

MULTIDISCIPLINARY PRACTICE UNDER THE WORLD TRADE ORGANIZATION'S SERVICES REGIME

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ABSTRACT

This article isolates and addresses one of the key arguments made in support of lifting the ban on multidisciplinary practice (MDP) between lawyers and other professionals in the United States. This is the argument that U.S. obligations under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) constrain the regulation of MDP in the United States. Such constraints have been stated to take the form of GATS restrictions on domestic rules that impede trade in legal services between the United States and other WTO members, the lawyers' rules of professional conduct that prohibit MDP being cited as examples of such domestic rules. This article challenges this view of the U.S. prohibition on MDP through an analysis of the structure of the GATS, the contours of U.S. treaty obligations under the GATS and the jurisprudence of the WTO Appellate Body and panels on the subject. It reaches the conclusion that GATS obligations leave the United States largely unfettered in its capacity to prohibit MDP.

I. INTRODUCTION

The age we currently characterize as the post-industrial, or the information-age, may well be ultimately characterized as the age of convergence. Not only are we witnesses to the great convergence of peoples and cultures inherent in globalization, we are also privy to rivulets of convergence in several discrete areas ranging from technical standards to corporate governance doctrine. The professions have not been immune to this phenomenon as moves have long been afoot in quest of professional combinations and convergence. In the medical field for instance, we see attempts to fuse hitherto discrete professions, as developments in technology have brought the question into the limelight among medical specialties such as surgery and radiology, not only with regard to their relationship *inter se*, but also with regard to their relationship to non-medical disciplines like computer science and robotics.¹

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While many physicians have expressed angst at the convergence of medical disciplines in circumstances in which the professional primacy of physicians would likely be undermined, their angst seems like a storm in the tea cup when juxtaposed with the anguish shown by lawyers at the prospect of convergence of the legal profession and other professions. Perhaps this difference is explained by the fact that physicians, unlike lawyers, have already been professionally humbled and undermined, at least since the 1990s, by the mighty Health Maintenance Organizations (HMOs).² The influence of HMOs and big pharmaceutical companies on modern medical practice is so much that

1. For instance, developments in Magnetic Resonance Imaging (MRI) now hold, clear prospects of dispensing with the traditional surgeon's scalpel in the bloodless execution of delicate surgery, using only high-energy precision beams in a non-invasive way. See Harbour Fraser Hodder, *Bloodless Revolution*, HARVARD MAGAZINE, Nov.-Dec. 2000, at 36-47. This has brought issues of turf war between different specialties and disciplines to the fore. *Id.* Such a technology threatens the surgeon with replacement by the specialty traditionally in charge of radioactive and related energy sources, i.e., the radiologist. *Id.* The radiologist is, in turn, threatened by other non-medical disciplines that are generally as knowledgeable in this and other relevant areas. *Id.* The latter includes robotics, which could actually be deployed to displace both surgeon and radiologist in the administration of high-energy precision beams, thus ultimately enthrone the robotics engineer, computer scientist and related fields at the head of precision surgery. *Id.* Aspects of this piece are instructive. On page 38, it quotes one of the major propagators of the new technology, Ferenc Jolesz, who speaks of "the inevitable restructuring of medicine and surgery that demolishes the traditional boundaries between specialties... [T]oday we have this sharp distinction between different specialties of surgeons and radiologists... But what we do here is multidisciplinary and interdisciplinary- we are working as a team. We're working not only with clinicians, but with computer scientists, physicists, engineers, and also multispecialty doctors." *Id.* Mirroring the MDP debate in relation to the legal profession, the article, at page 46 posits that, "one-stop cancer diagnosis and treatment at a radiologist's office would eliminate the need for operating rooms—or surgeons—which brings" up the question of threatened turf. *Id.* Ferenc Jolesz's ultimate response (on page 47) is most revealing: "My feeling is that in the operating room of the future the doctors will be different... Maybe there won't be radiologists and surgeons, but there will be a new type of specialty." *Id.*

2. See Lawrence Fox, Written Remarks of Lawrence Fox: You've Got the Soul of the Profession in Your Hand, Written Testimony before the ABA MDP Commission (February 4, 1999), available at <http://www.abanet.org/cpr/fox1.html>. Fox's words are instructive:

First, look at our colleagues in the medical profession. A decade ago they relaxed the rules on physicians working for non-physicians. Suddenly a flood gate of pseudo-prosperity opened up and a tidal wave of cash spread across the land, offering the docs thousands, even millions for their practices. I remember myself looking longingly at my physician friends as they cashed out their patient lists. Why did I decide I hated the sight of blood, I thought.

But where are the physicians today? Can you find a happy doc? Of course not and why would one expect to? Having sold out to Mammon they now find themselves acting as supplicants in endless phone calls with high school clerks who decide for the physicians which medicine to prescribe, which procedures to undertake and how soon their patients are thrown out of their hospital beds. If this is what happens to a vulnerable value -- professional independence -- when literally matters of life and death are on the line, can we expect a different result when the issue is the preservation of important, if less cosmic values like loyalty, confidentiality and client autonomy?

Id.

a significant number of physicians are finding disillusionment in their profession.³ Beyond the HMOs, the increasingly capital-intensive nature of medicine, especially cutting-edge medical practice, has made inevitable the incursion of high finance into medical practice which has accordingly become subjected to the imperatives of the market, just like engineering before it.

The legal profession in the United States has had to confront its anxieties over professional convergence, in the context of the recent debate regarding the propriety of permitting multidisciplinary practice in the United States. The term "multidisciplinary practice" (MDP) may be defined as joint practice by lawyers and members of other professions, where their professional activities in pursuit of that joint practice involve the offer of legal services to the public. Depending on its context, the term may also mean the professional grouping or entity under which, or through which, such joint practice is undertaken, such as a multidisciplinary partnership.⁴

MDP is prohibited in the United States by Rule 5.4 of the American Bar Association (ABA) Model Rules of Professional Conduct and its ancillary provisions.⁵ This rule has been adopted with modifications by various states, regulatory power over the professions primarily residing in states rather than the federal government.⁶ The rule prohibits lawyers from sharing fees with non-lawyers, forming law partnerships with non-lawyers, and practicing law in a professional corporation owned or controlled by a non-lawyer. Although some states, such as New York, still use the predecessor of the Model Rules, the Model Code of Professional Responsibility, which was adopted by the ABA in 1969, the contents of the relevant provisions are, for the purposes of MDP,

3. Lawrence Fox, a major opponent of MDP between lawyers and other professions, considered this a major factor in his opposition to MDPs, given the potential for other professions, both established and pip-squeak, to control lawyers' discretion in such a setting. See Fox, *supra* note 2. See also Lawrence Fox, Written Comments of Lawrence J. Fox, Written Testimony before the ABA MDP Commission (July 8, 1999), available at <http://www.abanet.org/cpr/fox4.html>.

4. The term would be used in this article in these two senses only, even though generally, it can also encompass joint practice by persons belonging to any two or more professions, none of whom is a lawyer, as for instance the sort of medical practice referenced in note 1.

5. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). The basic prohibition in Rule 5.4 is reinforced by several other provisions that ensure lawyer independence and fidelity to client interests. These include Rule 1.6 on Confidentiality of Client Information; Rules 1.7, 1.8 and 1.9 on Conflicts of Interest; Rule 1.10 on Imputed Disqualification; and Rule 5.7 on Responsibilities Regarding Law-Related Services.

6. The District of Columbia is the only jurisdiction in the United States whose version of Rule 5.4 permits fee-sharing and partnership between lawyers and non-lawyers subject to certain restrictions. See DC MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4 (b) (1991). MDP is thus technically permitted in the District of Columbia, though in practice this has not given any fillip to the formation of MDP in the United States primarily because of restrictions in other states that constrain the establishment of branch offices by law firms with non-lawyer partners. On some of ramifications of the DC Rules see George C. Nnona, *Multidisciplinary Practice in The International Context: Realigning the Perspective on the European Union's Regulatory Regime*, 37 CORNELL INTERNATIONAL LAW JOURNAL, 115, 145-146 (2004).

practically the same.⁷ MDP must be distinguished from a situation involving an individual with dual professional qualifications who is accordingly licensed to practice law as well as one or more other professions.⁸

Proponents and opponents of MDP, including the "Big 5" global accounting firms,⁹ have attempted to buttress their positions through arguments that draw on various sources of legitimacy. Central to both sides, for instance, has been an appeal to consumer interests and their protection. Each side has argued that its regulatory recipe is the optimal one for consumers of legal services.¹⁰ Peculiar to MDP proponents, however, is the argument canvassing the de-proscription of MDP by reference to regulatory constraints imposed by the international trading system. By casting the opposition in trade-restrictive terms, this argument broadly seeks to tap into the legitimacy enjoyed by the liberal trade regime in regulatory circles. More specifically, this argument presents the ban on MDP as contrary to the disciplines emanating from the world trading system, —ostensibly the disciplines imposed by the WTO via the General Agreement of Trade in Services (GATS).¹¹

While the value of convergence in many aspects of modern life can hardly be gainsaid, the case for MDP as an instance of that convergence within

7. See particularly MODEL RULES OF PROF'L CONDUCT R. 5.4(a), R. 5.4(b) and R. 5.4(d) (1983). These rules correspond respectively to MODEL CODE OF PROF'L RESP DR 3-102(A), DR 3-103(A) and DR 5-107(C) (1969).

8. Model Rule 5.7, dealing with a lawyer's responsibilities regarding law-related (ancillary) services, substantially governs such a professional; this rule is distinct from MDP, which primarily implicates Model Rule 5.4. See MODEL RULES OF PROF'L CONDUCT, R. 5.4, R. 5.7 (1983).

9. The term "Big 5," or "Big Five," has traditionally been used to refer to the five largest accounting firms: Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCoopers. The functional demise of Arthur Andersen LLP since 2002, in the wake of the Enron Corporation accounting scandals, has meant a reduction in this class of firms, now referred to as the "Big 4." This notwithstanding, the term "Big 5" will be used throughout this Article to refer collectively to the major global accounting firms, in order to maintain terminological continuity and consistency between this class of firms and the existing literature on them, which largely identifies them as the Big 5 rather than the Big 4, the latter term not having as yet become pervasive.

10. See Peter C. Kostant, *Paradigm Regained: How Competition From Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 51 (1999); James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interest of Clients and the Public?* 20 PACE L. REV. 33, 35 (1999); New York Bar Association, *Report of The Special Committee on Multi-Disciplinary Practice and The Legal Profession*, sec. III, para. 5 (January 8, 1999); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1158 (2000). But see the statement of Professor Neil W. Hamilton to the Minnesota State Bar Association, quoted in Lowell J. Noteboom, *Professions In Convergence: Taking The Next Step*, 84 MINN. L. REV. 1359, 1376 n.90 (2000): "I urge you to make the decision regarding MDP not on the basis of what 'customers' want. Make it on the basis of how we can preserve one [of] the great learned professions that is committed (albeit imperfectly) to serving justice." *Id.*

11. See references *infra* note 12.

the broader system of professions is less than persuasive, to the extent that it rests on the imperatives of the WTO regime for trade in services. Indeed, whatever may otherwise be the merit of the position that MDP be legalized in the United States, the argument seeking to support that position by reference to the WTO regime for services is flawed. The aim of this article is to show the shortcomings of that argument by exploring the WTO regime for services especially as it applies to the United States and its prohibition of MDP.

This article therefore challenges the premise that United States obligations under the WTO regime for trade in services, including the jurisprudence of the WTO dispute settlement system, constrain it in its regulatory choices regarding MDP. In relation to this premise, arguments by MDP proponents typically assert or suggest that the rules of professional conduct prohibiting MDP (principally Rule 5.4 of the Model Rules) constitute barriers to trade in legal services between the United States and other countries, and thus contravene arrangements under the WTO agreements that are primarily aimed at trade liberalization between the United States and other nations.¹² Interestingly, the exact manner in which the rules of professional conduct contravene the WTO services regime and the manner in which such contravention constrains regulators within the United States in their regulatory choice regarding MDP are hardly ever articulated in any detail by MDP

12. See for instance Ward Bower, *Multidisciplinary Practices - The Future*, GLOBAL LAW IN PRACTICE 155, 162 (J. Ross Harper ed., 1997).

