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Ms. Gloria Blue  
Executive Secretary  
Trade Policy Staff Committee  
600 17th Street, NW  
Washington, D.C.20508  
By Email

RE: **Legal Services Sector and the Doha  
Development Agenda: Response to 67  
Federal Register 59086 (September 19,  
2002)**

Dear Ms. Blue:

I have submitted these comments in response to the Federal Register Notice of September 19, 2002, *Request for Comments and Notice of Public Hearing Concerning Market Access in the Doha Development Agenda Negotiations in the World Trade Organization (WTO)*, 67 Fed. Reg. 59086 (Sept. 19, 2002). These comments address the **legal services sector**.

## **I. Introduction - My Background**

Although I have significant experience in issues related to global legal practice, the views expressed in this letter are my own views and do not necessarily represent the views of the Pennsylvania State University or any of the organizations with which I am affiliated. In the interests of full disclosure, however, I would note that I am Vice-Chair of the Transnational Legal Practice Committee of the American Bar Association (ABA) Section of International Law and Practice. I recently was appointed a member of the ABA Joint Committee on Lawyer Regulation, whose mission includes efforts to implement the recommendations of the ABA Commission on Multijurisdictional Practice. Recommendations 8 and 9, which were adopted as ABA policy in August 2002, address the issues of temporary and permanent practice by foreign lawyers in the U.S. I am a member of the WTO Working Group of the International Bar Association and was the principal drafter of *GATS: A Handbook for International Bar Association Member Bars*, a publication that addresses the application of the GATS and Doha Round to legal services. I also teach a course on *Global Legal Regulation* and have reached a tentative agreement with the ABA Section of International Law and Practice to publish during

Summer 2003, my compilation of *Global Legal Practice* provisions.

The subjects addressed in this testimony include:

- 1) identification of the issues relevant to legal services;
- 2) comments about the consultation process that has been used to date and recommendations for future consultations with the U.S. legal profession; and
- 3) specific issues about which the USTR should solicit additional consultation from the U.S. legal profession.

## **II. Identification of the Issues Relevant to Legal Services**

The September 19, 2002 Federal Register notice requested comments on the Doha Development Agenda negotiations concerning both goods and services. Trying to master the issues for all goods and services is obviously a daunting task for U.S. negotiators. Because I have a special interest in legal services, I thought it might be useful if I identified those issues in the Doha Development Agenda negotiations that I consider relevant to legal services.

I have identified six different ideas relevant to legal services that are implicated by the Federal Register notice. These issues include:

- 1) the US negotiating position on "inbound" foreign lawyers to the US;
- 2) the US negotiating position on "outbound" US lawyers who want to export their services to other countries;
- 3) "track 2" of the GATS, which is the proposed horizontal discipline on domestic regulation. (Some predict that this may end up being the most important GATS development of them all and the one most likely to affect state regulation of legal services);
- 4) the definition of legal services to be used in the ongoing round of WTO negotiations and whether to accept Australia's proposed definition of legal services, which is found in WTO document S/CSS/W/67/Suppl. 2 and S/CSC/W/32 (March 11, 2002);
- 5) comments on the negotiating procedures to use for the ongoing round of negotiations; and
- 6) whether to use Mode 3 or Mode 4 to "schedule" market access and national

treatment provisions that affect foreign lawyers who are established and work in the branch office of a law firm in a Host State.

In my view, the six issues above are the issues on which the USTR should concentrate with respect to legal services. Furthermore, in my view, these six issues are equally important and all deserve appropriate attention.

### **III. Consultations with the U.S. Legal Profession about the GATS Negotiations**

#### **A. The GATS is Relatively Unknown Within the U.S. Legal Profession**

In my experience, the U.S. legal profession has a relatively low level of awareness about the GATS. Lawyers who practice trade law are, of course, aware of the GATS and the fact that it applies to the legal services sector. Except for trade law lawyers, however, most U.S. lawyers and regulators seem to be unaware of the current WTO negotiations and unaware of the fact that the GATS applies to the legal services sector. I have found that this lack of awareness exists with respect to issues related to both "outbound" U.S. lawyers and "inbound" foreign lawyers. For example, U.S. lawyers who practice in law firms that might be interested in a lowering of barriers for "outbound" U.S. lawyers often are unaware of the GATS' application to legal services or know very little about it. I have similarly found a general lack of awareness about the GATS among lawyers, judges and regulators who develop and enforce the regulatory provisions that apply to foreign lawyers (including market access, domestic regulation and national treatment provisions).

#### **B. U.S. Legal Profession Organizations Have Only Recently Commented on Issues Relevant to the Legal Services Sector**

Federal law requires the U.S. government to consult with private-sector advisory committees as it develops U.S. negotiating proposals. "ISAC-13" is the name of the Industry Sector Advisory Committee that includes the legal services sector within its mandate. Currently, one position on ISAC-13 is designated for a representative of legal services; that representative is Peter Ehrenhaft.

