

CURRENT DEVELOPMENTS REGARDING THE GATS AND LEGAL SERVICES: THE SUSPENSION OF THE DOHA ROUND, “DISCIPLINES” DEVELOPMENTS, AND OTHER ISSUES

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The General Agreement on Trade in Services (GATS) was the first world trade agreement to apply to services and includes legal services within its coverage. 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 This update discusses a number of GATS developments that have occurred within the past nine months.

SUSPENSION OF THE DOHA ROUND NEGOTIATIONS

The most important development of the past nine months was the July 24, 2006, suspension of the WTO negotiations known as the Doha Round. The Doha Round negotiations commenced in November 2001 as a result of an agreement reached during the WTO's Fourth Ministerial Conference in Doha, Qatar.² The "services" portion of the Doha Round negotiations built upon the earlier GATS 2000 negotiations. The GATS 2000 negotiations implemented Article XIX of the GATS, which required WTO Members to begin additional negotiations within five years of the GATS entering into force "with a view to achieving a progressively higher level of liberalization."³

Agriculture issues were the primary basis for the suspension of the Doha negotiations. The G-6 countries (Australia, Brazil, India, Japan, the EU, and the U.S.) could not resolve their differences over cuts in farm tariffs or agricultural subsidies.⁴

Some Doha negotiations have now resumed.⁵ But it is not at all clear whether WTO Members will be able to reach an agreement on the key issues before U.S. fast-track trade authority expires at the end of June 2007, or what will happen if WTO Members are not able to reach an agreement by that time.⁶

DEVELOPMENTS RELATED TO GATS TRACK 2 AND THE "DISCIPLINES" ISSUE

Although the suspension of the Doha negotiations undoubtedly was the most important development of the past nine months, there were a number of other important developments related to the GATS Track 2 issues. GATS Track 2 refers to Article VI:4 of the GATS which requires WTO Members to develop "any necessary disciplines."⁷ Disciplines are, in essence, WTO regulations that would apply to those U.S. domestic qualification, licensing, and ethics rules that do not discriminate against foreign lawyers.⁸

In June 2006, the U.S. circulated to other WTO Members a revised proposal for "transparency"

disciplines. This document is available on the Internet although it has not been officially released to the public by the U.S. government.⁹ The four-page U.S. transparency proposal calls for disciplines that would (1) require WTO Members to establish mechanisms to respond to inquiries from interested persons; (2) require WTO Members to publicize laws and regulations related to qualification, licensing, and technical standards, and (3) encourage WTO Members, to the extent practicable, to ensure transparency in the regulation of services subject to licensure. The latter point included a “prior comment” provision that has been quite controversial.¹⁰

The second important disciplines development during the past nine months was the July 2006 paper that was issued by the Chair of the WTO Working Party on Domestic Regulation. This *Consolidated Working Paper on Disciplines* is a useful document because it summarizes the disciplines proposals that have been circulated within the WTO and identifies some of the “disciplines” debates among WTO Members. This paper is not a public document but has been leaked and is available on the Internet.¹¹ The U.S. government circulated a response to this paper that makes clear the U.S. preference to have any disciplines limited to the issue of transparency rather than addressing domestic regulation issues involving qualification or licensing.¹²

The third important disciplines development during the past nine months was the ABA’s adoption of an official policy position regarding the GATS Track 2 “disciplines” issues. During its August 2006 Annual Meeting, the ABA unanimously adopted a GATS disciplines resolution that was jointly supported by a number of ABA entities, including the Standing Committee on Professional Discipline, the Task Force on GATS Legal Services Negotiations, the

Section of International Law, and the Standing Committee on Client Protection, as well as the National Organization of Bar Counsel.¹³ The resolution, which gives the ABA a policy basis upon which it can provide comments to the Office of the U.S. Trade Representative, consists of two paragraphs that state that the ABA:

- supports the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of “any necessary disciplines” to be applicable to service providers; and
- supports the U.S. Trade Representative’s participation in the development of additional disciplines on domestic regulation that are: (a) “necessary” within the meaning of Article VI (4) of the GATS; and (b) do not unreasonably impinge on the regulatory authority of the states’ highest courts of appellate jurisdiction over the legal profession in the United States.

The resolution represents efforts to balance “inbound” and “outbound” interests; “inbound” interests are those related to foreign lawyers inbound to the U.S. and “outbound” interests are those related to U.S. lawyers and firms interested in providing legal services in other countries.