The worldwide proliferation of MDP activity (*de facto and de jure*) is further confused by the apparent legal authority of the World Trade Organization (WTO) in Geneva to exert regulatory control over 'professional services' (including lawyers) as a result of the adoption of the Uruguay Round of the GATS (General Agreement on Trade in Services) in 1993. Even the most casual WTO observer recognizes an apparent bias against regulation, for *laissez-faire*, *caveat emptor* and free trade in everything emanating from the rule-making and dispute-resolution activities of that body. Protectionist regulation is anathema to the WTO and even regulation in the public interest is subject to severe scrutiny.

Id. This general declaration on the deregulatory impact on MDPs of the WTO system is not anchored on any specific provision of a covered agreement or pronouncement of a WTO body, but rather on vague notions of WTO as a harbinger of a *laissez-faire* trade environment for services. See also John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1300-01 (2000). Here, the authors state cursorily that "the GATT treaty, which governs most international trade matters claims jurisdiction over these professions through the World Trade Organization—an organization historically biased against self-interested regulation." *Id.* That the writers speak of the GATT when they apparently intend to refer to the GATS is perhaps further indication of the perfunctory character of these and similar assertions. For other suggestive remarks and allusions to the WTO/GATS disciplines, see *American Bar Association Commission on Multidisciplinary Practice, Reporter's Notes* (1999), available at <http://www.abanet.org/cpr/mdpappendixc.html> (last visited Nov. 13, 2005) especially in Section I(A), and the related notes 8-17; Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV., 1547, 1550 (2000); CHRISTOPHER ARUP, *THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY*, 168-69 (2000).

proponents. The assertions are often near-perfunctory in nature.¹³ The perfunctory nature of these assertions and suggestions necessitates, by itself, a closer examination of the WTO regime for trade in legal services to ascertain its regulatory contours. Beyond that, however, such an examination is also apposite because the WTO is the largest multilateral trade arrangement in the world, whose regime potentially has tangential, if not direct, impact on other smaller regimes, especially by means of the operation of its now-famous dispute settlement system and the resultant jurisprudence. This article essentially argues that nothing in the WTO services regime requires the de-proscription of MDP, and the regime, as such, does not meaningfully constrain the regulatory authorities of the United States legal profession in their response to the MDP question.

Part I of this Article introduces the WTO's General Agreement on Trade in Services (GATS), the basic instrument covering trade in services. Part II explores the United States (U.S.) schedule of specific commitments under the GATS in order to shed light on the extent and limit of U.S. obligations. Part III analyzes the General Exceptions under the GATS, consistent with the existing jurisprudence of the WTO Appellate Body on the subject, the aim to show that these general exceptions can sustain derogation from the trade disciplines that are potentially applicable to the MDP issue. Part IV examines the GATS provisions on non-nullification violation for their potential to act as disciplines on the regulation of MDP, as well as their relationship to the General Exceptions. Part V embodies concluding remarks.

II. GENERAL AGREEMENT ON TRADE IN SERVICES

The basic WTO instrument regulating trade in services is the General Agreement on Trade in Services (GATS), introduced as Annex 1B to the Agreement Establishing the WTO of April 15, 1994. It establishes the basic structure for regulating trade in services by adopting a framework similar to that for trade in goods under the General Agreement on Tariff and Trade (GATT). Articles XVII and II respectively establish broad National Treatment and Most-Favored-Nation (MFN) obligations, subject to rather substantial rights of derogation under each country's Schedule of Specific Commitments and List of MFN Exemptions, respectively drawn up in line with further stipulations in Article XX of the GATS and the GATS Annex on Article II (MFN) Exemptions. Article XVI establishes a market access obligation somewhat akin to the provision on quantitative restrictions in Article XI of the GATT, which obligation is also subject to derogations under the Schedule of Specific Commitments. Despite these basic disciplines, the GATS is very much an inchoate agreement. In several respects, it is no more than an agreement to

13. See references *supra* note 12.

enter into further negotiations with reference to specific issues treated therein,¹⁴ and more generally with reference to progressive liberalization under Article XIX thereof. This makes it, in several respects, a difficult agreement to enforce, since several of the provisions effectively end up as expressions of intent to liberalize despite their not being worded as such. Beyond this, however, the negotiating technique adopted in drawing up the GATS further weakens it as a means of effectively constraining states' behavior in the services sector.¹⁵ Unlike the GATT, which involves a negative list approach under which any item or sector not included in a schedule is deemed to be automatically covered by the agreement, the GATS involves a positive list approach, under which only those items specifically scheduled by a contracting party are covered. The latter approach is inherently more restrictive, since only those commitments and sectors which the parties have expressly considered are covered. This approach excludes, for instance, newly-emerged services that no one contemplated at the time of the negotiations.¹⁶

It is not surprising, therefore, that the GATS is viewed in many quarters as merely enthrone a standstill commitment - an obligation on the part of WTO members not to introduce more restrictive rules on the flow of services, thus preserving the degree of access provided under current domestic regulations.¹⁷ Even this assessment may be unduly sanguine given that a meaningful standstill depends on the level of commitments undertaken in each member's Schedule of Specific Commitments, as modulated by the MFN exemptions. Following the scheme of Article XX, commitments in different service sectors on both market access (under Article XVI) and national treatment (under Article XVII) are inscribed in the schedule with such limitations and derogations as the inscribing contracting party deems necessary. These specific commitments effectively form the crux of the obligations currently undertaken by contracting parties under the GATS, since they determine the incidence of the wider, more general disciplines under the agreement. A GATS signatory is hardly constrained by the agreement if it has taken the broadest possible exemptions as to MFN and inscribed wide limitations on national treatment and market access in its schedule. This is true in spite of the existence of a few sectoral arrangements and disciplines in areas such as telecommunications, financial services and accountancy; which arrangements and disciplines are ostensibly aimed at achieving greater liberalization in these specific sectors by defining and facilitating the assumption of more robust commitments by the contracting parties in relation to

14. See Article VII(2) on recognition of qualifications, Article XV on subsidies, Article XVIII on additional commitments.

15. See Geza Feketekuty, *Assessing and Improving the Architecture of GATS*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 85, 111 (Pierre Sauve & Robert M. Stern eds., 2000).

16. See *id.* at 87.

17. See *id.* at 97.

such sectors. Indeed, it has been stated in relation to the commitments that "the substance of the GATS depends to a very large extent on the specific commitments which WTO Members have actually offered. In the absence of substantive commitments, the GATS, although in principle embracing the entire services industry, remains more or less an empty shell."¹⁸

III. SPECIFIC COMMITMENTS

It is clear from the foregoing that to determine the extent to which the GATS constrains the United States or any other country in its regulation of the legal services market generally, and MDP in particular, an examination of the country's schedule of commitments is imperative. In the Uruguay Round, fifty-five members included legal services in their schedules of commitments.¹⁹ The United States was one of them. A look at the U.S. schedule of commitments shows that it inscribed horizontal commitments and related limitations on market access and national treatment in relation to four areas: temporary entry and stay of natural persons, acquisition of land, taxation measures, and subsidies. None of these areas, however, are of exceptional importance to legal services, especially in the MDP context. With regard to sector-specific commitments, the U.S. split its commitments in the area of legal services into two broad categories: (1) practice as or through a qualified U.S. lawyer, which is clearly the more substantive and important category and therefore the focus of the discussions herein unless it is indicated otherwise, and (2) practice as a foreign legal consultant. Regarding the former category, the United States inscribed, for all states of the Union, market access limitations for all the four modes of services supply.²⁰ Notably, the United States restricted the supply of legal services through any of the modes to natural persons, thus precluding supply through artificial entities. Instructively, in relation to supply of legal services through commercial presence, the United States inscribed a market access limitation stipulating that partnership in law firms is limited to persons licensed as lawyers. The United States also inscribed a national treatment limitation in relation to the territory of some of the states: a requirement of in-state or U.S. residency for licensure in Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia and Wyoming. With regard to practice as a foreign legal consultant, the United States defined such consultancy to exclude court appearances, conveyances pertaining to real property located in the United States, preparation of trust or testamentary

18. See Robert F. Taylor & Philippe Metzger, *GATT and its Effect on the International Trade in Legal Services*, 10 N.Y. INT'L L. REV. 1, 23 (1997).

19. SYDNEY CONE, *INTERNATIONAL TRADE IN LEGAL SERVICES*, 2:20 (1996) (tbl. I gives a listing of these countries with an indication of the limitations in their respective schedules).

20. Under Article I(2) a-d of GATS, the modes include cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

instruments pertaining to real estate located in the United States that is owned by a U.S. resident, and preparation of instruments pertaining to marital or parental relations/rights of a U.S. resident. For all states within its territory, the United States indicates the supply of foreign legal consultants' services through presence of natural persons to be unbound, this being the most pervasive and important mode of supply of such services in the United States.²¹ For sixteen states²² and the District of Columbia, the United States inscribed additional commitments in relation to foreign legal consultants, permitting them to practice international law at the minimum and, depending on the state, practice third country law, associate with local lawyers, and use the home-country firm name. For the more liberal states, including Alaska, Hawaii, New Jersey, New York, Ohio, Oregon and the District of Columbia, the additional commitments permit a foreign legal consultant to practice host-country (U.S.) law, provided the practitioner involves a local lawyer in one form or another. The MFN exemption list of the United States stipulates exemptions of indefinite duration in relation to movement of persons, banking and other services (excluding insurance), and transport services. The list also includes MFN exemptions for all sectors in relation to taxation measures and land use.²³

By far the most important of the U.S. commitments in the context of MDP are those on market access. This is because MDP is fundamentally about the form of association or organization permissible within a jurisdiction for purposes of legal practice, an issue directly touched upon by Article XVI(2)(e) of the GATS on market access. This provision prevents a WTO member from adopting or maintaining, in sectors where market access commitments are undertaken, "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."²⁴ This obligation applies to measures adopted or maintained by the government of the member, as well as governments of regions, states or other sub-divisions of the member. MDP is not primarily an issue hinged on discriminatory treatment between U.S. providers of legal services and providers from other countries, nor is it about discrimination between service providers of third countries *inter*

21. A market access limitation is inscribed for thirty-five states, indicating that supply of the foreign legal consultant's services through commercial presence is also unbound.

22. Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Texas and Washington.

23. There is some difficulty in understanding the sense in which some of the scheduled items qualify as sectors or sub-sectors for scheduling purposes, both by their very nature and also by virtue of the Services Sector Classification List, GATT Secretariat, *Services Sector Classification List*, MTN.GNS/W/120 (March 10, 1991), which was published by the GATT Secretariat for use by contracting parties in scheduling commitments. While banking and transport services clearly qualify as sectors or sub-sectors under the classification list, movement of persons, taxation measures, and even land use hardly qualify as sectors for classification purposes. This sort of situation contributes to the difficulty of assessing the GATS schedules, a difficulty noted even by those well-acquainted with trade issues. See HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS*, 182 (1998).

24. GATS Art. XVI(2)(e).

se, these being fundamental forms of discrimination at which the national treatment and MFN obligations are respectively aimed. As such, in the absence of an express provision such as that in Article XVI(2)(e) of the GATS, one would be hard-pressed to find a directly applicable GATS provision potentially impinged upon by the MDP prohibition, in the context of the overall GATS scheme. The foregoing aside, the market access obligations are conceptually antecedent to the MFN and national treatment obligations, the latter two being considerably hinged on the market access obligations undertaken. Market access obligations embody substantive undertakings to open up a country's services industry to outside competition in readily quantifiable or determinable ways. MFN and national treatment on the other hand embody essentially procedural obligations to avoid discrimination between service providers of different countries in the administration of the sectors to which market access has been granted. That the scheduling scheme of GATS obligations did not conform to this distinction, often listing in the national treatment column the same limitations as are listed in the market access column, does not detract from the validity of this distinction. This is even more so considering that as important as the inscribed market access limitations are, they are but deductions from (i.e. limitations on) broad, substantive market access obligations automatically undertaken pursuant to Article XVI of the GATS upon the addition of a service sector to a country's schedule of commitments. They are not the commitments themselves; rather they are limitations thereto. Thus, national treatment and MFN, fundamental as they are to questions of international trade regulation generally, have a relatively circumscribed importance to the MDP question.

