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THE LEGAL PROFESSION AND THE LIBERALISATION OF SERVICES IN THE WORLD TRADE ORGANISATION (WTO)[1]

By Durval de Noronha Goyos[2]

1.- INTRODUCTION –

1.1.- Legal services have become an important economic activity and have evolved cross-border, following the important growth of international business relations in the past decades. Accordingly, they were included within the framework of the General Agreement of Tariffs and Trade (GATS), on of the treaties of the Uruguay Round of the General Agreement of Tariffs and Trade (GATT), and are presently being again discussed in the negotiations of the Doha Round of the World Trade Organisation (WTO).

1.2.- I have organised this presentation in the following manner:

[1] Basic text of the presentation delivered in Lisbon, Portugal, on June 29, 2007, at the seminar The Legal Profession and the Liberalization of Services organized by the International Association of Lawyers (UIA).

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1.2.1.- This introduction;

1.2.2.- The standards of the legal profession under international law;

1.2.3.- The legal professions and the GATS;

1.2.4.- Some unilateral domestic regulations of the legal professions in the EU which are against international law;

1.2.5.- Current obstacles for negotiations in legal services within the ambit of the Doha Round; and

1.2.6.- Conclusions.

2.- The Standards of the Legal Profession under International Law.

2.1.- There is in international law a hierarchy of treaties similar to the hierarchy of law in a municipal legal system. This feature has become relevant as a result of the growing complexity of international relations and of the multiplicity of treaties, which generated a number of antinomies not only *ratione materiae*, but also *ratione personae*. The web of international treaties to which a State has now become signatory has become very intricate. Accordingly, in the European Union (EU), the Court of Justice of the European Communities may be asked to give its opinion on whether an international agreement, into which the EU is contemplating to enter, is compatible with the provisions of the EU Treaty.

2.2.- However, with respect to international treaties, it is not as easy to establish an order of precedence, as in municipal law. In domestic law, the hierarchy starts with the constitution and is defined explicitly or implicitly by constitutional law. As there is no constitution in international law, States have agreed an order of precedence in many of the international treaties of which they are signatories. This hierarchy is established by ascribing to one treaty the highest precedence, rank or intrinsic superiority, such as the case of the Charter of the United Nations (the Charter), which reads in article 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other

international agreement, their obligations under the present Charter shall prevail." This is also the case of the Vienna Convention on the Law of Treaties[3] (the Convention), which reads in its article 1: "This present convention applies to all treaties between States".

2.3.- In other cases, a treaty may ascribe itself a lower precedence to others or intrinsic inferiority. In such cases where there is a clear intrinsic superiority, *lex superior*, or an intrinsic inferiority, *lex inferior*, we have a soluble antinomy by the application of the principle "*lex superior derogat inferiori*". However, in many cases, the hierarchy between two or more treaties is not clear and we may have a case of insoluble antinomy, as in international law the principle "*lex specialis derogat generali*" is not applicable without an apposite written provision. Similarly, the principle "*lex posterior derogat priori*" is only applicable when there is a manifest intention of the signatories of a given treaty to derogate it[4].

2.4.- For purposes of this analysis, it is important to clarify at this point that the multilateral trade agreements of the General Agreement on Tariffs and Trade (GATT)[5] and of the World Trade Organization (WTO) are of inferior precedence to the Charter and the Convention, as a result of the intrinsic superiority asserted by the latter. On the other hand, the Marrakesh Agreement Establishing the WTO[6] admits its intrinsic inferiority to the treaty of the International Monetary Fund (IMF). Similarly, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS' Agreement) recognises its intrinsic inferiority in relation to the Paris Convention[7], Berne Convention[8], Rome onvention[9] and the Treaty on Intellectual Property in Respect of Integrated Circuits[10].

2.5.- In case of conflicts *ratione materiae*, it is not always easy to discern clearly the superiority of a treaty over another based only on this criterion. However, there is a clear consensus that treaties on human

[3] 1969.
[4] See Durval de Noronha Goyos, "Arbitration in the WTO", Legal Observer, Miami, 2003, pages 15, 16 and 17.
[5] The GATT of 1947 is still in force.
[6] 1994.
[7] 1883.
[8] 1886.
[9] 1961.
[10] 1989.

rights prevail over commercial treaties, such as the multilateral trade agreements of the WTO. In this respect, Ernest-Ulrich Peterman well observed that "WTO Member-States may be legally liable if their implementation of WTO rules should be found to be inconsistent with human rights law. Human rights and the customary rules of international treaty interpretation require interpretation of WTO law with due regard to universally accepted human rights guarantees[11].

