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THE GATS AND LEGAL SERVICES: THE RESUMED GATS NEGOTIATIONS TRIGGER ADDITIONAL U.S. AND OTHER ACTIVITY

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This is an update about the General Agreement on Trade in Services (GATS) and how it affects legal services. Because the U.S. is a member of the World Trade Organization (WTO), it is bound by the provisions of the GATS. For background information about the GATS and legal services, see the author's previous BAR EXAMINER articles.¹

World Trade Organization (WTO) Member States, including the United States, currently are engaged in two different "tracks" of WTO trade negotiations that apply to legal services.¹ The August 2004 BAR EXAMINER GATS article focused on Track 2 and ongoing discussions about whether to extend the WTO Accountancy Disciplines to others, including lawyers. This article focuses on recent developments in Track 1, which applies to U.S. rules regarding foreign lawyers, and the ongoing GATS negotiations. Track 1 of the GATS does not require the U.S. to permit foreign lawyers to practice in the U.S. But the GATS does require that the U.S. (like other WTO countries) act in a transparent fashion and indicate in its Schedule of Specific Commitments any market access or national treatment limitations for foreign lawyers who want to practice in the U.S.

On August 1, 2004, WTO Member States agreed to resume the GATS Track 1 negotiations that had been suspended in September 2003, following the WTO Cancun Ministerial meeting.² Section 1(e) of this

August 1st WTO Decision states that revised services "offers" should be tabled by May 2005.³ Annex C of the August 2004 Decision contains additional details about GATS Track 1 offers and requests, and states that WTO Members must also intensify their efforts to conclude the negotiations regarding GATS Track 2 (the Disciplines issue).

What does the August 2004 WTO Decision mean for the U.S. legal profession? As a starting point, it means that the WTO Doha negotiations are now continuing and are on a fast timetable. As a result, the U.S. government will continue to address three broad issues that are relevant to the U.S. legal profession:

- What, if anything, does the U.S. want to "request" from other WTO Member States for U.S. lawyers traveling to another country?⁴
- What will the U.S. "offer" to foreign lawyers inbound to the U.S.? (These "offers" are made by the U.S. government on a state-by-state basis.)⁵
- What position will the U.S. take regarding the effort to extend the Accountancy Disciplines to other service sectors, including legal services?

As part of its efforts to address these three broad areas, the U.S. government will have to decide a number of issues in a fairly short time period; some of

these issues will be quite technical and some will involve the question of how the U.S. should respond to the negotiating positions of other countries. As a result, U.S. states and the U.S. legal profession have been and will continue to be engaged in efforts to understand the issues on which the U.S. Trade Representative will speak and to decide how to develop and provide their views to the U.S. Trade Representative.

Three recent developments should facilitate communication between the legal profession and the U.S. Trade Representative regarding the GATS and legal services. The first development is the reconstitution of the American Bar Association Task Force on GATS Legal Services Negotiations (“ABA GATS Task Force”). In September of 2004, Don De Amicis became the new Chair of the ABA GATS Task Force.⁶ The ABA GATS Task Force met in Washington, D.C., on November 16, 2004, at which time it adopted its “Mission Statement.”⁷ The ABA GATS Task Force thereafter distributed this Mission Statement widely in an effort to encourage greater communication in the U.S. legal profession about GATS issues.

The second event that facilitated communication about the GATS was the August 2004 Atlanta Summit. The Atlanta Summit brought together representatives from 14 U.S. states, various U.S. legal organizations, the Law Society of England and Wales, and the CCBE, which is the European Union’s bar association that represents over 700,000 lawyers.⁸ More than fifty people attended the Atlanta Summit, including state bar presidents, state international law section chairs, state bar executive directors, state disciplinary counsel, and representatives from the ABA, the ABA Center for Professional Responsibility, the National Organization of Bar Counsel, and the Conference of Chief Justices.⁹ The agenda topics included: the present status of the

GATS, the EU offer on legal services for the current GATS round, the “request” and “offer” of the New York State Bar Association, and a discussion of ways in which the jurisdictions present could further liberalize transnational legal services.

