so far to the process, it is not too late to start now. The bar should find out what is being offered in the field of legal services by its government, and what requests have been made for legal services within its territory by foreign governments. Once those two have been weighed up, the bar should lobby the appropriate ministry—probably the Ministry of Trade, with some assistance from the Ministry of Justice, although this will vary from country to country—to let them have their views.

The crunch comes as the negotiations build to a head. At that time, the bar will need to be sure that it is ready to put pressure on the important points and cede on those which might be less important. So, if access to a certain market (for instance, a neighboring country) is vital, that needs to be stressed strongly throughout. On the other hand, if there is an area of scope of practice (for instance, the practice of third country law) which foreign governments strongly want, but the bar has no strong views about, the bar needs to be aware of its possibility as a trading counter.

However, bars should be aware of an important part of the GATS negotiations, which is that offers and requests need not be identical. As already mentioned, this is called “de-coupling,” and works as follows:

One aspect of the Doha negotiations with which IBA Member Bars should be aware is the concept of “decoupling.” The term “decoupling” refers to the idea that a country might have, in a particular services sector such as legal services, asymmetrical “requests” and “offers.” In the past, it has been common for a country to “request” more liberalization in a particular sector (for example in legal services) than that country is itself prepared to “offer” to other countries. Because of this past history, some

governments have advised the bar associations and lawyer organizations to “decouple” their recommendations about the “requests” and “offers” for legal services and to consider “requesting” more than the bar would be prepared to “offer.”

The reason why a country might choose to “request” more liberalization in a particular sector than it is prepared to “offer” is because the negotiations are not simply bilateral negotiations about a single sector. Because countries negotiate their entire “package” of services, they sometimes choose to request more liberalization in areas in which there is strong interest in their country, while making “offers” or concessions in different sectors in which other countries have particularly strong interests. Thus, when formulating their recommendations, IBA Member Bars should be aware of the possibility of “decoupling” their recommendations. IBA Member Bars may want to consider the desirability of asking their governments to “request” liberalization of legal services, even though the Member Bar is not prepared to recommend that an “offer” be made on the same conditions. Although this may seem both dishonest and bad negotiating tactics (because it may be thought that it will rebound on the Bar concerned when the negotiations begin in earnest), the tradition of “decoupling” is well-established in trade-talks. The rationale in favor of decoupling is that the legal services sector will not be negotiated on its own, and so questions of honesty and tactics have to be decided not sector-by-sector, but in terms of the overall negotiations, of which only the country’s professional negotiators may have a clear view.⁵

Bars are also encouraged to participate in regional and international groupings of bars, because the discussions that take place there will help not only with the effort to understand and keep abreast of the GATS process itself, but also to know what other lawyers want in foreign markets and how their wishes can be fitted in with bar requirements.

There are other possibilities, too. The GATS offers the option of Mutual Recognition Agreements (MRAs), which are bilateral agreements between two countries allowing recognition of each other’s qualifications, leading to greater practice or requalification rights in the two countries. MRAs can only be concluded by governments, and so, once a bar has concluded a provisional arrangement with a bar in a foreign country, the two respective governments should be approached for their backing. The background to MRAs is as follows:

Article VII of the GATS is titled “Recognition.” Some regulators of legal services may decide that they are willing to “recognize” the qualifications of lawyers who are already licensed in another

5. See IBA GATS HANDBOOK, *supra* note 1, at 38.

jurisdiction and permit those lawyers to practice in the Member State.⁶

Article VII envisions that recognition issues may be handled through “Mutual Recognition Agreements” negotiated between GATS Member States. This section creates a structure by which Member States can negotiate “Mutual Recognition Agreements” or MRAs. These are bilateral agreements and may seem a good way to avoid the MFN rule mentioned above. However, any Member State—and the MRA is signed between Member States—which enters into an MRA with another must give all WTO Member States the opportunity to participate on an equal footing in an MRA. The WTO has been notified of very few MRA’s to date, and none, apparently, in the field of legal services.⁷

Conclusion

Many bars think of the GATS as a remote and theoretical treaty, difficult to understand and of little or no consequence to them. But the truth is that it represents the framework for regulating what most bars are experiencing in practice—the crossing of borders by foreign lawyers into their countries to practice. There are many concerns that arise as a result of cross-border practice, and the GATS provides a way of dealing with them.

6. ⁸ See IBA GATS HANDBOOK, *supra* note 1, at 11.

7. See IBA GATS HANDBOOK, *supra* note 1, at 10.

Annex

28 April 2003

Mr. Carlos Gimeno-Verdejo
DG Trade
European Commission
CHAR - 07/133
Rue de la Loi, 170
B – 1049 Bruxelles

Re.: GATS 2000/Inbound Position of the CCBE

Dear Mr. Verdejo,

Reference is made to our letter of March 1, 2001 to Commissioner Lamy and his kind reply of March 22, 2001.