While this consultation is desirable, I believe it would be even more desirable to have broader information distribution and broader consultations by the USTR with individual U.S. lawyers and various U.S. legal profession organizations. From my perspective, legal profession organizations in the U.S. have been relatively slow to provide commentary to the USTR on issues related to the legal services sector. For example, in July 1999 (*see* S/WPDR/M/2), WTO Member States agreed to consult with domestic professional associations in their countries concerning the potential applicability to those professions of the *Disciplines for the Accountancy Sector*, S/L/63 (Dec. 14, 1998). To my knowledge, the USTR has not yet received any comments from any U.S. bar association or legal profession organization concerning the

desirability of applying to the legal profession the *Disciplines for the Accountancy Sector*.

The lack of feedback by U.S. bar organizations stands in contrast to the situation in Canada. Both the *Canadian Bar Association* and the *Federation of Law Societies of Canada* have prepared extensive analyses of the *Disciplines* from the perspective of their applicability to the Canadian legal profession. (These reports are found at <http://www.cba.org/cba/submissions/pdf/00%2D30%2Deng.pdf> and <http://www.flsc.ca/en/pdf/2001wtoreport.pdf>.) The Canadian Bar Association has sponsored, for several years, a website in which it explains the GATS' applicability to legal services and solicits questions from its members. See, e.g., *Canadian Bar Association, EPIIGRAM (Emerging Professional Issues Initiative), Update, Multi-Disciplinary Practice and World Trade Organization, November 2000*, available at <http://www.cba.org/CBA/EPIIgram/November2000/default.asp> and *WTO Negotiations, February 2000* available at <http://www.cba.org/EPIIgram/February2000/>.

Although U.S. legal profession organizations have not yet commented on the *Disciplines for the Accountancy Sector*, they have recently begun to comment on other aspects of the current negotiations. In February 2002, the ABA adopted a resolution that addressed the U.S. negotiating position with respect to "outbound" U.S. lawyers. In August 2002, the ABA adopted two recommendations that address the issue of "inbound" foreign lawyers. I understand that all of these recommendations either have been or soon will be transmitted to the USTR. The New York Bar and the Association of the Bar of New York City also have adopted recommendations concerning the GATS and legal services. The National Organization of Bar Counsel also has submitted comments to the USTR concerning "inbound" foreign lawyers. Until these recent developments, the primary commentator with respect to legal services was the Coalition of Service Industries, or CSI, which is particularly interested in issues related to "outbound" U.S. lawyers. In sum, U.S. lawyers and legal profession organizations have only recently begun to comment extensively on the GATS negotiations for the legal services sector.

**C. Increased Consultation With the U.S. Legal Profession Would be Beneficial**

In my view, the recent commentary about the GATS by the U.S. legal profession is a positive development. First, I believe it is appropriate for the USTR to hear from as broad a constituency as possible as it develops U.S. trade policies concerning the legal services sector. Second, I believe that U.S. trade policies concerning the legal services sector will be more widely accepted if they result from a national dialogue and consensus-building process within the bar. Because I believe that increased commentary by individual lawyers and U.S. legal profession organizations is useful, I would encourage the USTR to make every effort possible to facilitate broad consultations with U.S. lawyers and legal profession organizations.

**D. The USTR Should Take Advantage of Existing Infrastructures in Order to Promote Consultations With U.S. Lawyers and Legal Profession**

### **Organizations**

I urge the USTR to take advantage of the existing infrastructures in order to promote increased consultations with U.S. lawyers and legal profession organizations concerning the GATS and the legal services sector. As noted above, I believe that increased consultations would be beneficial. However, given the staffing level at the USTR, it does not seem reasonable to expect the USTR to take the initiative in soliciting consultations for all goods and services sectors. Thus, I recommend that the USTR consider low-effort means to communicate with existing infrastructures in an effort to facilitate more extensive consultations. I have provided below some concrete suggestions the USTR might consider.

As a preliminary matter, however, let me note that prior experience has shown that U.S. lawyers are willing to participate in important national policy discussions concerning the legal services sector. One recent example of extensive consultations with U.S. lawyers is the "Ethics 2000" project sponsored by the ABA. In 1997, the ABA established a commission to reevaluate the validity of the ABA's set of model legal ethics rules. *See Homepage, Commission for the Evaluation of the Rules of Professional Conduct [the Ethics 2000 Commission]* available at <http://www.abanet.org/cpr/ethics2k.html>. The Ethics 2000 Commission was chaired by the Chief Justice of the Delaware Supreme Court and included approximately 13 lawyers and judges and two liaisons. The Ethics 2000 Commission established an excellent website through which it publicized the Commission's proposed rule changes and solicited comments. The website included written and oral testimony of those who appeared before the Ethics 2000 Commission; suggested rule changes; and the minutes of the Commission's meetings. In my view, the Ethics 2000 Commission webpage created a superb national "public forum" for discussion of important regulatory and ethics issues. The Ethics 2000 Commission heard from a large and diverse group of individuals and the Commission's policies evolved in response to the comments it received. In short, the Ethics 2000 experience demonstrates that the U.S. legal profession is willing to engage in important national policy discussions if a suitable forum is available.