The third recent event of importance was the November 16, 2004, meeting held at the Office of the U.S. Trade Representative (USTR). This meeting was intended as a follow-up to the August 2004 Atlanta Summit. The purpose of the November 2004 USTR Meeting was to give state representatives and others the opportunity to engage in a dialogue with the USTR and vice versa. This meeting was the first time that representatives of the USTR had met, simultaneously, with a large number of representatives of the legal profession. The USTR officials attending the meeting included Christine Bliss, Deputy Assistant Trade Representative for Services, and Christopher Melly, Director, Services Trade Negotiations. Unlike the Atlanta Summit, conference call facilities were available for the November USTR meeting. Almost thirty people attended the USTR meeting in person, with approximately a dozen individuals participating by conference call. Those attending included representatives from California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Maryland, Michigan, New Jersey, New York, Texas, and Virginia, together with representatives from the American Bar Association, the Conference of Chief Justices, the National Organization of Bar Counsel, and the Coalition of Service Industries. The 2½ hour meeting included eight agenda items: (1) welcoming remarks and the goals of the meeting; (2) the status of the GATS negotiations; (3) the U.S. legal services’ GATS request; (4) state liberalization efforts; (5) the Conference of Chief Justices and GATS; (6) the regulation of foreign lawyers by states; (7) ITAC and CSI and the campaign to expand U.S. services trade; and (8) a general dis-

cussion of how to coordinate efforts and whether the U.S. can get its house in order.

At the same time that these events were occurring in the U.S., GATS legal services discussions were occurring outside of the U.S. One of the issues that has commanded significant attention elsewhere in the world is the issue of which “classification system” WTO Members should recommend that countries use when preparing the legal services portion of their GATS Schedule of Specific Commitments.¹⁰ During the original negotiations leading to the 1994 GATS, the WTO issued a document called W/120 that set out the classification systems that countries could use, but were not required to use, when submitting their GATS commitments.¹¹ In the current GATS Track 1 Doha negotiations, WTO Members have continued to recommend, but not require, that WTO countries use the classification system in WTO Document W/120 when making their commitments.¹²

The ABA GATS Webpage includes a subpage devoted to this legal services “classification” issue; it contains all the classification documents cited in this update.¹³ WTO Document W/120 recommends that when countries submit their GATS legal services “offers,” they do so using the legal services classifications contained in section 861 of the United Nations Provisional Central Product Classification (UN CPC). In 1998, the WTO Secretariat issued an analysis of the legal services sector that questioned the usefulness of the UN CPC subcategories. Both Australia and the European Union submitted proposals to modify WTO document W/120 with respect to legal services. In addition to the U.N. and proposed Australian and EU classification systems, the International Bar Association (IBA) adopted a “Terminology Resolution” in September 2003. Although the IBA could not agree upon a classification system, the IBA

Council unanimously adopted a resolution that set forth “terminology” that countries might use when preparing their Schedules of Specific Commitments. (The IBA Terminology Resolution indicates that its terminology could be used in multiple classification systems.)¹⁴ On November 25, 2004, IBA WTO Working Group members Ben Greer and Steve Nelson made a presentation to the WTO Committee on Specific Commitments about the IBA Terminology Resolution.¹⁵

The U.S., like other WTO Members, will have to decide whether to use any of these legal services classification systems when preparing its May 2005 legal services “offer.” During the November 2004 USTR meeting described above, USTR officials indicated that they welcomed input from the ABA about the classification issue, including whether the U.S. should use the IBA terminology when preparing the legal services portion of the U.S. Schedule of Specific Commitments.

During its December 2004 monthly teleconference meeting, the ABA GATS Task Force decided not to prepare a recommendation on classification for the ABA House of Delegates to consider during the February 2005 ABA Midyear Meeting. The Task Force based its decision on the short time frame before the February 2005 ABA Midyear Meeting, specifically the need to circulate such a proposal to interested entities for comment prior to the meeting, and the complicated and highly technical nature of the classification issue. The ABA GATS Task Force further concluded that in light of the May 2005 target deadline for “offers,” the priority for the U.S. legal profession should not be the proposed revisions to WTO Document W/120, but working with the USTR as it prepares the U.S. legal services “offer.”

