

LATEST DEVELOPMENTS REGARDING THE GATS AND LEGAL SERVICES

by *Laurel S. Terry*

This is the third in a series of articles about current developments concerning the General Agreement on Trade in Services (GATS) and 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 previous BAR EXAMINER articles.¹

Some of the developments concerning the GATS and legal services that have occurred since the last article about the GATS appearing in *THE BAR EXAMINER* include legal services “offers” by some WTO Member States; an increased awareness of, and response to, the GATS by various U.S. legal professionals; and the International Bar Association’s GATS Forum. This article will discuss each of these developments in turn.

SUBMISSION OF THE “INITIAL OFFERS” CONCERNING LEGAL SERVICES

As the prior *BAR EXAMINER* articles mentioned, the 1994 GATS agreement required WTO Member States to begin negotiations for further liberalization within five years. In November 2001, in the Doha Ministerial Declaration (signed in Doha, Qatar), WTO Member States agreed to a timetable for these new negotiations. According to the Doha Declaration, WTO Members agreed to submit their initial negotiation “requests” to other countries by June 30,

2002, to submit their initial “offers” (the responses to the “requests”) by March 31, 2003, and to conclude the negotiations by January 1, 2005.

A number of WTO Member States submitted their “offers” on or around March 31, 2003. Many (and perhaps all) of these “initial offers” have been made public. For example, the U.S. offer is available on the website of the Office of the U.S. Trade Representative (USTR). The European Union also has published its offer on its website.

The transparency of these “initial offers” stands in contrast to the manner in which some (and perhaps all) WTO Member States treated their “initial requests.” Both the U.S. and the European Union, for example, treated their requests as confidential government-to-government documents. As a previous *BAR EXAMINER* article noted, this confidential treatment made it difficult for U.S. states to formulate their responses to these requests for changes in their foreign lawyer rules since the states did not know the substance of these requests.

Because the U.S. offer is public, however, we know that the U.S. has not yet offered to make any changes to U.S. state laws concerning foreign lawyers. The U.S. offer that is posted on the USTR website is identical to the promises included in its 1994 "Schedule of Specific Commitments."

The failure to submit any proposed changes in state laws by March 31, 2003, probably can be attributed to the retirements in the USTR office of those responsible for legal services and the difficulty of coordinating a federal trade offer for a profession that has been traditionally regulated by the states. It is quite possible, however, that in the future the U.S. will submit another offer that includes changes to the legal services portion of the U.S. Schedule of Specific Commitments. The USTR has contacted the supreme courts of those states that have adopted foreign legal consultant (FLC) rules subsequent to the preparation of the 1994 U.S. Schedule of Specific Commitments. The USTR has asked these states whether they are willing to have their FLC rules included in the U.S. offer.

Although the U.S. offer has not yet included changes for legal services, other countries have proposed changes to their rules for regulating foreign lawyers. Both the European Union and Japan, for example, have submitted offers that include changes in the "legal services" portions of their Schedules of Specific Commitments. Those who are interested in the rights of outbound U.S. lawyers in specific countries can look for these offers on the respective countries' GATS websites or on the WTO website.

INCREASED U.S. AWARENESS OF THE GATS AND LEGAL SERVICES

During the past few months, there have been significant developments that will increase U.S. awareness

of the GATS and its effect on legal services, and facilitate communication among the federal government and the states on these issues. Most notably, the USTR has decided to reconstitute and broaden the Inter-Governmental Policy Advisory Committee (IGPAC) to include all branches of state and local government. It is possible that representatives from the Conference of Chief Justices (CCJ) will be added to this group.

These developments follow a January 2003 presentation to the CCJ about the GATS and the subsequent decision by the CCJ to create an "International Agreements" committee, whose mandate includes monitoring GATS developments. The co-chairs of the CCJ International Agreements Committee are Chief Justice Linda Copple Trout of Idaho and Chief Justice Margaret H. Marshall of Massachusetts. Additional members include Chief Justices Jeffrey Amestoy of Vermont, Harry Lee Anstead of Florida, and Charles E. Jones of Arizona.

The USTR also has agreed to share information on legal services developments with various legal organizations. These include the American Bar Association, the Conference of Chief Justices, the National Conference of Bar Examiners, the National Organization of Bar Counsel, the National Association of Attorneys General and the Association of American Law Schools.