2.6.- The substantive international norm of highest hierarchy governing the nature of the legal professions is the United Nations Basic Principles on the Role of Lawyers (UN Principles), approved by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in September of 1990. The General Assembly of the United Nations adopted this in December 1990. As a rule, non-treaty standards do not have the legal power of treaties, but having been adopted by the United Nations` General Assembly are considered to be binding on States as treaties.

2.7.- The introduction to the UN Principles recalls the obligations of States under the Charter to promote universal respect for, and observance of, human rights and freedoms. It also evokes that the " professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operating with governments and other institutions in furthering the ends of justice and public interest…" The introduction to the UN Principles concludes to the effect that the standards therein "should be respected and taken into account by Governments within the framework of their national legislation and practice…".

2.8.- The purview of the UN Principles reads that "lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity[12]". The UN Principles also

[11] Ernest-Ulrich Petersmann, "Constitutionalism and WTO law", in "The Political Economy of International Trade Law", edited by Daniel Kennedy and James Southwick, Cambrige University Press, Cambridge, United Kingdom, 2003, pages 64 and 65.
[12] Article 24, UN Principles.

attribute to professional association's joint responsibility for ensuring that "lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law[13]". There is also a similar joint responsibility towards avoiding discrimination[14]. In addition, the UN Principles establish the joint duty of professional associations of lawyers, Governments and educational institutions to assist minorities and other underprivileged groups in the access to the legal profession[15].

2.9.- The UN Principles also itemise a number of personal obligations of individual lawyers, which include the maintenance of "the honour and dignity of their profession as essential agents of the administration of justice[16]"; the upholding of human rights and fundamental freedoms recognised by national and international law[17]; and the acting freely and diligently in accordance with the law and ethics of the legal profession[18]. Similarly, the UN Principles establish the duty of loyalty of the lawyers with respect to the interests of their clients[19].

2.10.- The UN Principles allow codes of professional conduct for lawyers to be established by the legal profession through its appropriate organs or by legislation, but always in accordance with national law and custom and recognised international standards and norms[20]. From these principles, one can deduct that the legal profession is one to be exercised by a physical person. The individual in question needs appropriate training and is subject to a set of ethical and deontological obligations of a personal nature. In addition, the individual lawyers must be organised by self-governing professional associations, with a view to ensuring the independence of the profession and the maintenance of standards in accordance with municipal and international law.

[13] Article 9, UN Principles.
[14] Article 10, UN Principles.
[15] Article 11, UN Principles.
[16] Article 12, UN Principles.
[17] Article 14, UN Principles.
[18] Article 14, UN Principles.
[19] Article 15, UN Principles.
[20] Article 26, UN Principles.

2.11.- Another substantive international norm on the juridical nature of the legal profession is the Recommendation 21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer[21] (CE Recommendation). It has a lower hierarchy to the UN Principles. The CE Recommendation refers to the UN Principles, recalls the desire of promoting the freedom of the exercise of the profession with a view to strengthening the rule of law. It also takes into consideration the need of guaranteeing the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

2.12.- The CE Recommendation advances the principle that "Bar Associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public[22]". It also establishes that "The role of bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected[23]". The Explanatory Memorandum to the CE Recommendation is potentially incoherent or contradictory when it explains that "self-regulation is only one model for ensuring that the independence of practitioners from the government is not infringed. Indeed, the regulation of the profession is a matter in which governments or other bodies may have a perfectly proper role to play[24]". However, predominant rules of hermeneutic require the purview of a statute higher value than subsequent clarifications of records of debates.

2.13.- In addition, the CE Recommendation reads to the effect that " where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings[25]". It goes on to establish that " Bar associations or other lawyers` professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning

[21] Adopted on October 25, 2000.
[22] Principle V, 2.
[23] Principle V, 3.
[24] Item 63.
[25] Principle VI, 1.

lawyers[26]". Similarly to the UN Principles, the CE Recommendation treats the lawyer as a physical person with ethical and deontological obligations towards their clients[27].