The GATS issues discussed in this article are important to all U.S. states. Even the smallest states in the U.S. export a significant amount and have substantial direct foreign investment. For example, even Rhode Island, which is the smallest U.S. state, exported \$1.2 billion in goods and services in 2003 and had \$3 billion in foreign direct investments in 2002.¹⁶ While some of this business may occur without the involvement of U.S. lawyers, logic suggests that many of these Rhode Island clients—and state citizens—need and want the assistance of U.S. lawyers when selling their goods and services outside of the U.S. Logic also suggests that even without international MJP regulation, there already may be significant activity by foreign lawyers in the U.S. One of the goals of the GATS is to facilitate and regularize this type of international legal services work. International MJP obviously raises important regulatory issues and concerns for U.S. states.¹⁷ But the failure of U.S. states to consider international MJP issues also raises important questions and concerns, such as U.S. clients' possible loss of access to their U.S. lawyers overseas and the possibility that international MJP may occur in the U.S. in an unregulated, rather than a regulated, context.

Because we live in a global economy in which the U.S. federal government negotiates world trade agreements that apply to legal services, the legal profession must learn how to adapt the traditional state regulatory system to this new reality. The August 1, 2004, WTO Decision has put legal services GATS issues back on a fast track. By May 2005, it is important for the U.S. legal profession to stay aware of, and participate in, these GATS developments. 

1. See 71 BAR EXAMINER 2:25 (May 2002), 71 BAR EXAMINER 4:20 (Nov. 2002), 72 BAR EXAMINER 3:27 (Aug. 2003), 73 BAR EXAMINER 1:38 (Feb. 2004), 73 BAR EXAMINER 3:34 (Aug. 2004). These BAR EXAMINER articles are available at the GATS website of the ABA Center for Professional Responsibility; see http://www.abanet.org/cpr/gats/gats_home.html.

2. WTO, Doha Work Programme Decision Adopted by the General Council on 1 Aug. 2004, WT/L/579 (Aug. 2, 2004). This "Decision," together with the other Track 1 WTO documents cited in this article, are available on the "Track 1" page of the ABA GATS Webpage. See http://www.abanet.org/cpr/gats/track_one.html. For information about the suspension of the GATS Track 1 negotiations, see 73 BAR EXAMINER 38, *supra* note 1, at 39, n.8, which offers some explanation of why the negotiations were suspended following the Cancun Ministerial as a result of significant differences about the direction of the Doha negotiations, especially with regard to issues involving agriculture and the so-called "Singapore issues."
3. The GATS uses a "request" and "offer" process. An "offer" tells other countries what access you are prepared to offer to foreign lawyers. For additional information on the request-offer process, see 71 BAR EXAMINER 20 (Nov. 2002), *supra* note 1, and the resources cited there.
4. In June 2002, the U.S. submitted to other WTO Member States its "requests" for liberalization for outbound U.S. lawyers. The contents of these "requests" are confidential, but a summary of the reference paper is available at http://www.abanet.org/cpr/gats/us_request.doc. The U.S. Trade Representative recently asked the ABA and others to advise it of any additional "requests" the U.S. legal profession wanted the USTR to make on its behalf.
5. The legal services portion of the May 2003 U.S. "offer" for foreign lawyers coming to the U.S. did not contain anything new, but repeated the contents of the U.S. 1994 *Schedule of Specific Commitments*. See http://www.abanet.org/cpr/gats/legal_svcs.pdf. Other WTO countries already have "requested" that the U.S. issue a revised "offer" that includes further liberalization of the rules that apply to foreign lawyers coming to the U.S. See http://www.abanet.org/cpr/gats/track_one_requests.html. During the August 2004 Atlanta Summit, some EU bar representatives expressed surprise at the gap between the U.S. "request" for more liberalization and its failure to improve its "offer" regarding legal services.
6. De Amicis is a partner in the Boston office of Ropes & Gray and a former chair of the ABA Section of International Law and Practice.
7. This "Mission Statement" says that the GATS Task Force will endeavor to: "monitor the GATS negotiations and the negotiations of other international trade agreements that involve the United States and the provision of legal services; coordinate the Association's positions on issues relating to the provision of legal services by U.S. lawyers and lawyers from other countries in foreign jurisdictions; advise the United States Trade Representative of existing Association policies relating to these issues and of the Association's position on relevant aspects of the negotiations; develop policy recommendations