It is of course arguable that formally identical measures applied uniformly to domestic and foreign service suppliers can sometimes result in less favorable treatment of foreign suppliers, thus leading to *de facto* discrimination contrary to the national treatment obligations of the GATS. In the present context, this would mean in effect that the prohibition of MDP within the United States, though applied uniformly to foreign as well as domestic suppliers of legal services has a disproportionately unfavorable impact on the former. This could be a valid argument in the context of WTO/GATT jurisprudence, and would give national treatment primacy in and of itself as an obligation potentially precluding the prohibition of MDP. However, it would be a less direct and hence weaker argument, very dependent on the hermeneutic inclinations of WTO judicial bodies, when juxtaposed to the more express and direct provisions of Article XVI(2)(e) of the GATS on requirements of organizational and association forms as market access constraints. Furthermore, the success of such an argument would be dependent on side-issues, the judicial resolution of which has never been easy. Notably, a key component in arriving at a conclusion that the national treatment obligation has been breached in the context of Article XVII of the GATS would be a prior determination that the domestic supplier in question and the foreign supplier both supply "like services" and also that they both can be categorized as "like service suppliers."

Ignoring the possible ramifications of determining who qualifies as "like service suppliers" and focusing on the concept of "like services," the issue arises whether legal services provided by domestic U.S. lawyers practicing independently of other professionals in the context of stricter ethical rules and constraints of the legal profession are alike to legal services offered by professionals (be they U.S. or foreign) working collaboratively in the MDP context under manifestly different ethical rules and cultures. This readily implicates distinctions and arguments akin to those made in relation to the vexed issue of production-and-process-method (PPM) in relation to trade in goods: Is the method of production of a service or range of services to be considered a characteristic of such a service or range of services? Whatever the answer to the foregoing question, how do we distinguish between production methods for services and intrinsic constituents of such services, given the intangible nature and general characteristics of services? More specifically, should the attorney-client privilege (and the benefits flowing therefrom) be classified for instance, as intrinsic elements of lawyer-provided services or as a PPM? Are the broad ethical and professional contexts to be considered aspects of the production method, or should the definition of production method be more narrowly drawn and restricted to, for instance, the requirements for the completion of a particular piece of transactional legal work at the government agency having regulatory control of such transactions. The problems of PPM seem even more daunting in this context, given the peculiarities of services.²⁵

Unlike an argument founded on breach of national treatment obligations, a claim founded on breach of market access obligations stands on seemingly firmer footing. The provisions of Article XVI(2)(e) apply to preclude the United States, in the context of the market access obligations it undertook in its schedule of specific commitments, from introducing or maintaining measures which "restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."²⁶ A requirement that precludes legal services from being rendered through an MDP ordinarily qualifies as such a restriction. Even if MDP as a vehicle for offering legal services does not qualify as a specific type of legal entity *sui generis*, it very much qualifies as a form of joint venture under the express language of Article XVI(2)(e).

25. An indication of the intricacies of the PPM issue in the GATT context is given in MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, 412-19 (1999) (particularly on page 413). The WTO Appellate Body in the Japanese Alcohol case has instructively noted, while construing Article III(2) of the GATT on National Treatment, that the concept of like products should "be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn." Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS 8/R, WT/DS 10/R, WT/DS 11/R, AB-1996-02 at 19-20 (Oct. 4, 1996) (quoted in TREBILCOCK & HOWSE, *supra*, at 413). While this is clearly not dispositive, it does denote the precariousness of an argument dependent on the MDP prohibition qualifying as a national treatment violation under GATS.

26. GATS, Art. XVI(2)(e).

The clarity and apparent strength of the market access obligations notwithstanding, chinks exist in its armor. Such chinks are worthy of consideration as a possible first line of defense for the United States against claims that the state rules prohibiting MDP constitute measures which violate U.S. market access obligations. One such chink is the limitation that services must be supplied by a natural person with respect to all four modes of supply of services, as expressly inscribed in the U.S. schedule of specific commitments relating to practice as or through a qualified U.S. lawyer. An immediate issue that arises in connection with this limitation is whether it does not contemplate and exempt from the market access commitments, the U.S. rules prohibiting MDP, at least in a situation where a foreign MDP seeking to supply legal services in the United States is a juridical entity and not just a grouping (say, a partnership) of natural persons. (An MDP need not necessarily be constituted as a juridical entity, but could be a partnership of individuals or a joint venture of such partnerships.).

In the above scenario, with juridical personality present, the MDP would be distinct from the constituent individuals and thus would not qualify as a natural person supplying legal services for purposes of the requirement in the U.S. schedule that such legal services be supplied by natural persons. While such an argument may be sustainable in specific contexts with regard to MDPs that are structured as juridical entities, it clearly does not provide general, overarching support for the U.S. prohibition on MDP. However, such support as it provides becomes considerably enhanced, when taken together with an oft-ignored provision inscribed as part of the U.S. limitations on practice as or through a U.S. lawyer through the third mode of supply of services, i.e. supply through commercial presence.²⁷ Here, the United States inscribed an additional limitation that "partnership in law firms is limited to persons licensed as lawyers."²⁸ This provision invites a conclusion that the United States can validly maintain a prohibition on MDPs, as partnerships that include persons who are not lawyers. The cumulative effect of these provisions would be that MDP, whether in the form of juridical entities or natural persons/partnerships, can be validly prohibited by the United States, relying on the limitations as to market access in its GATS schedule. The scope of these provisions would, however, obviously not cover the prohibition of MDP in relation to foreign MDPs structured as partnerships seeking to supply legal services into the United States through a mode of supply other than commercial presence.²⁹

27. This is by far the most important mode of supply for international trade in legal services, not just because it gives the foreign-country entity involved a "permanent" establishment – and hence a foothold – in the host country, but also because it is the mode of supply which the host country has the greatest interest in regulating, given the higher level of intrusiveness involved. Thus, both the foreign country and the host country have a heightened interest in the regulation of this mode of supply.

28. The US Schedule of Sector- Specific Commitments paragraph 1(A) (a).

29. While countries have traditionally sought to control the consumption of foreign services supplied through such modes, their claim to jurisdiction and control over cross-border

Besides, a question can be raised as to whether the term "law firms" in the market access limitation under discussion encompasses MDP firms. In essence, is the term to be construed strictly in line with its traditional usage so as to encompass only firms of lawyers offering legal services, or construed broadly to include any firm that offers legal services to the public, even if the firm is, for instance, one made up exclusively of investment bankers³⁰ or an MDP comprising investment bankers and lawyers.? Unless it can be construed in the latter, broader fashion –which is clearly not certain– the market access limitation in question may not go as far as completely excusing the U.S. prohibition of MDP in relation to supply of legal services through commercial presence. This is because, if it is construed in the strict traditional sense, the limitation that partners in law firms be only licensed as lawyers would be inapplicable to MDPs, which would then not qualify as law firms for purposes of the limitation.

A closer examination would indicate, however, that the term "law firms" covers MDPs rather than merely traditional law firms. This flows from the requirement that the term be given an interpretation which does not render the provision, i.e. the limitation, absurd or largely inutile.³¹ An interpretation that limits the term "law firms" to traditional law firms would have this effect. It would be absurd to adopt an interpretation preventing non-lawyers from acting as partners in a firm that renders legal services if that firm is characterized as a law firm, while permitting them to act as such partners merely by virtue of the firm's characterization as an MDP or some other sort of entity. The difference between a law firm in which lawyers are engaged in practice with non-lawyer partners (something expressly prohibited by the market access limitation in question) and an MDP involving lawyers in joint practice with non-lawyer partners is one of form, not substance. Indeed, the difference is less than one of form; a difference borne of mere semantics.³² Because there is no substantive

supply and consumption abroad has in the information age not been, from both logistical and legal bases, as strong or important as the claim for jurisdiction and control over supply through commercial presence and presence of natural persons. Unlike jurisdiction over the supply of services through commercial presence and presence of natural persons, questions of the extraterritoriality of jurisdiction, for instance, weaken the claim of states to jurisdiction over the other modes. Similarly, the immense logistical difficulties implicated in reaching foreign service providers and in controlling emigration logistically constrain control over these modes of supply. Hence, supply through commercial presence is not only the most important mode of supply of services into a jurisdiction in terms of legitimate state interests implicated, but also the most amenable to state regulation.

30. In some countries it is permissible for non-lawyers to render legal advisory services to clients, provided they do not designate themselves as lawyers or hold themselves out as being lawyers; the United Kingdom provides an example of this scenario. See ADAMSON, *supra* note 23.

31. See *Shrimp/Turtle* case, *infra* note 47, at para. 121.

32. It may be argued in this regard that a substantial difference exists between the two situations because in one – the situation in which non-lawyers are permitted to be partners with lawyers in an MDP – what is involved is not just the offer of legal services to the public, but rather the offer of a composite or blend of services of which legal services form but one element. Such composite services justify a rule permitting the partnership of lawyers with non-lawyers.

difference between these two scenarios, it would be absurd to have an interpretation that excludes one but not the other. Besides, such interpretation reduces the efficacy of the limitation and renders it largely without force, since all that is needed to evade it is for one to claim that the firm involved is an MDP rather than a law firm.

Beyond the foregoing, a robust interpretation, one that gives effect to the spirit and context of the provision, would be broad enough to capture all firms that offer legal services to the public in whatever form since the offer of such services is the essence of a law firm. Such interpretation would be in line with the injunction in Article 31(1) of the Vienna Convention on the Law of Treaties³³ which requires that a treaty provision be interpreted in accordance with the ordinary meaning to be given to its terms in their context and "in the light of its object and purpose." The object and purpose of the limitation on market access under consideration is to ensure that foreigners who supply legal services via commercial presence in the United States do so on the same terms and under the same restrictions as U.S. suppliers of such services, i.e. U.S. lawyers; one of those restrictions being notably that in Model Rule 5.4 prohibiting U.S. lawyers from sharing profits or forming partnerships with non-lawyers. The broader context of this market access limitation is the insistence of the U.S. judicial system on lawyer independence, of which Rule 5.4 is but one expression. Taken together, the purpose and context of this U.S. market access limitation dictate the inclusion of all firms that render legal services within the ambit of the phrase "law firms", the result being that any firm, such as an MDP, the structure of which renders it incapable of meeting the terms of the limitation, cannot offer legal services via commercial presence in the United States.

IV. GENERAL EXCEPTION

The general exceptions in Article XIV of the GATS constitute perhaps the most resilient defence against claims that the rules prohibiting MDP violate U.S. obligations. Article XIV of the GATS provides, in pertinent part, as follows:

Subject to the requirement that such measures are not applied
in a manner which would constitute a means of arbitrary or

A response to that argument would be that the fact of joint practice by lawyers and non-lawyers does not by itself assure us of a composite or blend of services. The essence of partnership is the sharing of profits and the concomitant mutual influence of partners on one another. Composite services would not necessarily be the result of a partnership arrangement between lawyers and non-lawyers. The lawyers may well continue to render their services from a discrete branch or department within the same firm while the non-lawyers continue to work separately in their own branch or department. They may actually share few, if any, joint clients thus further attenuating the possibility of delivering blended services, which is truly present only when they serve the same clients on the same matter contemporaneously.

33. See *infra* note 35.

unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;³⁴

Article XIV, borrowed from Article XX of the GATT, embodies the general exceptions under the GATS, the excerpted portion mirroring the chapeau and paragraph (a) of Article XX of the GATT. The notable difference between paragraph (a) of Article XX of the GATT and paragraph (a) of Article XIV of the GATS is the additional phrase "or to maintain public order" tagged on to the latter. This phrase is novel, not having been employed in any of the other provisions of the GATT or any other WTO agreement. Given its novelty, its interpretation should proceed through the use of general interpretative tools, giving ordinary meaning to the words of the treaty provision in their context and in the light of their object and purpose.³⁵ A note to this phrase (note 5) states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."³⁶ While this note does not give the meaning of the new phrase, it does indicate that not just one but several "fundamental interests of society" can sustain the invocation of the "public order" exception, thus eliminating the possibility of a narrow construction of the exception that is limited to, for instance, situations where there is a breach (or threat of breach) of public law and order in the sense of civil strife or disorder. Indeed, the limited dimension of law and order in this narrow sense potentially excludes it from the ambit of the exception since it is arguable that threats to law and order in the narrow sense do not pose a serious threat to a fundamental societal interest. Adopting this expansive view of the term, it is clear that the fundamental interests that

34. GATS, Art. XIV(a).

35. Article 31(1) of the Vienna Convention on the Law of Treaties, 8 ILM 679 (1969), enunciates this rule of interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This general rule has now attained the status of a rule of customary or general international law. See OPPENHEIM'S INTERNATIONAL LAW 1271-75 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); International Court of Justice decision in *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 33 I.L.M. 571, 581-82 (1994). The rule thus forms part of the "customary rules of interpretation of public international law," which the WTO Appellate Body has been directed by Article 3(2) of the Dispute Settlement Understanding to apply in seeking to clarify the provisions of the GATT and the other covered agreements of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), dated April 15, 1994.