In light of the first item reported above—the suspension and unclear future of the Doha negotiations—one might wonder whether it is a waste of time to learn about these recent disciplines developments. In my view, it is not a waste of time and it would be a mistake for the U.S. legal community to use the Doha Round’s difficulties as a reason to ignore the disciplines issue and these three

disciplines developments. Even if the Doha negotiations to *further* liberalize countries' GATS commitments fail, this failure would not invalidate the GATS itself or WTO Members' 1994 commitments. The 1994 GATS agreement includes a disciplines-like provision that applies if WTO Members fail to adopt any disciplines at all.¹⁴ Thus, regardless of the success of the Doha negotiations, it is useful for the U.S. legal community to continue to think carefully about the disciplines issue. Moreover, it is unlikely that the disciplines issue will disappear since the disciplines issues continue to be under discussion at the WTO (e.g., a number of countries, including India, Brazil, and Chile, are pressing hard for disciplines related to qualification and licensing issues) and since domestic regulation issues may arise in the context of bilateral free trade agreement.¹⁵

OTHER RECENT DEVELOPMENTS

There have been a number of other developments in the past nine months that are worth noting. These developments include the following:

- In December 2005 in Hong Kong, WTO Members had agreed that they would try a new procedure in which some WTO Members would join together to prepare plurilateral or "collective" requests.¹⁶ The U.S. was one of a number of countries that joined in (and also received) the resulting February 2006 "Legal Services Collective Requests."¹⁷ This document provides a useful blueprint to show the type of legal services liberalization sought by many countries.
- In May 2006, Australian and U.S. government and legal profession representatives held a meeting pursuant to the Annex on Professional Services contained in the U.S.-Australia Free Trade Agreement. This Professional Services

Annex requires the U.S. and Australian governments to encourage their relevant bodies to develop mutually acceptable standards and criteria for the licensing and certification of professional services suppliers.¹⁸ After the May 2006 meeting, the Conference of Chief Justices (CCJ) invited Australian representatives to attend the CCJ's 2006 Annual Meeting.

- During its August 2006 Annual Meeting, the ABA coordinated an Asian Summit and a third summit with the CCBE. These summits addressed a wide range of topics, including lawyer discipline cooperation, possible mutual recognition initiatives, and other issues related to global multijurisdictional practice. Those attending the summits included representatives from the ABA, state bars, the CCJ, the NOBC, NCBE, and other law-related organizations.
- In August 2006, the ABA passed a revised version of its Model Foreign Legal Consultant Rule.¹⁹ The ABA Section of Legal Education and Admissions to the Bar sponsored the amendments, which were based in large part on recommendations that came from the experiences of state bar admission authorities who administered FLC rules.
- In August 2006, the Conference of Chief Justices adopted a resolution regarding foreign legal consultant rules. Resolution 4 urges the highest court of each state, if it has not already done so, to consider adopting a rule permitting the licensing and practice of foreign legal consultants.²⁰
- The Office of the USTR currently is negotiating a number of bilateral trade agreements, many

of which include legal services within their coverage.²¹

In September 2006, during the International Bar Association annual meeting, U.S. lawyers and regulators participated in panel discussions about the GATS and about international lawyer discipline cooperation (and whether Rule 22 of the Model Rules for Disciplinary Enforcement might serve as a model). During that same meeting, IBA Members discussed a possible new GATS resolution that would encourage countries to provide increased GATS market access commitments, but acknowledges their right to condition such market access on “skills transfer” requirements, including the transfer that takes place in the context of partnering with or employing foreign lawyers.

Finally, it is worth noting that several state governors recently have sent letters to the U.S. Trade Representative requesting that their states not be included within the GATS or other international trade agreements.²²

As this brief summary shows, there have been significant GATS developments within the past nine months. Once again, I recommend that U.S. bar admission authorities, bar associations, and lawyers follow these developments closely. 

ENDNOTES

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), 75 BAR EXAMINER 1:43 (Feb. 2005); 75 BAR EXAMINER 1:26 (Feb. 2006). These BAR EXAMINER articles are available on the “articles” page of the GATS website of the ABA Center for Professional Responsibility, which is located at <http://www.abanet.org/cpr/gats/articles.html> (last visited Jan. 12, 2006).

2. See Laurel S. Terry, *GATS, Legal Services and Bar Examiners: Why Should You Care?*, 71 BAR EXAMINER 25, 27-28 (May 2002).
3. The General Agreement on Trade in Services (GATS) is Annex 1b to the Agreement Creating the World Trade Organization, 33 ILM 1125, 1168 (1994), http://www.abanet.org/cpr/gats/gats_agreement.pdf.
4. See, e.g., Daniel Pruzin, *Diplomats Turn to Quiet Diplomacy at WTO While Doha Talks Remain in the Doldrums*, 23 INT'L TRADE REP. 1390 (Sept. 28, 2006).
5. In November 2006, WTO Director-General Pascal Lamy convened an informal meeting of the WTO Trade Negotiations Committee stating that he did so “in the light of the signals I had received in my contacts with officials at every level, of a growing and widely-shared desire to make the most of every opportunity to lay the foundations for further progress.” See WTO NEWS ITEMS, Dec. 14-15, 2006, http://www.wto.org/english/news_e/news06_e/tnc_chair_report_14dec06_e.htm. On December 14, 2006, he reported “an increasing level of engagement.” *Id.*
6. For reports about the status and likely success of the negotiations, see the current and archived news reports in ICTAD, *Bridges Weekly Trade News Digest*, <http://www.ictsd.org/weekly/archive.htm>. For information about the relationship of U.S. fast-track trade promotion authority and the Doha negotiations, see, *id.* and Press Briefing with Deputy U.S. Trade Representative Peter F. Allgeier on the Doha Development Agenda (Feb. 16, 2005)(question to the Deputy USTR stated that the Doha 2006 deadline had been largely dictated by the fact that U.S. fast track negotiating authority ends in at the end of June 2007); Trade Adjustment Assistance Reform Act of 2002, P.L. 107-210 (Aug. 6, 2002) at §2103, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ210.107.pdf codified in 19 USC § 3803.
7. For additional information about the GATS Track 2 disciplines issue, see Laurel S. Terry, *Further Developments Regarding the GATS and Legal Services: Extending the Accountancy Disciplines to Lawyers*, 73 BAR EXAMINER 3:34 (Aug. 2004)
8. Rules that apply only to foreign lawyers are not subject to Article VI:4 disciplines but are addressed in a country’s *Schedule of Specific Commitments*. For more help in determining the scope of application for Article VI:4, see Laurel S. Terry, *But What Will the Accountancy Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 Symposium, *Professional Lawyer* 83 (2004), available at http://www.abanet.org/cpr/gats/terry_symp_iss_2003.pdf.
9. See *Communication From the United States: Horizontal Transparency Disciplines in Domestic Regulation*, JOB(06)/182 (9 June 2006), <http://www.tradeobservatory.org/library.cfm?refID=88214>.
10. See ICTSD, *Some Members Call For Greater Focus on Services, As Talks Resume in Geneva*, 11 BRIDGES WEEKLY (Jan. 24, 2007), <http://www.ictsd.org/weekly/07-01-24/story2.htm>.

11. Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Consolidated Working Paper, Note by the Chairman (Job (06)/225)(July 2006), <http://www.tradeobservatory.org/library.cfm?refID=88479> (reportedly a July 18 version) [hereinafter "July 2006 Consolidated Paper on Disciplines]. There are several different versions of this document available on the Internet, but they are difficult to distinguish because the documents that are posted are undated. *See also* <http://www.tradeobservatory.org/library.cfm?refID=88415> (reportedly a July 12 version).
12. Communication from the U.S.: Outline of U.S. Position on a Draft Consolidated Text in the WPDR, Job 06/223 (July 11, 2006), <http://www.tradeobservatory.org/library.cfm?refID=88410>.
13. American Bar Association Standing Committee on Professional Discipline, Task Force on Gats Legal Services Negotiations, Section of International Law, Standing Committee on Client Protection, National Organization of Bar Counsel, Recommendation 105 (August 2006), <http://www.abanet.org/leadership/2006/annual/onehundred-five.doc>.
14. GATS Article V states:
 - (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); and
 - (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 organizations[footnote] applied by that Member.

The U.S., along with approximately 45 other countries, has placed legal services on its Schedule of Specific Commitments and is thus subject to GATS Article VI:5.
15. *See* 11 BRIDGES WEEKLY (Jan. 24, 2007), *supra* note 10. *See* the ABA GATS Track 2 webpage for links to the disciplines proposals from other WTO Members, http://www.abanet.org/cpr/gats/track_two.html.
16. *See* 75 BAR EXAMINER 26, 28 (Feb. 2006).
17. Australia, Canada, the EC, Japan, New Zealand, Norway, and the USA, Collective Requests: Legal Services (Feb. 2006), <http://www.tradeobservatory.org/library.cfm?refID=78740>.
18. *See* Annex 10-A to the U.S.-Australia Free Trade Agreement, at ¶1, p. 10-9, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file927_5153.pdf.
19. American Bar Association Section of Legal Education and Admissions to the Bar, Report to the House of Delegates, Report 301 Recommending Revisions to the Model Rule for the Licensing and Practice of Foreign Legal Consultants (August 2006), <http://www.abanet.org/leadership/2006/annual/threehundredone.doc>.
20. Conference of Chief Justices, Resolution 4 Regarding Adoption of Rules on the Licensing and Practice of Foreign Legal Consultants (Adopted as proposed by the CCJ International Agreements Committee and the CCJ Professionalism and Competence of the Bar Committee at the 58th Annual Meeting on August 2, 2006), <http://ccj.ncsc.dni.us/InternationalResolutions/resol4ForeignLegalConsultants.html>.
21. *See* ABA GATS Other International Agreements Webpage <http://www.abanet.org/cpr/gats/fta.html> (ongoing negotiations with Panama, among others); *see also* Office of the U.S. Trade Representative, Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (listing completed and pending FTAs).
22. *See, e.g.*, Letter from Theodore Kulongoski, Oregon Governor, to the U.S. trade Representative (Marcy 17, 2006), [http://www.citizen.org/documents/kulongoski_to_portman_031706_final\[1\].pdf](http://www.citizen.org/documents/kulongoski_to_portman_031706_final[1].pdf); Letter from John Baldacci, Maine Governor, to the U.S. trade Representative (April 5, 2006), http://www.citizen.org/documents/baldacci_letter_portman_040506.pdf; Letter from Thomas Vilsack, Iowa Governor, to U.S. Trade Representative (May 19, 2006), <http://www.citizen.org/documents/IowaGovltr051906.pdf>; Letter from Jennifer Granholm, Michigan Governor, to U.S. Trade Representative (June 22, 2006), http://www.citizen.org/documents/GOV-GRANHOLM-GATS_062206.pdf.



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