The American Bar Association also has taken significant steps to increase awareness of the GATS and legal services. In March 2003, the ABA Center for Professional Responsibility launched a new webpage devoted to the GATS and legal services. ABA President A.P. Carleton recently appointed a new GATS Task Force. The members of that task force include representatives from the Sections of Litigation (David Rivkin), Business Law (Dennis

Lehr), Administrative Law and Regulatory Practice (Lindsay Meyer), International Law and Practice (Philip von Mehren), Legal Education and Admissions to the Bar (Hon. Elizabeth Lacy), the National Conference of Bar Examiners (Alice Richmond), and liaisons from the ABA Board of Governors (Carolyn Lamm) and the ABA Center for Professional Responsibility (Laurel Terry and Seth Rosner). The Task Force also includes A. Stephens Clay, and, as a liaison, the USTR ISAC-13 Representative, Peter Ehrenhaft. ISAC-13 is a statutorily mandated private industry-consultation group that provides advice to the USTR. Peter Ehrenhaft holds the “legal services” seat on ISAC-13.

In addition to these developments, there have been a number of other efforts to increase awareness of the current developments concerning the GATS and legal services. Both the electronic and print versions of the ABA JOURNAL recently published short articles on the GATS and legal services. The topic of the GATS and legal services has been featured at several recent conferences, including the August 2003 ABA Annual Meeting, the August 2003 Annual Meeting of the National Conference of Bar Counsel, and the 29th National Conference on Professional Responsibility. In short, since the most recent BAR EXAMINER article appeared, there has been a significant increase in the awareness of the GATS and its effect on legal services.

THE IBA GATS FORUM

Another recent noteworthy event is the May 30, 2003, GATS Forum sponsored by the International Bar Association, or IBA. In February 2003, the IBA circulated to its member bars two “discussion papers” related to the GATS. IBA member bars were invited to submit comments and alternative proposals, which were then circulated before the GATS

Forum. The purpose of the IBA GATS Forum was to develop a consensus within the IBA on the two issues that were the subject of the discussion papers.

The first issue the IBA GATS Forum considered was the terminology or “classifications” that countries should use when submitting legal services “offers.” The IBA GATS Forum considered three alternative classification systems—the existing system, which is based on classifications developed in the U.N., and alternatives proposed by Australia (and Japan) and the European Union. Those attending the GATS Forum voted in favor of the Australian/Japanese classification system, with certain modifications.

The second issue the IBA GATS Forum considered was what changes, if any, would be required in order to apply to the legal profession a document entitled “Disciplines for Domestic Regulation in the Accountancy Sector.” GATS Forum attendees were asked to consider several specific language changes to the Accountancy Sector Disciplines. The GATS Forum attendees voted in favor of some, but not all, of the proposed changes.

Following the May 30, 2003, GATS Forum, members of the IBA WTO Task Force prepared draft resolutions for consideration by the IBA Council. These resolutions (and accompanying supporting material) are scheduled to be voted upon by the IBA Council at their annual meeting in September 2003 in San Francisco. If the IBA adopts these resolutions, they will be transmitted to the WTO Secretariat (and will be discussed in an upcoming article).

As this brief summary shows, events concerning the GATS and legal services continue to unfold slowly but surely. For the bar admissions community, and the entire legal community, the GATS developments with respect to legal services bear watching.

ENDNOTES

1. 71 BAR EXAMINER 2:25 (May 2002), 71 BAR EXAMINER 4:20 (Nov. 2002).
2. **See** http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf.
3. **See** <http://www.esf.be/pdf/EU%20Initial%20Offer%20-%20290403.pdf>.
4. In my prior article, I encouraged lawyer regulators to contact the USTR's "point-of-contact" person for their state. I know that the regulators in at least one state—Georgia—did so and obtained access to the confidential "requests" for changes to Georgia's foreign lawyer rules.
5. The USTR website indicates that any changes in the U.S. Schedule of Specific Commitments are indicated by special fonts. **See** note 1, *supra*. The posted "offer" does not indicate any changes in the legal services portion of the schedule. I have not independently done a line-by-line comparison of the U.S. offer to verify the lack of changes.
6. **See** http://www.dfat.gov.au/trade/negotiations/gats_initial_offer_explnotes.html (Australia) and <http://www.mofa.go.jp/policy/economy/wto/submit0304-c.html> (Japan) and http://www.wto.org/english/tratop_e/serv_e/s_prop-newnegs_e.htm (the WTO).
7. **See** http://www.abanet.org/cpr/gats/gats_home.html.



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Terry currently is Vice-Chair of the Transnational Legal Practice Committee of the ABA Section of International Law; she also serves on the International Bar Association's WTO Committee and the Committee on Cross Border Legal Practice issues. Terry was the principal drafter of the International Bar Association's **GATS Handbook** and served as an ABA observer at the 1998 Paris Forum on Transnational Practice for the Legal Profession.

A graduate of the University of California, San Diego (Phi Beta Kappa) and the UCLA School of Law (Order of the Coif), Terry clerked for the U.S. Court of Appeals for the Ninth Circuit. She is a past member of the Executive Committee of the Association of American Law Schools' Section on Professional Responsibility.