36. GATS, Art. XIV(a) n. 5.

can sustain an exception under this provision would be context-specific, varying from state to state depending on local peculiarities as to culture, politics, and the like. It then seems safe to assume that given the peculiarities of the United States as a nation under law,³⁷ a nation where the rule of law operating through the auspices of an independent and activist judiciary is supreme, the society has a fundamental interest in maintaining the institutional framework that supports the law's reign. Without doubt, the legal profession in the United States qualifies as a major component in the system of laws operated by the US, both on its own account and on account of its being fundamentally a creation and appendage of the judiciary. Any arrangement which threatens to erode the fundamental precepts upon which the profession is founded poses a genuine and serious threat to the fundamental interest of the U.S. society in the maintenance of the rule of law and, hence, the maintenance of public order. Social order in the United States flows directly from the law in a manner not replicated elsewhere. (In most other jurisdictions, subterranean codes and norms of behavior play a substantial role in social ordering, in a way not applicable to the United States given the different values that underpin the society.) Any measure designed to meet and contain the aforementioned threat would be justified under the terms of Article XIV(a) of the GATS as a measure necessary to maintain public order. The rules prohibiting MDP constitute such a measure, for they are aimed at maintaining the independence and other characteristics that are *sine qua non* for the legal profession's performance of its functions within the system of social ordering. The whole system of legal counseling, litigation and general representation, on which U.S. citizens and institutions rely as no other citizens elsewhere do, stands threatened by the dilution and erosion of lawyer values. Yet such erosion and dilution is intrinsic to the proper functioning of the very best MDPs.³⁸

37. Mary Ann Glendon has indicated the pernicious dimensions of an overly law-minded society. But this criticism, while sound, does not vitiate the central place of law and the lawyers that are its high priests in the U.S. society. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

38. This is evident from the facts and circumstances surrounding the celebrated decision of the English House of Lords in *Prince Jefri Bolkiah (Appellant) v. KPMG (a Firm)* [1999] 2 A.C. 222 (U.K.). The House of Lords in this case ruled that it was impermissible for KPMG, an international firm of accountants, to offer forensic accounting services to the Brunei Investment Agency (BIA) in litigation between BIA and Prince Jefri. This was because KPMG had previously offered similar forensic services to Prince Jefri for purposes of previous litigation between him and third parties, in the course of rendering which services KPMG had come into possession of confidential information pertaining to Prince Jefri's personal affairs. Just as an English solicitor (attorney) is precluded by the applicable rules of professional conduct from representing interests adverse to a former client's, where such representation poses a threat to the confidentiality of information entrusted to him by the former client, so also is an accountant precluded from doing so when he renders forensic accounting services—as he is permitted to render under applicable English professional rules—such forensic accounting services being analogous to services rendered by an attorney. To arrive at this decision, the English House of Lords had to discount KPMG's argument that its internal procedures, especially its use of Chinese walls (ethical screens) were such as to ensure the preservation of Prince Jefri's

Commenting on the peculiar character of the U.S. judiciary, Abram Chayes writes:

The judicial department established by the framers was unique among nations in 1787 and, to a large extent, remains unique today. All modern societies have judges, and an independent judiciary is a hallmark of liberal democracy. In other countries, however, the judicial system is regarded primarily as a service provided by the government, much like education...with the workaday function of resolving the disputes that arise in the ordinary course of social and economic life. The courts in such societies are, of course, essential organs. Unlike the judicial branch brought to life by article III, [of the Constitution] however, they are not thought to be, nor are they in fact, engaged in the political process.³⁹

This statement, by underscoring the place of the U.S. judiciary as an integral component of government at par with any other organ participating in the

confidential information, even while the firm served BIA in a litigation in which BIA's interests were diametrically opposed to Prince Jefri's. In so doing, the court showed an uncommon appreciation of the workaday realities of MDPs, especially of the Big 5 type. The lead Judgment of Lord Millet showed a keen awareness of the perpetual ebb and flow of personnel in a Big 5 firm, with employees constantly combining and recombining in an endless possibility of arrangements. *Id.* at 238-39. Such flexibility of staff usage plays a key role in the overall strategy of the Big 5 MDP. By being able to deploy staff flexibly, the Big 5 are able to attain efficiency levels which they otherwise might not have attained. Employee slack time or down time is reduced since, with constant rearrangements, it is possible to fit employees into the nooks where they are most needed, or at least where they can be gainfully occupied at any particular time. The centrality of such an approach to these organizations' overall strategy is such that it is bound to trump any other consideration, including questions of lawyers' confidentiality, in the day-to-day business of the organization, as the very facts of Prince Jefri's case demonstrate. Any observer who has paid attention to the workaday activities of Big 5 employees would confirm that in the hustle and bustle of their average work day, the confidentiality concerns and related questions that engage the attention of sedate lawyers are, as a matter of necessity, relegated to the background if not jettisoned.

Also instructive along these lines are the circumstances surrounding the violation by one of the Big 5, PricewaterhouseCoopers, in 1999, of auditor independence rules that prevent an auditor from investing in the securities of an audit client. See Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV., 1097, 1100-01 (2000). When more than half of the firm's partners were found to be in violation of this rule, the Securities and Exchange Commission (SEC) declared that it had discovered widespread non-compliance reflecting serious structural and cultural problems in the firm. *Id.* Instructively, the response from some supporters of the firm was, among other things, a criticism of the very rules breached because the rules had not kept up "with the firm's evolving push into every market niche under the sun." *Id.*

39. See Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1028 (1988).

political process, further reinforces the position of the legal profession, not as a discrete institution essential to the administration of law and maintenance of order in a relatively narrow sense, but as an element in the broader political superstructure of which the judiciary constitutes a central player, a political superstructure without which social order in the broadest sense would be lacking. Any situation or arrangement that threatens to impair the capacity of the legal profession to perform its functions in this context poses a threat to the fundamental interest of society in the maintenance of a viable, respectable political system, and any measure taken to meet that threat qualifies as a measure necessary for the maintenance of public order under Article XIV(a) of the GATS.

Related to the foregoing, but distinct from it, is the extent to which lawyers and their activities are woven into the general fabric of U.S. society. This intertwining is as extensive as it is *sui generis*. Not only are lawyers engaged in activities cardinal to political and social order in a direct sense, their activities are additionally relevant in an indirect way to social order through the pervasive influence on a society of lawyers and their ways. America is perhaps the only modern state where lawyers and judges are folk heroes by virtue of no more than their forensic exploits. From Daniel Webster and Oliver Wendell Holmes to fictional characters in television sitcoms, the American lawyer evokes inspiration and exercises influence far beyond the ken of lawyers in other jurisdictions, a point noted quite early by Alexis de Tocqueville.⁴⁰

40. The penetration of law and lawyers into the social fabric in U.S. society is captured by Alexis de Tocqueville in a famous passage:

In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. . . . The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* vol. 1, ch. XVI 270, 280 (1835) (Alfred A. Knopf trans., 1994). Lawyers as a group and the society at large in the United States mutually

Inherent in such influence is the power to shape and reshape society; a power so capable of misuse that it ought to be subjected to prophylactic restrictions through rules such as those that secure lawyer independence by prohibiting MDP.

While Article XIV(a) of the GATS is *sui generis*, to the extent that it provides a general exception for measures necessary to maintain public order, it nevertheless forms part of a provision, the general contours of which have been explored by GATT and WTO panels and the Appellate Body. The existing jurisprudence in this regard merits some examination.

One of the principles enunciated by GATT/WTO panels and tacitly endorsed by the Appellate Body in relation to the interpretation of the related provisions in Article XX of the GATT is that the language of "necessity" means that the state relying on an exception would have to show that it has exhausted all options less restrictive of trade before resorting to the measure sought to be justified under the Article XX GATT exceptions.⁴¹ In the panel decision in *United States – Standards for Reformulated and Conventional Gasoline* ("U.S. Gasoline case"), the panel indicated that the United States could not justify, under Article XX(b) of the GATT, the environmental measure in issue therein since there were other "measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health."⁴² For such a measure to be justified under the terms of Article XX(b) of the GATT, the United States was required to show necessity, i.e. that the measure was "necessary" for the protection of human, animal or plant life. The language of necessity is similarly key in the GATS Article XIV(a) exception, since the measure sought to be justified thereunder has to be "*necessary*...to maintain public order."⁴³ This means that the United States has to show that the measure restricting MDP is the least restrictive option open to it in safeguarding the interests protected through that measure. This test is a factual one which takes into consideration the context and circumstances of the

shape and interpenetrate each other in a pattern that is as true (if not more so) today as it was in De Tocqueville's time.

41. See the following GATT/WTO Panel decisions: *Canada – Measures Affecting Exports of Unprocessed Herring And Salmon*, March 22, 1998, GATT B.I.S.D. (35th Supp.) at 12 (1988); *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 21, para. 75 (1990); GATT Dispute Settlement Panel Report on *United States Restrictions on Imports of Tuna*, Aug. 16, 1991, 30 I.L.M., 1594, 1620 (1991) (unadopted) [hereinafter *Tuna/Dolphin I*]; *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *U.S. Gasoline case*]. See also the WTO Appellate Body decision on appeal in the U.S. Gasoline case, WT/DS2/AB/R (April 29, 1996).

42. See Panel decision in the *U.S. Gasoline case*, *supra* note 41, at para. 6.25. This part of the Panel's ruling was not appealed by the United States, whose appeal focused instead on paragraph (g) of Article XX and the "relating to" language therein. Indeed, the Appellate Body noted the Panel's enunciation of the principle in passing with no indication of disapproval. See also the Appellate Body decision in *U.S. Gasoline case*, *supra* note 41, at parts II(A) and part III.

43. GATS, Art. XIV(a).

measure in question. In the *U.S. Gasoline case*, the panel rejected the U.S. measure in question because there were other definite, substantive approaches through which the United States could have achieved its aim of reducing gasoline-related emission without adopting a different, discriminatory, and more onerous standard for assessing the emission capacity of foreign-supplied gasoline. The United States, reasoned the panel, could for instance have employed existing systems for tracking the origin of goods in international trade in determining the source of each supply of gasoline, in order to tie that supply to a specific baseline reflecting the production history of the facility from which the supply originated.⁴⁴ The panel also reasoned that the United States could simply have used for domestic suppliers, the same general baseline it applied to foreign suppliers, thus obviating the need to set specific baselines for foreign suppliers while achieving the desired level of emission across the board.

Considering the MDP prohibition in the light of this ruling, it is clear that the panel's second instance of a less-restrictive measure is inapplicable, since the prohibition of MDP, unlike the gasoline emission measure, is a facially-neutral non-discriminatory measure, applied alike to domestic and foreign suppliers of legal services.⁴⁵ This element being absent, a search for other less-restrictive approaches to safeguarding the interest of the United States in maintaining social order through a bar that is independent of lay influence is inherently speculative, potentially inviting a revision of the basic issues and questions that structure the discourse on MDP: What are the ramifications of lawyer independence? Are some of the ramifications more fundamental to the maintenance of social order than others? Given its ramifications, what are the possible approaches to safeguarding lawyer independence? Would Chinese walls between the different professions in an MDP suffice in ensuring lawyer independence? Clearly, these are not questions with simple answers. Howbeit, the U.S. prohibition of MDP is in the circumstances strengthened by the basic

44. This was in response to the claim of the United States that it could not set individual baselines for different foreign suppliers as it had done for U.S. suppliers due to the difficulty, if not impossibility, of determining with confidence, the sources of the gasoline imported into the United States from different foreign suppliers.