for the ABA and take other actions as may be necessary to carry out its mission; assist other Association entities in the implementation of Association policies relating to the multi-jurisdictional practice of law in an international context; educate and engage in outreach to interested entities and individuals relating to the status of the GATS and other international trade agreement negotiations and provide those individuals and entities with a mechanism to provide their input to the Association for consideration and study; and report to the ABA Board of Governors on the status of the GATS negotiations and advocacy efforts undertaken by the task force." The full mission statement will appear on the forthcoming webpage of the ABA GATS Task Force.

8. The jurisdictions that had representatives at the meeting included: California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Texas, and Virginia.
9. The "Atlanta Summit" was coordinated by the leaders of the Transnational Legal Practice Committee of the ABA Section of International Law and Practice. Committee Chair Philip von Mehren assumed the primary responsibility for the "Atlanta Summit." Additional Committee officers who helped plan the "Summit" included Co-Chair Bob Lutz and Committee Vice-Chairs Peter Ehrenhaft, Carole Silver, Cliff Hendel, and Laurel Terry. The Committee worked closely with Don De Amicis, the incoming Chair of the ABA GATS Task Force, and Ken Reisenfeld, the Chair of the ABA Section of International Law.
10. Classification was one of the topics addressed at the IBA GATS Forum held in May 2003 and described in 73 BAR EXAMINER 3:34 (Aug. 2004), *supra* note 1. Classification also has been an important topic of discussion in the meetings of the WTO Friends of Legal Services group. In addition to the WTO discussions, other entities have addressed classification issues. In October 2004, for example, the U.S. Bureau of Labor Statistics sought comments from the ABA about the classification of legal services to use in the proposed 2008 revisions to the North American Product Classification System. The United Nations currently is considering whether to revise its legal services classifications. See Laurel Terry, Materials Submitted to the Technical Subgroup (TSG) of the Expert Group on International Economic and Social Classifications, U.N. Statistics Division (October 18, 2004), available at <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/27-IBA%20documents.pdf>.
11. See World Trade Organization, Services Sectoral Classification List, MTN.GNS/W/120 (10 July 1991) [hereafter W/120].
12. See WTO Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services*, S/L/92 (March 28, 2001) at paragraphs 23-24. A recent WTO panel decision shows the importance of the

language used in a country's Schedule of Specific Commitments. A WTO panel recently issued a 273-page decision indicating that the U.S. had not clearly indicated its intent to exclude gambling services from its 1994 Schedule of Specific Commitments. See WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Panel*, WT/DS285/R (10 Nov. 2004).

13. See the Classification subpage of the ABA GATS Webpage, http://www.abanet.org/cpr/gats/track_one_class.html.
14. See IBA Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations [hereafter IBA "Terminology Resolution"]. For additional information about this "Terminology Resolution," see Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN. STATE INT'L L. REV. 695 (2004).
15. See Email Letter from Bernard L. Greer, Jr., Chair, IBA WTO Working Group to IBA WTO Working Group Members, Dec. 19, 2004 (on file with author).
16. See http://ita.doc.gov/td/industry/otea/state/state_dollar_value_03.html and http://www.bea.doc.gov/bea/di/fdiop/all_gross_ppe.xls.
17. Recommendations 8 and 9 of the ABA Commission on Multijurisdictional Practice were intended to address these issues. For additional information on these recommendations and their relationship to the GATS, see 71 BAR EXAMINER 4:20 (Nov. 2002) and the webpage of the ABA Joint Committee on Lawyer Regulation, available at http://www.abanet.org/cpr/jclr/jclr_home.html.

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