2.14.- The Explanatory Memorandum to the CE Recommendation, in connection with the ample scope of the lawyers` obligations, cites the Code of Conduct of the Council of the Bars and Law Societies of the European Union (CCBE) to the effect that: "In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's case but to be his adviser. A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society[28]".

3.- The Legal Professions and the GATS

3.1.- The General Agreement on Trade in Services[29] (GATS) is one of the treaties of the Uruguay Round of the GATT. Its objective is the liberalisation of trade in services and its regulation within the

[26] Principle VI, 2.
[27] Principle III, 3.
[28] Item 3.
[29] 1994.

multilateral system of the WTO. The principles of the GATS are transparency; progressive liberalisation; national treatment; the most favoured nation clause (non-discrimination); access to market; the right to regulation; and increasing participation of developing countries. The services' sector was defined as telecommunications; construction; transportation; tourism; financial services (including banking, capital markets and insurance); and professional services (including legal services, accounting, advertising, administration, architecture, health, engineering and software).

3.2.- The different financial services and professional services were treated separately and object of individual concession schedules that were then multilaterised via the most favoured nation clause. The GATS does not contemplate the possibility of mixed or crossed services, not even within the category of professional services. Accordingly, the schedules of concessions made by the Member States during the negotiations of the Uruguay Round are separate and specific for each service. Thus, the offers made on legal advice[30] and those on accounting[31](inserted in the same sub-sector as auditing and bookkeeping) services are separate. So are the ones on taxation advisory services[32]. The EU schedule of concessions on legal advice, contains specific preconditions of membership to the regulated legal and judicial professions made by France, Denmark, Portugal, Luxembourg and Germany. In addition, sub-sector c, which deals with taxation, has a general exclusion of representation in courts or tribunals, which is to be interpreted as a restriction on behalf of regulated professions.

3.3.- The GATS established four different modes for the provision of services. These are cross-border; movement of consumer; commercial presence; and movement of physical persons[33]. Cross-border means a service rendered from one country to the consumer of another. Movement of consumer means the dislocation of a consumer from one

[30] Legal advice home country law and public international law (excluding EC law). Sector Professional Services, sub-sector a, European Communities and their Member States, Schedule of Specific Commitments. April 15, 1994.Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1b, volume 28, published by the GATT Secretariat, Geneva, 1994, pages 12 and 13.
[31] Accounting services (other than auditing services). Sector Professional Services, sub-sector b, *op. cit.* pages 14 and 15. Auditing services (other than accounting services). Sector Professional Services, sub-sector b, *op. cit*., pages 15, 16 and 17. Bookkeeping services. Sector Professional Services, sub-sector b., *op. cit.* pages 17 and 18.
[32] Taxation advisory services. Sector Professional Services, sub-sector c, op. cit., pages 18 and 19.
[33] Article I.2, GATS.

country to buy a service in another. Commercial presence means the establishment of an operation of a juridical person of one country in another. Movement of physical persons means the movement of individual service providers.

3.4.- With respect to domestic regulation, in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner[34]. Members must not apply licensing and technical standards that nullify and impair their specific commitments, *inter-alia* in a manner that could not have been reasonably expected at the time when specific commitments in those sectors were made[35]. In determining if a Member is in conformity with the obligation of avoiding the derogation (nullification or impairment) of another's rights, "account shall be taken of international standards of relevant international organisations applied by that Member[36]".

3.5.- GATS further reinforces the prevalence of international criteria for Member-States dealing with services` trades and professions in the following terms. Accordingly, "…In appropriate cases, Members shall work in co-operation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for the recognition and common international standards for the practice of relevant services trades and professions[37]". In doing so, GATS accepts its intrinsic inferiority, for purposes of eventual conflicts, with respect to other treaties in the substantive regulation of the matter of standards.

3.6.- With respect to competition, GATS recognises that certain business practices may restrain it and thus restrict trade in services. However, whenever a Member-State wishes to eliminate such practices, it must, upon the request of another Member-State, enter into consultations, supplying non-confidential information and, with adequate safeguards, confidential material as well[38].

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[34] Article VI, 1, GATS.
[35] Article VI, 5, a, ii, GATS.
[36] Article VI, 5, b, GATS.
[37] Article VII, 5, GATS
[38] Article IX, 1 and 2, GATS.