45. That a facially-neutral measure such as this can also sustain a claim of de facto discrimination under the national treatment provisions does not detract from its sufficiency for purposes of determining whether the least-restrictive approach has been adopted under Article XX of the GATT or Article XIV of the GATS. The least-restrictive approach is intrinsically a less-exacting standard since the focus is not on the prevention of any objective, specific result – as is the case with national treatment where the focus is on the prevention of discrimination per se – but rather a comparison of different results or effects in order to determine whether some are less-trade-disruptive than others. Thus, a measure that has the effect of discriminating between domestic and foreign suppliers is per se in breach of the national treatment test, but is not so for the less-restrictive-measure test, since the latter is not an absolute ban on discrimination or any other negative, trade-inhibiting result, but rather a ban on levels of trade disruption not justified by the results sought. As significant, national treatment and similar substantive obligations are conceptually antecedent to the less-restrictive-measure test, since the latter is triggered only in the context of exploring a general exception to a prior determination or concession that a substantive breach has occurred.

procedural requirement that a party who asserts the existence of a fact has the onus of proving the same. As such, it would be up to the proponents of MDP to show alternative measures less restrictive of trade than the current ban on MDP. The factual speculation entailed would primarily have to be conducted by such proponents.

A key principle enunciated by the WTO Appellate Body, in relation to the construction of the preambular portion –the chapeau– of Article XX of the GATT is cardinal to an interpretation of the same portion of Article XIV of the GATS, the latter being essentially a reproduction of the former. Appellate Body jurisprudence on the chapeau indicates a two-pronged approach to its interpretation. The first prong is a provisional justification of the specific measure under consideration, by showing it to fall within one or more of the exceptions specified in the various paragraphs of Article XX of the GATT. This step has already been followed in relation to the MDP prohibition by showing above, that the measure falls within the class of measures contemplated by Article XIV(a) of the GATS. The second prong involves a further determination that the measure does not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,"⁴⁶ or a disguised restriction on international trade." A measure is saved under the general exception only if it meets the requirements of both prongs.⁴⁷ The object of the chapeau is to prevent abuse of the exceptions.⁴⁸ As such, it addresses arbitrariness and absence of justification, both in relation to the detailed operating provisions of the measure and in relation to the manner in which the measure is applied. The dimensions are both substantive and procedural.⁴⁹

In interpreting the chapeau in the *U.S. Gasoline* case, the Appellate Body noted that "arbitrary discrimination," "unjustifiable discrimination" and "disguised restriction" on international trade may be read side by side, and that they impart meaning to one another.⁵⁰ Thus, "disguised restriction," whatever else it may cover, may properly be read as extending to restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the ambit of the general exceptions. "The fundamental theme," it said, was "to be found in the purpose and object of

46. The related portion of Article XIV of the GATS differs from this in that instead of "countries where *the same* conditions prevail," it speaks of "countries where *like* conditions prevail." This difference, though generally significant, is not important to the present analysis.

47. See Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, part IV (where the Appellate Body enunciated this approach to interpreting the chapeau). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Oct. 12, 1998, at paras. 118-19 [hereinafter *Shrimp/Turtle* case] (where the Appellate Body further confirmed and reiterated the importance of this approach, building generally upon the principles established in the former decision).

48. See Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, at part IV.

49. *Shrimp/Turtle* case, *supra* note 47, at para. 160.

50. See Appellate Body decision in *U.S. Gasoline* case, *supra* note 41, at part IV.

avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."⁵¹ The Appellate Body having thus indicated a combined and interactive reading of the terms, proceeded to apply them to the U.S. measures in question in that case in a manner indicating that the terms substantially overlapped. While not expressly stating so, the Appellate Body appeared to depart from this combined reading of the terms in the *Shrimp/Turtles* case. There, the Appellate Body approached the terms separately, attempting to show their distinctiveness by isolating aspects of the measures that respectively qualify as "arbitrary discrimination" or "unjustifiable discrimination."⁵² It deemed it unnecessary, however, to similarly consider "disguised restriction" in the context of the case.⁵³

Notwithstanding this attempt at separating the two terms, the distinction is anything but clear given that there was no express delineation of the conceptual difference between them by the Appellate Body, the focus under its discussion of both terms being simply the related acts of discrimination by the United States, especially as between shrimp producers from different countries, in relation to whom the U.S. measure had been applied differently. It would appear however that the conceptual difference between "unjustifiable discrimination" and "arbitrary discrimination" lies in the idea that the latter, unlike the former, involves something akin to recklessness in the administration of a measure, such recklessness being reflected for instance in the absence of consideration for the disparate impact of same measures on different countries. In this wise, the words of the Appellate Body are instructive:

We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail." We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification ... adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.⁵⁴

51. See Appellate Body decision in the *U.S. Gasoline* case, *supra* note 41, at part IV.

52. *Shrimp/Turtle* case, *supra* note 47, at paras. 161-82.

53. *Id.* at para. 184.

54. *Id.* at para. 177.

This apparently implicates the idea that same or similar treatment of different countries can, in the context of the chapeau, amount to *de facto* discrimination, so that what is actually required to avoid such discrimination is dissimilar treatment. There is, however, a measure of circularity in this line of reasoning, given that the essence of the chapeau, at least a cardinal dimension thereof, is that discrimination, whether of the unjustifiable category or of the arbitrary kind, does not result from the application of a measure "between countries where the same conditions prevail."⁵⁵ To proceed then on the assumption that a country applying a measure should take into consideration such disparate effects of the measures as result from the different situations or conditions of the countries does strain somewhat the logic of the chapeau. It is possible, however, to see the Appellate Body's reasoning here as resting not just on the fact that the disparate effects of the measure ought to be taken into consideration for countries where different conditions exist, but also on the fact that the U.S. measure in question envisaged the adoption by other countries of a comprehensive regulatory program that is essentially the same as that in the United States. In promulgating a measure so extraterritorial in nature, the United States might reasonably be expected to consider the specific conditions in the other territories affected. Beyond such disparate impact, however, the Appellate Body further hinged its conclusion as to the arbitrary character of the discrimination on the absence of due process and transparency in the administrative implementation of the U.S. measure by the agencies involved, some essential determinations having been made *ex parte*, for instance, without regard to basic principles of fair hearing, thus effectively resulting in discrimination between those shrimp exporting countries who receive benefits, i.e. certification, under the U.S. measures in question and those who are denied such benefits.⁵⁶ These shortcomings in basic due process provide a firmer ground for a conclusion that the discrimination is arbitrary, the result of recklessness as to basic procedures.

Another significant principle enunciated by the Appellate Body in the *U.S. Gasoline* case is, that the exercise of applying the general exceptions in Article XX of the GATT would be unprofitable, if it involved no more than applying the same standard used in finding that a measure was inconsistent with a substantive provision of the GATT, say, by virtue of its being discriminatory contrary to national treatment obligations of Article III. It stated that, "[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."⁵⁷

Thus, while the basic elements of discrimination in the case were the more onerous requirements imposed on foreign gasoline vis-à-vis domestic gasoline, the additional elements required to show unjustifiable discrimination and disguised restriction on international trade for purposes of the chapeau were: (i)

55. GATS Art. XIV.

56. The *Shrimp/Turtle* case, *supra* note 47, at paras. 180-81.

57. *U.S. Gasoline* case, *supra* note 41, at part IV.

the omission of the United States to explore in conjunction with other countries involved (Venezuela and Brazil) cooperative means of mitigating the administrative problems relied on by the United States as a basis for failing to permit individual baselines for foreign gasoline suppliers as it had done for U.S. suppliers, and (ii) U.S. failure to consider the costs for foreign suppliers that would result from the imposition of across-the-board statutory baselines.⁵⁸ It is noteworthy however that these additional elements correspond somewhat to the requirements relevant to a showing that a country has exhausted all options less restrictive of trade before resorting to the measure sought to be justified under an Article XX GATT exception in relation to which the language of "necessity" applies. Thus an element of circularity still dogs the application of the general exceptions to specific facts, even when the underlying logic appears clear.

Further application of this WTO/GATT jurisprudence to the question of MDP in the context of the related provision of Article XIV(a) of the GATS, requires an examination of the conformity of the MDP prohibition with the second leg of the two-tiered process prescribed by the Appellate Body. In essence, this invites a response to the following question: Is the U.S. prohibition of MDP applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services? The claimed exemption under Article XIV(a) of the GATS can be sustained only if this question can be answered in the negative.

A significant distinction between the measures in issue in both the *U.S. Gasoline* and *Shrimp/Turtles* cases on the one hand, and the measure prohibiting MDP on the other hand is the fact that unlike the latter, the former are, on the whole, complex measures administered by agencies charged with conferring or denying benefits under the scheme of the measures, thus necessitating the agencies' active interaction with stakeholders. Thus, they elicit intricate procedures necessary to determine and delimit the interests of various stakeholders in the measures. In contrast, the MDP measure is not a measure that invites such intense administrative activity, being a simple, non-complex and primary measure under which no benefits are administered or conferred on any party, irrespective of country of origin. This singular difference makes the measure less vulnerable to attack on the basis of its application, since it does not lend itself to the complexity and multiplicity of circumstances to which the other measures are subject. Indeed, a mechanism suggested by the Appellate Body in the *U.S. Gasoline* case, by which the United States could have eliminated the discriminatory manner in which the measure in question was applied, is the adoption of the same statutory baseline for assessing emission both for foreign and domestic gasoline.⁵⁹ The MDP

58. *Shrimp/Turtle* case, *supra* note 47, at last paragraph.

59. *U.S. Gasoline* case, *supra* note 41, at part IV. See also *supra* text accompanying note

measure, as a measure that applies to foreign and domestic lawyers and legal services alike, meets the parameters indicated by this suggestion. The requirements of the chapeau are essentially requirements that concern the *application* of a measure, and where that application is simple, unlayered and straightforward, there exists less room for a finding of discrimination, –whether arbitrary or unjustified– of the sort necessary to sustain a challenge to the measure under the chapeau. It is important to note that, in line with Appellate Body jurisprudence on the matter, the discrimination necessary to impugn the MDP measure, for purposes of the chapeau, must go beyond that initially necessary to find a substantive violation of the provision of the GATS. Thus, where the antecedent finding of substantive violation is *de facto* discrimination in breach of national treatment obligations under Article XVII of the GATS,⁶⁰ the same acts or omissions on which *de facto* discrimination is founded would not suffice to show that the discrimination is arbitrary or unjustified under the language of the chapeau. One is however hard-pressed to discover in the present circumstances the alternative sources of such second-level discrimination, given the character of the MDP measure as a rather bare measure with a strict, rigid application; which application would be very difficult to adjust or render more nuanced without effectively dispensing with the measure itself altogether.

The strictness and rigidity with which the MDP measure is applied invites a possible conclusion that in effect, it arbitrarily discriminates between countries by failing to inquire into the appropriateness of its program for the conditions prevailing in the exporting countries, as suggested by the Appellate Body's pronouncement in the *Shrimp/Turtles* case.⁶¹ However, such a conclusion can only be reached if one were to lose sight of salient differences between the circumstances of the measure in that case and the MDP measure. The pronouncement in that case was made in relation to the administrative machinery put in place to administer the benefits and burdens of the primary measure by, *inter alia*, examining the efforts made by various countries to avoid or minimize sea turtle mortality in the course of commercial shrimp harvesting. They were not made in relation to the primary measure banning shrimps harvested with commercial fishing technology harmful to sea turtles. Section 609(b), paragraph (1) of The Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990 contained the primary measure banning the importation of shrimps harvested using technology harmful to sea turtles. It provided:

IN GENERAL. -- The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea

60. See *supra* paragraph accompanying note 25, for an explanation of the potentials for such *de facto* discrimination.

61. See *supra* text related to note 53.

turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).⁶²

Paragraph (2) of the same section, on the other hand, provides:

CERTIFICATION PROCEDURE. -- The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that -- (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.⁶³

It was in the details of the certification procedure—details relating to the active administration of the measure—rather than the primary measure in section 609(b) paragraph (1) that the problem lay in this case. Indeed, the recklessness that forms the hallmark of arbitrary discrimination can both conceptually and actually be located in the details of a measure's implementation and administration, rather than the bare measure itself. The absence of procedural due process loomed large in the *Shrimp/Turtles* Appellate Body's conclusion that the application of the United States' measures was arbitrarily discriminatory. Procedural due process is however largely irrelevant, where a primary measure of a narrowly-drawn nature is, without more, in issue. In both the *U.S. Gasoline* and *Shrimp/Turtles* decisions, the Appellate Body based its determination that the measures in question were arbitrary in *application* on the administrative rules and details by which the measures were *applied*. This is quite logical and in concert with the text and character of the chapeau. A measure such as the MDP measure, which is so structured that it lacks these elaborate administrative rules in its application, is largely not amenable to impeachment as being arbitrarily discriminatory. This is not to say that it is

62. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 101-162, 103 Stat. 988 (1990) (subsequently codified as 16 U.S.C. § 1537). Section 609(a) merely mandated the U.S. Secretary of State in consultation with the Secretary of Commerce to enter into certain broad international negotiations with a view to the conservation of sea turtles, to encourage international agreements towards same purpose, and to report back to Congress on certain issues related to such conservation.