The GATS Committee of the CCBE since then has had numerous discussions internally and with you on the subject matter. By now the work of the Commission and of the Member States on the offer to be submitted to other WTO Member States has been completed. Nevertheless, we would like to come back to the aforementioned correspondence and to follow up on it, i. a. in order to put on record for your benefit the position of the CCBE as it stands today, which position is not necessarily always identical with the position of the Member States.

1. Both our letter of March 1, 2001 and this letter address only the delivery of legal services by a lawyer from a home country through a commercial presence in the host country, comparable to a lawyer from one EU Member State established in another EU Member State under the Establishment Directive. This in our view is the most relevant mode for the new GATS round. Our letters do not address the delivery of legal services by a foreign lawyer who is not established in the host country, i. e. of a lawyer who travels from his home country to a host country to render legal services in the host country on a temporary basis and who thereafter returns to his home

country, comparable to a travelling lawyer acting under the Services Directive.

2. Page 2 of our letter of March 1, 2001, literas a) to g), has given the common inbound position of the CCBE on which all CCBE member organisations were in agreement. Subsequent discussions among the member organisations have led to a modification, in particular in the sense of a further liberalisation. Our present position may be summarised as follows:
3. The CCBE member organisations are prepared to apply the FLP ('foreign legal practitioner') concept to lawyers from States outside the EU wishing to establish themselves in an EU Member State as follows, with the term "home country" standing for a Non-EU Member State and the term "host country" standing for an EU Member State.
 - a) The FLP is recognised by the host country on the basis of Art. VII GATS 1994, provided he is a member of a comparable independent regulated bar with a code of conduct in line with the code of conduct of the CCBE and its member organisations, has obtained sufficient education and experience comparable to those required in the host country, and has met the requirements of his home country or obtained the licences or certifications required in his home country.
 - b) The FLP must register as such with the bar and/or competent authorities of the host country, and is subject to its/their disciplinary powers. He must produce evidence that his activity as an FLP in the host country is covered by a professional liability insurance policy.
 - c) The professional conduct of the FLP in the host country is regulated under the ethical rules of the bar and/or competent authorities of the host country, notwithstanding the fact that the ethical rules of the host country may be stricter than those of the home country.
 - d) The FLP must practise in the host country under his home title, and for the necessary information of the public, must mention that he is not admitted to advise on host country law.
 - e) The FLP must give legal advice only in his home country law

and/or in international public law (excluding European Community law).

- f) The FLP is not permitted to represent anybody in court and before administrative authorities except where permitted by host country law.
- g) The FLP may associate with host country lawyers and may be employed by host country lawyers, to the extent permitted by host country law, for the joint exercise of the profession.

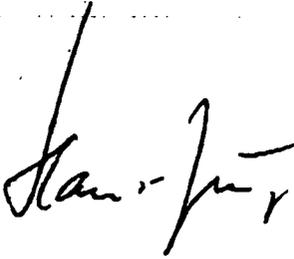
It is, of course, realised that some of the aforesaid is not so much a matter of market access and scope of practice but rather of domestic regulation.

- 4. As regards to the issue of scope of practice covered above under lit. e), the CCBE is, of course, aware of the fact that home country law and international public law are already contained in the EU Schedule of Specific Commitments of GATS 1994. However, we would like to recall the fact that this was done at that time without the support of the CCBE. More important, certain EU Member States at that time rejected the so-called concept of the FLP that underlies the GATS 1994, and based on Art. VI GATS 1994 require full integration of the FLP into the domestic legal profession. Compared thereto, it is a significant step that the FLP concept underlying the GATS 1994 is today accepted by all CCBE member organisations, i.e. also by the professional organisations in those EU Member States that follow the full integration concept.
- 5. We would like to repeat in writing our oral remarks to you that our discussions inside the CCBE have shown that the majority of the EU Member States in GATS 1994 seem to have misunderstood Mode 3 to cover not only the opening of the office in the host country but also the staffing of it with home country lawyers established in the host country. The correct understanding would have been that Mode 3 covers only the office as such (including local staff) whereas the services of established lawyers working from such office fall under Mode 4, just like the temporary services of travelling lawyers. We suggest that the Commission analyses the question whether this misunderstanding requires a correction of the GATS 1994 Schedules of Commitments. This analysis could be done when the Requests from other GATS Member States for liberalisation, in the GATS framework, of temporary services by travelling lawyers are being

reviewed by the Commission and the EU Member States.

We would be pleased to continue to closely cooperate with you on the above matters. We appreciate such cooperation very much.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Hans-Jürgen". The signature is written in a cursive style with a long vertical stroke at the beginning.

Hans-Jürgen Hellwig
First Vice-President
Chairman, GATS Committee