3.7.- Contemplating the possibility of damages, GATS allows for negotiations on the question of emergency safeguard measures based on the principle of non-discrimination[39], similarly to what exists for trade in goods. Those negotiations were to be concluded in December of 1997, but yet no consensus has been obtained by Member-States on the subject. The lack of safeguard norms for trade in services is regarded by many Member-States, particularly developing countries, a stumbling block for future negotiations in trade liberalisation for the sector.

3.8.- A Member-State of the WTO may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment came into force[40]. This must be notified to the Council for Trade in Services within three months before the intended date of implementation[41]. Member-States that may be affected by a proposed modification shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment[42]. Compensatory adjustments shall be made on a most-favoured-nation basis[43], which means that they will benefit the total membership basis of the WTO[44].

3.9.- In case negotiations fail, the respective matter may be brought to arbitration under the Dispute Settlement Understanding (DSU) of the WTO before the Dispute Settlement Body (DSB) of that organisation[45]. If a measure is determined by the DSB to have nullified or impaired a benefit to any Member, the DSB may determine the modification or withdrawal of the measure[46]. In case the measure is not modified or withdrawn, the Member affected shall be entitled to compensation or retaliation under Article 22 of the DSU[47].

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[39] Article X. 1, GATS.
[40] Article XXI, 1, a, GATS.
[41] Article XXI, 1, b, GATS.
[42] Article XXI, 2, a, GATS.
[43] Article XXI, 2, b, GATS.
[44] Presently 146 Member-States.
[45] Article XXI, 3, a, combined with Article XXIII, GATS.
[46] Article XXIII, 3, GATS.
[47] For an overview on compliance with DSB rulings, see Durval de Noronha Goyos, "Arbitration in the WTO", *op. cit.*, page 67.

4.- Some Unilateral Domestic Regulations of the Legal Professions in the EU which are against International Law.

4.1.- One of the legal professions in England and Wales, that of solicitor, developed enormously as a result of international activity. Accordingly, law firms achieved large sizes and expanded overseas. The number of lawyers employed by those firms is expressive, even if the majority of solicitors still works elsewhere.

4.2.- With their economic expansion, the large English law firms became expressive exporters of services and achieved notable political power, both within Parliament as well as in the Law Society of England and Wales, the organisation representing the class, in ways that no other legal profession has achieved anywhere else in the world.

4.3.- In view of the limitations of their domestic markets, such large English law firms took the view that their expansion in the future was subject to the conquest of new markets. With this objective in view, they influenced the Law Society of England and Wales to act in a quest for the “opening of the markets” as well as for the British government to enact legislation with a view to turning English firms more competitive in the international arena.

4.4.- The ethically challenged government of Tony Blair gleefully complied and introduced legislation in 2006, The Legal Services Bill, that would *inter alia* permit new business structures involving partnerships between lawyers and non-lawyers and the possibility of external ownership of law firms.

4.5.- Similarly, the Spanish Congress of the Deputies passed on March 1, 2007, law number 77-24, dealing with the so-called professional services companies which, *inter alia*, admitted the provision multidisciplinary services between lawyers and non-lawyers and the admission of non-lawyers as shareholders.

4.6.- Both laws fail to address the fundamental point that the provision of legal services, in accordance with international as well as to domestic

laws, is incumbent upon individuals and not upon companies. Companies are not lawyers. Individuals are. Thus, outside ownership of law firms breaches the established international standards of the legal professions.

4.7.- Accordingly, both laws violate the multilateral regime of the WTO, in particular Article VI, 1 of GATS, which requires that all measures of general application affecting trade in services be administered in a reasonable, objective and impartial manner.

4.8.- In addition, there would be a breach of article VI 5a ii of GATS, because Member States must not apply licensing and technical standards that nullify and impair their specific commitments, inter alia in a manner that could not have been reasonably expected at the time when specific commitments were made in those sectors[48]. Partial ownership by non-lawyers would allow means for obtaining capitalisation not contemplated in international standards and certainly not existing when commitments were made under GATS.

4.9.- There would also be an inconsistency with Article VI, 5 b of GATS, which requires that account shall be taken, for the regulations of affected disciplines, of international standards of relevant international organisations applied by a given Member. Article VII, 5 of GATS also requires that Members shall work in co-operation with relevant intergovernmental and non-governmental organisations towards the establishment of common international standards for the practice of relevant services and professions[49]. Consultations with other Member-States are also necessary[50]. Thus, the partial ownership by non- lawyers would clearly represent a departure from present international standards and failure to seek common international rules on the matter.