63. *Id.*

impossible for such a primary measure to sustain a charge of discrimination in other respects, for instance, with regard to basic national treatment or MFN obligations. Rather, it is to say the primary measure is *factually* incapable of sustaining a claim of arbitrary discrimination under the chapeau, given the detailed principles enunciated by the Appellate Body. This is more so given that Appellate Body jurisprudence indicates that *in principle*, a different, extra element of discrimination is necessary to prove that a measure in its application offends the chapeau. "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."⁶⁴ The same facts, i.e. the primary measure, justifying an initial finding of substantive discrimination under the GATT or GATS would not suffice for a finding of discrimination under the chapeau.

The MDP measure is primarily embodied in Rule 5.4(b) and 5.4(d) of the American Bar Association's Model Rules of Professional Conduct of 1983 (as adopted by various state judiciaries) and the corresponding provisions in Disciplinary Rules (DR) 3-103(A) and 5-107(C) of the American Bar Association's Model Code of Professional Responsibility of 1969. The Model Rules provide in paragraphs (b) and (d) as follows:

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

64. See *supra* text accompanying note 57.

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.⁶⁵

These provisions have no elaborate administrative mechanisms, if any. Arguably, the procedural rules of the bar disciplinary bodies in the various states of the United States may qualify as the administrative mechanisms for these rules. However, even if they are accepted to be so, they provide no advantages to lawyers within the United States. They effectively make for stricter enforcement of the blanket MDP prohibition against U.S. lawyers vis-à-vis foreign lawyers in respect of whom such disciplinary bodies have and claim no jurisdiction over their non-U.S. activities.⁶⁶ Putting aside substantive adequacy, and focusing on operative or procedural adequacy, it is clear that the approach *actually* used by the bar authorities in administering the MDP measure does not implicate arbitrary or unjustifiable discrimination. The U.S. measure prohibiting MDP as embodied in the provisions is, by virtue of the provisions' structure, not amenable to application in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail. The provisions simply provide no room for such application.

The existence of operating provisions is a cardinal element in assessing the substantive adequacy of a measure for purposes of determining whether arbitrary or unjustifiable discrimination exists. Recall that in the *Shrimp*/

65. The recent revision of the rules by the ABA's Ethics 2000 commission did not change these provisions. While other provisions of the Model Rules and Model Code aim at the protection of lawyer independence from lay interference, these are the rules that do so by way of prohibiting MDP. Rule 5.4(a) prohibiting the sharing of legal fees with non-lawyers is effectively covered by Rule 5.4(b) since the legal essence of a partnership is the sharing of profits and loss from a joint enterprise. Rules 1.7-1.8 on conflict of interest and a variety of other rules also seek to reinforce and protect lawyer independence, though not primarily by means of prohibiting joint practice with non-lawyers. The American Bar Association, promulgator of the model rules and model code, has no legislative authority. However, the rules and code are influential and have been adopted in one form or another in most of the states within the United States, jurisdiction over professional regulation lying primarily within the legislative competence of the states. The District of Columbia is the only U.S. jurisdiction that has modified Model Rule 5.4 to permit, in limited circumstances, partnership with non-lawyers in the practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.4 (Discussion Draft 1933).

66. The possibility exists, however, for such a claim where "foreign" lawyers are also licensed to practice within a U.S. state. Such a state potentially has disciplinary jurisdiction over the out-of-state activities of the "foreign" lawyers. (See in this wise, Rule 8.5 of the ABA Model Rules of Professional Conduct, dealing with disciplinary authority and related choice of law issues.) In this scenario, however, it becomes debatable whether the state is indeed exercising jurisdiction over foreign lawyers, given that a jurisdiction's definition of "foreign lawyer" would not ordinarily encompass any lawyer admitted to its own bar, irrespective of his national origin. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (Discussion Draft 1933).

A review of the intricacies of multi-state jurisdiction over lawyers in their cross-jurisdictional activities may be found generally in: Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. OF LEGAL ETHICS 677 (2000).

Turtles case, the Appellate Body emphasized the substantive and procedural dimensions of the chapeau, noting:

that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.⁶⁷

It would seem that the potency of the substantive dimensions of this requirement is circumscribed in the context of the MDP measure, given the leanness of the *provisions* embodying the measure and its operative parts, if an operative part can be said to actually exist. Nor is the situation much different in relation to the *actual* manner of application of the measure, given the transparency and uniformity that has attended the MDP prohibition over the decades.

A cardinal aspect of the chapeau is the requirement that the arbitrary or unjustified discrimination, necessary to disqualify a measure that otherwise falls within the specific exceptions listed in the paragraphs of Article XIV of the GATS, occur between countries where like conditions prevail.⁶⁸ In both the *U.S. Gasoline* and *Shrimp/Turtles* cases, the Appellate Body failed to examine the concept in any meaningful depth beyond its ruling –with the acquiescence of the parties themselves– that the phrase "between countries where the same conditions prevail" contemplates the conditions in the domestic jurisdiction vis-à-vis other countries, as well as the conditions in such other countries vis-à-vis one another. Since it is axiomatic that effect should be given to this portion of the chapeau, it is indisputable that any party intent on showing that the MDP measure in the United States does not qualify as a general exception under Article XIV of the GATS has the onus of showing that the conditions in the United States, for purposes of this measure, are like those in any other country in respect of which the claim of arbitrary or unjustifiable discrimination is made. Conceptually, there could be a claim that such discrimination has been effected by the United States as between one foreign country and another where like conditions exist. However, this scenario is largely irrelevant for present purposes, since that is not how the MDP measure has been designed as a provision, nor does it reflect the way it has actually been implemented. Proving that conditions related to the production and consumption of legal services in

67. See *Shrimp/Turtle* case, *supra* note 47, para. 160.

68. The related portion of Article XX of the GATT chapeau actually speaks of countries where "the same" conditions prevail. This difference is, however, not material to the present discussion.

the United States, are alike to those in other countries is predictably a difficult task, given the sharp peculiarities of the U.S. legal and political processes.⁶⁹

In both the *U.S. Gasoline* and *Shrimp/Turtles* cases, the Appellate Body did not clearly indicate the elements of the term "disguised restriction on international trade" either by conceptually delineating its contours or by specific examples drawn from the facts of the cases. In *U.S. Gasoline*, the Appellate Body, reflecting its belief that the key operative terms of the chapeau impart meaning to one another, interpreted "disguised restriction on international trade" to include disguised discrimination in international trade, as well as concealed or unannounced restriction or discrimination. For the Appellate Body, "the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination,' may also be taken into account in determining the presence of a 'disguised restriction' on international trade."⁷⁰ The Appellate Body in its decision in *Shrimp/Turtles*, as already indicated, declined to rule on this element of the dispute, even though there is indication in the structure of its judgment that the element was to be treated distinctly from the others. However, aspects of the ruling in *Shrimp/Turtles* provide insight into the construction of this element. In that case, the Appellate Body declared that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states."⁷¹ This good faith requirement in the construction of the chapeau suggests that the term "disguised restriction," as an element of the chapeau, is amenable to meaningful application only through an examination of the circumstances of a case with the mind-set of a court of equity rather than a court of law. No rigid principle seems applicable in this wise. For, in the words of the Appellate Body:

The task of interpreting and applying the chapeau is . . . essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT. . . . The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.⁷²

69. See *supra* text accompanying notes 33-35.

70. *U.S. Gasoline* case, *supra* note 41, at part IV; see also *supra* text accompanying note 47.

71. See *Shrimp/Turtle* case, *supra* note 47, at paragraph 158.

72. *Id.* at para. 159.

In this connection, whether a measure qualifies as a disguised restriction on international trade in services or not is largely a contingency, and attempts at prediction would be largely speculative. Notions of fairness and equity implicate a high level of indeterminacy. That said, aspects of the MDP measure make a strong case for it as a bona fide measure applied with no intent on trade restriction. These aspects include its pedigree as a measure –whether in the form of provisions in the earlier ABA Model Code of Professional Responsibility of 1969, the ABA Canons of 1908, or antecedent common law principles– substantially predating the current concern with the liberalization of trade in services. Equally included is the absence of covert extraterritoriality in the application of the measure. In ruling against the United States in the *U.S. Gasoline* case, the Appellate Body, after reviewing two possible approaches that the United States could have adopted to mitigate the impediments claimed to justify the discriminatory application of the measure in issue, concluded that "[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable."⁷³ This suggests that the existence of an opportunity for forward planning in the design of a measure to achieve disguised restriction is an important consideration in determining the good faith of a measure and its application. Where a measure is one of reasonable vintage, the possibilities for a conclusion that such an opportunity existed becomes considerably attenuated. Likewise, the extraterritorial dimension seemed cardinal in the Appellate Body's decision in the *Shrimp/Turtles* case, where it deprecated the extraterritoriality manifest in the application of the U.S. measure under review in the case.⁷⁴ This measure appeared, from the conclusions drawn by the Appellate Body, to be essentially a unilateral attempt to deal with a global issue –in this case the mortality of migratory sea turtles– thus implicating impermissible extraterritoriality. The MDP measure is quite different, being a more narrowly-drawn measure that lacks any element of extraterritoriality in its design and implementation. It embodies no expressed or covert policy objective of getting other countries to effect policy (or even isolated structural) changes within their jurisdictions as did the measures in the *Shrimp/Turtles* and *U.S. Gasoline* cases.

73. *U.S. Gasoline* case, *supra* note 41, at part IV.

74. See *Shrimp/Turtle* case, *supra* note 47, paras. 164-165, where the Appellate Body declared:

It is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members. . . . This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers

V. NON-VIOLATION NULLIFICATION OR IMPAIRMENT

The GATS provision on non-violation nullification is embodied in Article XXIII(3), which provides:

If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.⁷⁵

This provision is reinforced by the transitional provisions of Article VI(5) of the GATS, which provide as follows:

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c);⁷⁶ and

75. GATS Art. XXII(3).

76. Sub-paragraphs 4(a), (b) and (c) of Article VI provide:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

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

GATS Art. VI(5).

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations⁷⁷ applied by that Member.⁷⁸

In the context of the broader MDP debate, these GATS provisions provide a possible avenue for challenging the prohibition of MDP in the United States. In this regard, a credible case can be made that notwithstanding its facial neutrality and conformity with the substantive provisions of the GATS, the measure prohibiting MDP leads to nullification or impairment of WTO members' expectations of enhanced access to the U.S. market for legal services, both generally and in the light of specific commitments undertaken. These provisions thus merit an examination in the light of the related GATT provisions and jurisprudence.

The provisions of Article XXIII(3) of the GATS broadly reflect those of Article XXIII(I)b of the GATT. Though the former appears more peremptory, its scheme is effectively the same as the latter's. Both provisions essentially reflect the need felt by trade regime designers to provide avenues for the management of trade-distorting impact of measures that are otherwise formally within the scope of the respective agreements. They envisage the use of some consultative or conciliatory means either after a formal finding of non-violation nullification or impairment, but before the adoption of retaliatory or punitive counter-measures by the aggrieved party—as is the case with Article XXIII(3) of the GATS— or before (or as part of) such a formal finding—as is the case with Article XXIII(I)&(2) of the GATT.

Non-violation nullification or impairment under Article XXIII of the GATT and the GATS is the most direct application of the reasonable expectations principle (also referred to as “reasonable assumptions” or “reasonable anticipation” principle) first enunciated by the GATT Panel in *The Australian Subsidy on Ammonium Sulphate* decision.⁷⁹ Although the principle

77. Footnote 3 to Article VI(5)(b) provides: “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.” GATS Art. VI(5)(b) fn 3.

78. GATS Art. VI(5).

79. *The Australian Subsidy on Ammonium Sulfate*, April 3, 1950, GATT B.I.S.D. (2d Supp.) at 188, para. 12 (1950). See Adrian T.L. Chua, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, J. WORLD TRADE, April 1998, at 29, 30. See also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 374 (1999) (noting that in applying the concept of non-violation nullification or impairment in the recent case of *Japan—Measures Affecting Consumer Photographic Film and Paper*,

is not contained in the text of the GATT or the interpretive notes adopted by the GATT contracting parties, it has been persuasively put forward as arguably an intrinsic part of the GATT, capable of being distilled from the provisions and structure of the GATT.⁸⁰ In a detailed analysis examining GATT jurisprudence on non-violation nullification or impairment, Adrian Chua, attempts an isolation of the elements of such a complaint, as they have evolved incrementally through judicial legislation by the panels. Three elements are isolated as being essential for a successful non-violation complaint.⁸¹

(a) The existence of benefits accruing under the GATT, which benefits are alleged to have been impaired or nullified;

(b) Nullification or impairment of such benefits through some governmental measure;

(c) Reliance-inducing conduct by the respondent.

Regarding the requirement that benefits accruing under the GATT be impaired or nullified, a substantial preponderance of benefits alleged in the cases to have been so impaired or nullified “have been bound tariff concessions under Article II” of the GATT.⁸² In the services context, these concessions correspond roughly to the market access commitments undertaken pursuant to Article XVI of the GATS. While such a tariff concession or market access commitment is not necessarily implicated in non-violation complaints, their preponderance in GATT non-violation jurisprudence and the centrality of market access commitments to the GATS framework, justify an examination of the essential requirements of a possible claim that the U.S. measure prohibiting MDP impairs or nullifies market access benefits accruing under the GATS, given the obligations undertaken by the United States in its schedule of specific commitments. Apart from the existence of a benefit, the second element essential for a successful non-violation complaint is the actual nullification or impairment of benefits by means of a governmental measure. Concerning this, three requirements are delineated: (i) that the measure upset the balance of concessions as between the parties, (ii) that the measure be not reasonably foreseeable by the complainant at the time expectations of better market access

WT/DS44/R (98-0886) of March 31, 1998, the WTO Panel followed earlier GATT jurisprudence in applying the concept conservatively seeking “evidence of what one might call in domestic law ‘actual reliance’ to find legitimate expectations”).

80. Chua, *supra* note 79, at 30.

81. Six “elements” (numbered A-F) are actually listed. See Chua, *supra* note 79, at 37-48. However, only these three are in the nature of substantive requirements; the rest being either in the nature of procedural characteristics (rather than requirements *per se*) or adjuncts of the substantive three. *Id.* See also Trachtman, *supra* note 79, at 370, 373.

82. See Chua, *supra* note 79, at 39-40.

arose, and (iii) that there occur a frustration of the complainant's reasonable expectations of enhanced market access arising out of any of several possible sources of such expectation.⁸³ The third element essential for a successful non-violation complaint is reliance-inducing behavior by the country against which a complaint is filed. It seems that such behavior, while not necessary for purposes of the broader principle of reasonable expectations –for which purpose other sources of reasonable expectations would suffice– is essential for that principle in the specific context of non-violation nullification or impairment.⁸⁴ No doubt, a measure of overlap is involved in these requirements as analyzed. This is not surprising, given that the effort towards isolating and sorting the various elements and related requirements of the non-violation complaints is quite nascent.

The three requirements pertaining to the element of actual nullification or impairment of benefits seem central to a successful non-violation claim and, thus, merit the greatest attention, *a fortiori*, since they subsume the third element of reliance-inducing conduct. Along these lines, can it be said that the MDP measure in question has upset the balance of concessions as between WTO members, that it was not reasonably foreseeable by them at the time GATS negotiations on legal services were conducted, and that it has frustrated their reasonable expectations of enhanced market access arising out of U.S. statements, conduct or agreements with third countries? It is immediately seen that these are questions better answered on a case-by-case basis in the context of specific actual non-violation nullification or impairment complaints or disputes. This notwithstanding, certain well-known facts concerning MDP and the state of competition in the international market for legal services, as well as the U.S. approach to negotiating market access concessions in the legal services sector, indicate that the odds are very much against a finding of non-nullification violation or impairment by the United States vis-à-vis other WTO members who may file such complaints. First is the fact that the international market for legal services is one in which, competitively speaking, U.S. suppliers were dominant in the years leading up to the conclusion of GATS and have remained dominant thereafter.⁸⁵ Nothing in the concessions made by the

83. The sources of such expectations are open-ended, but the most significant ones are:

- a) Assurances and statements made in the course of trade negotiations;
- b) Established negotiation practice of the parties
- c) Conduct of respondent government's policy
- d) Provisions of GATT negotiated between the respondent and a third party
- e) Pre-existing competitive conditions

See Chua, *supra* note 79, at 32-36. It seems from the cases that only complainant's expectations of improved market access arising out of negotiated agreements or statement or conduct of the respondent are relevant for this requirement. *Id.* at 41.

84. See Chua, *supra* note 79, at 47.

85. In 1993, the year immediately before GATS became operative, the United States provided \$1.453 billion worth of legal services to other countries, as against \$326 million worth of legal services purchased by the United States from other countries. The major importers of U.S. legal services were the European Union (\$765 million) and Japan (\$335 million). See U.S.

United States indicated an intention to disrupt this competitive state substantively. The aim was to provide other countries with an equal opportunity to compete, rather than an assurance of absolute improvements in their legal services export to the United States. Equal opportunity in the context in which the negotiations were carried out in the late 1980s and early 1990s cannot logically be dependent on the availability or acceptance of a specific, hitherto-unrecognized, if not inexistent, vehicle for delivering legal services – the MDP.

A claim that there has occurred an upset in the balance of concessions can thus not be readily substantiated, whether such a claim is dependent on the resistance of the U.S. legal services market to exports from abroad by regular law firms and MDPs established in those countries, or is dependent on the denial of opportunity to such foreign entities in the notional sense of disallowing their use of the vehicle best suited to effective competition and optimal performance by them.

It is widely acknowledged that the core of the U.S. approach in negotiating and inscribing its GATS schedule of specific commitments involved offers to bind the professional rules of the various states, especially those states which had made appropriate provisions for foreign access to their legal services market, by way of foreign legal consultancy.⁸⁶ This indeed reflected a general approach in the broader GATS negotiation towards preserving, rather than expanding, the levels of liberalization existing in the various countries⁸⁷ and granting limited concessions, as implicit in the positive list approach used in scheduling commitments. Even though the United States Trade Representative (USTR), working in conjunction with the ABA, encouraged some states to adopt appropriate legislation permitting foreign legal consultants, there was no impetus for an expansion of the degree of access

Department of Commerce, Economics and Statistics Admin., Bureau of Economic Analysis, Survey of Current Business, Vol. 74, no. 9 (September, 1994) 132-133 (cited with some critical but non-fundamental commentary in CONE, *supra* note 19, at 1:19). The trend continues to be the same. The United States Trade Representative (USTR) reports that “[f]or the United States, balance of payments receipts for legal services amount to roughly \$3.2 billion annually.” Press Release, U.S. Proposals for Liberalizing Trade in Services: Executive Summary (July 1, 2002), available at http://www.ustr.gov/assets/Document_Library/Press_Releases/2002/July/asset_upload_file224_2009.pdf

86. See CHRISTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 167 (2000). Sydney Cone notes:

[T]he U.S. Schedule of Specific Commitments on legal services consists of two parts: Part (1) is a two-page summary of state law on admission to the bar; Part (2) is an 18-page summary of legal-consultant rules in 16 U.S. jurisdiction Part (2) is thus a commitment that those 16 jurisdictions will respect a ‘standstill’ as regards legal consultancy. . . .

See CONE, *supra* note 19, at 2:44–2:45.

87. See Feketekuty, *supra* note 15, at 87.

granted by each U.S. state beyond an emphasis on the avoidance of reciprocity requirements.⁸⁸ In this regard, Cone writes:

It was thus not a task of awesome proportions for a state to be responsive to USTR policy during this period; as long as a state steered clear of reciprocity, it could respect that policy while indulging in any substantive restriction it found expedient for lulling into tolerable quiescence the local bar examiners and other guardians of the public interest.⁸⁹

Being an established element of the various states' regulation of law practice, the continued existence in the circumstances of the measure prohibiting MDP cannot reasonably be said to frustrate any party's expectations. There were three main parties involved in the negotiations,⁹⁰ and every party knew of its existence and could reasonably anticipate that it would not be amenable to repeal.

Concerning possible expectations arising from U.S. statements or conduct in the course of negotiations, it must be acknowledged that there exists a general perception that the U.S. Government was *prepared* to lay down legal services like a sacrificial lamb in the Uruguay Round of trade negotiations.⁹¹ But whatever the concessions that may have been made by the United States in that regard, it did not extend to promises—or conduct indicating a readiness—to de-proscribe MDP. Indeed, indications are that the sacrifices were in the area of foreign legal consultants' practice within the United States, in relation to which the United States bound unconditionally, i.e. without requiring reciprocal treatment, the liberalized provisions of the various states that had already adopted appropriate legislation permitting such practice.⁹² U.S. trade negotiators, however high their enthusiasm may have been for facilitating trade in other sectors through offers in the legal services sector, were aware of limitations and difficulties implicit in making promises of liberalization that

88. For example, requirements which predicate the availability of the concessions granted by a country on the existence of reciprocal concessions in a country whose service suppliers seek to take advantage of the granted concessions.

89. See CONE, *supra* note 19, at 4:29. See also CONE *supra* note 19, at 2:7.

90. Japan was represented by Japanese Government officials and the Japanese Bar Federation (known by its Japanese acronym "Nichibenren"), the European Union was represented by the European Commission and CCBE, and the United States was represented by the USTR and ABA.

91. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), Commentary (Terence P. Steward ed., 1993), cited in ARUP, *supra* note 86, at 167. Sydney Cone reports that some sort of side deal may have been made by the U.S. negotiating team, involving a trade-in of U.S. liberalization of legal services with regard to practice by foreign legal consultants, for trade concessions to the United States in areas other than legal services, possibly Japanese Semiconductor markets covered by the TRIPS Agreement. See CONE, *supra* note 19, at 2:3, 2:12–2:13.

92. See *id.* at 2:12–2:13, 2:44–2:45, 4:29.

went beyond the status quo in the various states, regulatory authority over professions being primarily within the legislative purview of the various states rather than the Federal Government. They accordingly tailored their offers in tandem with this reality, and the so-called sacrifice of the U.S. legal services sector did not go beyond the fact that trade concessions, which the United States obtained from other countries by binding the existing levels of market access, did not accrue to the U.S. legal profession, but rather to other sectors of the U.S. economy, contrary to the high hopes of ABA representatives working with the USTR.⁹³ The sacrifice did not extend to removing or promising a removal of the prohibition on MDPs. Indeed, the negotiators took the pains to indicate that related prohibitions concerning unauthorized practice and partnership with non-lawyers were reflected in and protected through appropriate market access limitations for all the states of the Union.⁹⁴ Sydney Cone, a close observer of the process leading up to the conclusion of GATS negotiation on legal services, provides a detailed account of the intricacies of the negotiations and the jostling leading up to the U.S. commitments in the legal services sub-sector.⁹⁵ There is no indication that the USTR, which had primary responsibility for the negotiations, and the ABA, which was a de facto but active participant, made any broad promises beyond a binding of state positions generally on legal practice as they existed at the time of negotiations, and the encouragement of states to permit the licensing of foreign legal consultants. Significantly, Cone writes that, "[i]n the case of the United States, no formal promises were lodged in the schedule subsumed by the GATS, but . . . definite expectations were raised that the ABA and the USTR would promote the adoption of the Model Rule [on foreign legal consultants] throughout the United States."⁹⁶ Arguments for non-violation nullification or impairment relying on U.S. negotiating conduct or promises in the course of such negotiations are, therefore, unavailing.