4.10.- The provisions allowing for multi-disciplinary partnerships would also be a violation of international law. As we saw before[51], GATS does not contemplate the possibility of mixed or crossed services, not even within the category of professional services. Accordingly,

[48] See uten 3.4 ut supra.
[49] See item 3.5 ut supra.
[50] Article IX, 1 and 2m GATS. See also item 3.6 ut supra.
[51] See item 3.2 ut supra.

commitments were made for the distinct categories of services identified as part of the relevant sector[52].

4.10.1.- The integration of professionals of different categories subject to different international regulatory standards and without a set of accepted international rules of its own could also impair and nullify benefits in a manner that could not have been reasonably expected when commitments were made[53]. Failure to seek common international standards for the modes under examination would also breach the relevant provisions of the multilateral trade law[54]. Absence of consultations with other Member-States would have the same effect[55].

5.- Current Obstacles for Negotiations in Legal Services within the ambit of the Doha Round.

5.1.- The inclusion of services within the framework of the multilateral trade system was an initiative of the United States of America and of the European Union during the Uruguay Round of the GATT. This was opposed for many years by developing countries, reluctant in expanding the scope of the system without addressing first the core issues of agriculture and textiles.

5.2.- The pressure on developing countries was such that, towards 1991, the resistance subsided and agreements formulated in accordance with the wishes of developed countries were presented in the areas of services, investments and intellectual property. After the first decade of the agreements of the Uruguay Round, the participation of developed countries in the export of services grew much more than that of developing countries, threatening to alienate these from this important segment.

5.3.- The generalised perception of the biased treatment towards developing countries by the legal order of the WTO caused the organisation to fall into disrepute. ONU itself had stated that 80% of the benefits of the Uruguay Round were reaped by developed countries.

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[52] See item 3.1 ut supra.
[53] Article VI, 5 a ii, GATS. See also item 3.4 ut supra.
[54] Article VII, 5, GATS. See also item 3.5 ut supra.
[55] Article IX, 1 and 2, GATS. See also item 3.6 ut supra.

UNCTAD adopted the São Paulo consensus to the effect that “trade is not an end in itself, but a means for economic development”.

5.4.- The firm conviction that the WTO is an organisation created and managed with a view to promoting the prosperity of a few in detriment of the many was such that a new round of trade negotiations, the Doha Round, was launched in 2001 with the purpose of promoting development.

5.5.- However, as the collapse of the Potsdam talks last week reveal, old habits die hard and the hegemonic powers, notably the EU and the USA, insist in maintaining a regime of subsidies for the agricultural sector that is not allowed in industry, investments and services. The EU has historically spent more than 50% of its budget in agricultural subsidies.

5.6.- For trade in legal services, the picture is not that different. We have seen that two important Member States of the EU have violated the multilateral trade regime and other relevant international law in the struggle to allow their legal sectors to become hegemonic in the world.

5.7.- In addition, the legal sector has been plagued by horizontal barriers. The visa requirements for lawyers of developing countries are today harsher than they were when the Uruguay Round was concluded in 1994. The lack of safeguards in GATS contrarily to trade in goods and agriculture, for instance, increase the vulnerability of the developing countries. No progress has been made in this area.

5.8.- The USA and the EU negotiate in a federative capacity, but the treatment of the legal professions is given by its federate states and member states respectively. Those are not uniform, on the contrary. The vast majority of the regimes is highly protectionist. However, both EU and the USA negotiate in bad faith with developing countries failing to present the truth on their respective regimes.

5.9.- Accordingly, the offers made by the developed countries in the matter of trade liberalization in legal services are not to be taken seriously. No regard is given to safeguards. No special non-onerous treatment for access of individual lawyers to markets is granted. No uniform regulation is presented. Transparency leaves a lot to be desired.

Unilateralism prevails in the regulation of the legal professions in certain countries, without regard to multilateral trade commitments or to international law.

5.9.1.- Most European countries, notably the United Kingdom, and all US states fail with their obligation under the non-discrimination provisions of the most-favoured nation clause in the qualification of lawyers from abroad. Last, but not least, the EU continues to insist in its offer within the Doha Round that EU law is domestic, rather than international law. What hypocrisy!

6.- Conclusion

6.1.- Trade in legal services is still a long way from free and fair trade. In that, it is absolutely coherent with the rest of the legal order of the multilateral trade regime of the WTO.