An important point in relation to non-violation nullification is whether a measure justified under the Article XIV of the GATS exception would still be amenable to impeachment under the provisions of Article XXIII(3) of the GATS. In other words, what is the hierarchy, if any, between the general exceptions and the non-violation provisions? In the present context, would a finding that the U.S. MDP measure nullifies or impairs expected benefits override a finding under Article XIV(a) of the GATS that the measure is one that is necessary to maintain public order, or would it be the other way around? This is important because Article XIV of the GATS provides what is perhaps the best defense for the MDP measure, while Article XXIII(3) of the GATS

93. See *supra* note 91 and accompanying text. See also CONE, *supra* note 19, at 2:42–2:44.

94. See *supra* text accompanying notes 19–20.

95. See generally CONE, *supra* note 19, at chapter 2 (especially at 2:2–2:13, 2:24–2:34), Chapter 4.

96. *Id.* at 2:32–2:33.

likewise qualifies as the ultimate assault weapon for parties intent on impugning the measure. Reconciliation is therefore imperative.

It has been argued, in the context of the related provisions of Article XX of the GATT, that "[i]n principle, there is no objection in allowing a measure justified under an Article XX exception to be challenged under Article XXIII(1)(b)."⁹⁷ This argument places reliance on certain averments made in the context of discussions under the emergency exception in Article XXI of the GATT.⁹⁸ Clearly, however, this is a question that has not been adjudicated definitively by any panel. More importantly, it is a question regarding which a textual approach to interpretation would yield no dividends. This is because by its very terms, the general exceptions in Article XIV of the GATS (just like Article XX of the GATT exceptions) seek to subsume and override all other provisions of the GATS including those of Article XXIII(3), while Article XXIII(3) GATS (just like the corresponding Article XXIII(1)(b) of the GATT) seeks likewise to subsume and override other provisions, including the general exceptions. They are mutually eliminating. A teleological approach that takes into consideration the design and purpose of the provisions would be more auspicious. Along these lines, it would seem that the interests sought to be protected by the general exceptions – interests such as health and environment, public order and morality, safety and privacy – transcend those implicated by the non-violation nullification or impairment provisions, not just in terms of being values that attract more attention and concern among civil society currently, but more importantly, in terms of embodying values and concerns in which all peoples and states possess concurrent vested interests. Unlike these generic interests, the interests sought to be protected by the non-violation nullification or impairment provisions are contingent, state-specific interests without abiding implications for most other states and civil society in general. It seems in the context of the interests implicated, that the general exceptions would prevail over the non-violation nullification or impairment provisions, should the question arise whether a measure saved by the former is condemned by the latter.

Non-violation nullification or impairment seems ultimately to be a "discipline" at the cross-roads of law and politics. It simultaneously assumes legality and illegality – legality in the sense that there has been no violation of substantive provisions, and illegality in the sense that there has effectively occurred an abridgment or loss of expected benefits. Such contradiction is indicative of the weakness of the WTO legal framework; a weakness resulting from the organization's character as a grouping of sovereigns where the dictates of diplomacy, as distinct from legality, remains key, notwithstanding the much-trumpeted dawn of a rule-based dispute settlement system.

97. Chua, *supra* note 79, at 46.

98. *Id.*

VI. CONCLUDING COMMENTS

The GATS does not oblige or constrain the regulators of the legal profession to accommodate MDP as a vehicle for the delivery of legal services in the United States, and this is not likely to change in the course of the current rounds of WTO negotiations over services.⁹⁹ Significant in this regard is the reality that in the hierarchy of fundamental norms that constrain and shape the trading system itself, the importance of non-trade values such as that of maintaining law and order within a nation, is constantly being reaffirmed and reinforced.¹⁰⁰ This is especially so in relation to considerations of the long-term future of the trading regime, whether in respect of goods or services. This reinforcement further secures the capacity of the United States to maintain, in the long-run, a prohibition on MDP as an element of a regulatory mechanism properly tailored to meet legitimate state interests recognized by the WTO itself through the GATS general exceptions. This is quite separate from the fact that the United States has inserted in its schedule of commitments appropriate market access limitations that constrain the capacity of foreign MDPs to claim access to the U.S. legal services market, especially by way of commercial presence, such commercial presence being the most dominant mode for the transnational supply of legal services—at least where such legal services are supplied by the major institutional providers of legal service.

The ABA went into the negotiations leading to the Uruguay Round agreements armed with little other than sanguine expectations of better access to foreign markets. It sustained heavy losses,¹⁰¹ and the results have since left it better educated and, thus, better prepared for subsequent rounds. More attuned to the intricacies of trade negotiations, especially in the light of government's possible perception of legal services as a relatively insignificant sector that may be pawned for bigger fish, the ABA should be able to marshal resources necessary to hold its own among other competing interests. Therefore, it is not likely that much impetus towards the de-proscription of MDP would flow from future trade negotiations. Indeed, the primary force behind the inclusion of legal services in the Uruguay round was the U.S. legal profession as represented by the ABA,¹⁰² and it still lies within its reach to influence and shape the obligations assumed by the United States in the current

99. The rounds commenced with the Doha Ministerial Declaration (adopted Nov. 14, 2001) and were slated to end no later than January 1, 2005. See paragraph 45 of the Doha Ministerial Declaration, *Doha WTO Ministerial 2001: Ministerial Declaration*, WTO document # WT/MIN(01)/DEC/1 2001. The rounds have been fraught with much difficulty however and the rounds have been extended beyond 2005. The expectation is that the rounds will end by the end of 2006, but this is not certain. See WTO, *The Doha Declaration Explained*, available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#services (last visited Jan 16, 2006).

100. See Doha Ministerial Declaration *supra* note 98 at ¶¶ 6, 7.

101. See CONE, *supra* note 19, at 2:2–2:14, 2:40–2:45; see also *supra* note 91.

102. CONE, *supra* note 19, at 2:2.

rounds of trade negotiations over services. Nothing in its input to the negotiations, or that of the USTR, so far indicate an interest in propagating MDP in the United States. Their focus is the facilitation of transnational practice involving law firms and practitioners, with basically no attention paid to MDP. Noteworthy in this regard is the February 3, 2002 resolution of the ABA section on international law concerning the negotiating position of the United States with regards to legal services.¹⁰³ The resolution basically expresses support for access to foreign markets for U.S. lawyers through permanent establishments consistent with, and as expressed and incorporated in, the ABA's 1993 "Model Rule for the Licensing of Legal Consultants" in the United States. These rules are consistent with permanent establishments as a mode of supply but contain no provisions for MDP. It is also interesting that the recent offer of commitments by the USTR pursuant to the on-going trade negotiations, does not contain any adjustments indicating a move towards the accommodation of MDP.¹⁰⁴ From the foregoing, it is clear that to the extent that the GATS is the source of the obligations claimed to potentially constrain U.S. regulatory authorities in relation to MDP, the opportunity for such regulators to shape the contours of regulation as they deem fit remains ample in the context of the current trade negotiations.

In relation to professional services, of which legal services constitute a prominent aspect, some specific initiatives undertaken within the WTO framework are noteworthy because they shed further light on the current and future contours of obligations under the GATS. The most prominent appear to be the initiatives of the WTO Working Party on Domestic Regulation (formerly known as the Working Party on Professional Services). Established by virtue of the Decision on Professional Services adopted by the WTO Council on Trade in Services on March 1, 1995,¹⁰⁵ its name was changed to Working Party on Domestic Regulation by the Decision on Domestic Regulation adopted by the Council for Trade in Services on April 26, 1999.¹⁰⁶ The March 1995 decision mandated the working party to develop disciplines in the area of professional services, in fulfillment of the broader mandate of the Council for Trade in Services under Article VI(4) of the GATS to ensure that measures relating to technical standards, licensing requirements, qualification requirements, and procedures do not constitute unnecessary barriers to trade in services. Pursuant to this mandate, the Working Party on Professional Services

103. Center for Professional Responsibility, ABA, *Materials about the Gats and Other International Agreements* (2005), at http://www.abanet.org/cpr/gats/gats_home.html (last visited on October 13, 2005).

104. See U.S. initial offers, March 31, 2003, available at http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf (last visited Nov. 27, 2005). The offer on legal services, in the form of a proposed schedule of specific commitments, as updated by the USTR in May 2005 is available at http://www.abanet.org/cpr/gats/legal_svcs_offer.pdf.

105. Document Symbol: S/L/3.

106. Document Symbol: S/L/70.

produced the "Guidelines for Recognition of Qualifications in the Accountancy Sector," which was adopted by the Council for Trade in Services on May 29, 1997.¹⁰⁷ These non-binding guidelines are meant to assist governments in effecting negotiations in the accounting sector. It provides procedural standards, such as transparency, which should attend the making of agreements to provide recognition between WTO members. More substantive than the Guidelines, are the Disciplines Relating to the Accountancy Sector,¹⁰⁸ adopted by the Council for Trade in Services by means of its Decision on Disciplines Relating to the Accountancy Sector of December 14, 1998.¹⁰⁹ These disciplines are applicable only to those WTO members who have scheduled specific commitments in accountancy under the GATS.¹¹⁰ Besides, Article I of the Disciplines make it clear that they do not apply to any measures subject to scheduling by virtue of Article XVI and XVII of the GATS, which measures are to be addressed through the negotiation of specific commitments. The Disciplines thus restrict themselves to licensing and qualification requirements under Article VI GATS, and should remain so restricted even if extended to the legal services sector as expected under the current round of trade negotiations.¹¹¹ Some may be tempted to argue that the MDP prohibition may qualify in effect as a licensing requirement—an area where the working party probably has some leeway in prescribing standards. This would however amount to stretching the words of

107. Press Release, World Trade Organization, WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector (May 29, 1997), available at www.wto.org/english/news_e/pres97_e/pr73_e.htm, for a list of guidelines.

108. Press Release, World Trade Organization, WTO Adopts Discipline On Domestic Regulation for the Accountancy Sector (Dec. 14, 1998), available at www.wto.org/english/news_e/pres98_e/pr118_e.htm.

109. Document Symbol: S/L/64. The text of the Disciplines is usually annexed to the text of the Decision.

110. This follows from the use of the positive list approach in scheduling commitments under the GATS. Under that approach, any member who does not expressly list the accounting or legal sub-sectors in its schedule of specific commitments is deemed not to have made any commitments in those areas.

111. *Id.* Regarding this expectation and its ramifications, see the presentation of the CCBE (Council of the Bars and Law Societies of the European Union) to the WTO, *CCBE Response to The WTO Concerning the Applicability of the Accountancy Disciplines to the Legal Profession May 2003*, available at http://www.ccbe.org/doc/En/ccbe_response_080503_en.pdf. There is the important issue of the definition of necessity for purposes of the injunction in the Discipline that WTO members adopt only measures that are not more trade-restrictive than necessary to achieve certain desired ends. The CCBE has reflected the fears entertained by some lawyers that necessity or 'necessary' could be defined in such a narrow manner as to impede the Bar's need to regulate itself in a manner that secures key interests such as that of independence. (See *id.* page 4.). Were that to happen, it is not inconceivable that such a narrow definition of necessity for purposes of the Discipline (and Article VI(4) of the GATS to which it is appurtenant) would spill over to the construction of the word "necessary" for purposes of the general exception in Article XIV(a) of the GATS, thus constricting the reach of the exception. The odds are however higher that the WTO Appellate Body, whose jurisprudence has shown an enhanced robustness in the protection of non-trade values, would resist such narrowness in the construction of the language of necessity, at least for purposes of the general exceptions.

the statute out of their context, licensing requirements being traditionally distinct from requirements pertaining to practice groupings and vehicles for service delivery, a distinction maintained in the GATS itself.¹¹²

112. See GATS Article VI, dealing with licensing requirements and related issues, especially in paragraphs (4), (5) and (6) thereof, as distinct from GATS Article XVI(2)(e) dealing with vehicles or entities for the delivery of services. For a treatment of these vehicles and structures, see the paragraph of this article immediately following that in which note 25 *supra* occurs.