Thus, I urge the USTR to make efforts to ensure broad consultation within the U.S. legal profession concerning the GATS and the legal services sector by taking advantage of existing infrastructures for facilitating such discussions.

#### **E. Some Suggestions to Facilitate Increased Consultations with the U.S. Legal Profession**

Many organizations exist that could help facilitate communication with the U.S. legal profession concerning the ongoing GATS negotiations. In this section, I recommend two entities with which the USTR might work in order to facilitate greater consultation. I do not intend this list to be exhaustive.

## **1. The ABA Center for Professional Responsibility**

First, I recommend that the USTR encourage and assist the ABA Center for Professional Responsibility to act as a conduit for information about the GATS negotiations as they apply to the legal services sector. In particular, I think it would be appropriate for the USTR to encourage the ABA Center for Professional Responsibility to establish a website about the GATS and legal services. The ABA Center for Professional Responsibility hosted the Ethics 2000 Commission's website. The ABA Center for Professional Responsibility also hosted the websites of the ABA Commission on Multidisciplinary Practice and the ABA Commission on Multijurisdictional Practice. All of these websites facilitated extensive policy discussions within the U.S. legal profession concerning important issues. See links from the ABA Center for Professional Responsibility webpage, available at <http://www.abanet.org/cpr/home.html>.

The ABA Center for Professional Responsibility previously has not monitored the GATS negotiations or their application to the legal services sector. However, I believe that the ABA Center for Professional Responsibility would now be willing to facilitate communication and consultations concerning the GATS in light of the ABA's August 2002 adoption of the recommendations of the ABA Commission on Multijurisdictional Practice. Because the ABA represents approximately 50% of the lawyers in the U.S. and because there is no other organization with greater representation, I believe that it is appropriate for the USTR to work with the ABA to develop such a website. In my view, the ABA Center for Professional Responsibility has the staffing levels and expertise that might permit it to host such a webpage.

Such a webpage would be extremely useful and would serve a role comparable to that served by the professional services webpage of the Government of Canada. See <http://strategis.ic.gc.ca/SSG/sk00052e.html>. Among other things, the Canadian Government webpage collects the relevant WTO documents concerning legal services, consultations with Canadian legal profession organizations, and legal services negotiating proposals from other countries.

The USTR could promote increased consultation with the legal profession by sharing electronic copies of appropriate documents with the ABA Center for Professional Responsibility. For example, there often is a time lag between the issuance of non-restricted documents and their appearance on the WTO website. For example, as of October 11, 2002, the most recent minutes of the Working Party on Domestic Regulation that were available on the WTO website were the minutes from the November 29, 2001 meeting. (Three additional sets of minutes have been added to the WTO website since October 11, 2002.) It would be extremely useful if the USTR could send to the ABA Center for Professional Responsibility electronic copies of the minutes of the Working Party on Domestic Regulation and the Council on Special Services.

The USTR could also use the existing ABA infrastructure to publicize its current

consultation efforts. For example, although I am interested in the topic of GATS and legal services, I have had great difficulty locating information about the public portion of the ISAC-13 meetings. If there is an agenda that is publicly-available or if there are minutes of the public-portion of the meeting, it would be helpful to share that information with the U.S. legal community. Moreover, an ABA website could provide a forum through which the USTR could solicit additional opinions and information.

Finally, because the ABA Center for Professional Responsibility often serves as a coordinator of information concerning the U.S. legal profession, the ABA Center could help the USTR identify individuals in each state who would know whether the *U.S. Schedule of Specific Commitments* accurately reflects the current U.S. state regulations concerning lawyers. For all of the above reasons, I recommend that the USTR encourage and assist the ABA Center for Professional Responsibility to act as a conduit for information about the GATS negotiations as they apply to the legal services sector

## **2. The Conference of Chief Justices**

The Conference of Chief Justices is another organization with which I recommend the USTR regularly communicate. Because of the constitutional doctrine of “separation of powers,” in most U.S. states it is the state supreme court that ultimately will act on any “requests” from WTO Member States directed toward legal services. Accordingly, I recommend that the USTR add the Conference of Chief Justices to the organizations with whom it regularly communicates.

I recently have been trying to research what “requests” - if any - were submitted to the U.S. from foreign countries concerning legal services. The Doha Ministerial Declaration adopted on 14 November, 2002 (WT/MIN(01)/Dec. 1 (20 Nov. 2001) specified June 30, 2002 as the date upon which initial “requests” were to be submitted. In the course of my research, I contacted someone from the state “point of contact” lists maintained on the webpage of the USTR Office of Intergovernmental Affairs and Public Liaison. See <http://www.ustr.gov/outreach/index.shtml>. One of the things that became clear to me from this conversation was that some (and perhaps most) state liaisons have no need to regularly communicate trade requests with the state supreme court and thus have no established mechanism for doing so.

In my view, the USTR should consider it useful to have the U.S. state supreme courts consider (and perhaps even adopt) the legal services “requests” that the U.S. has received from other WTO Member States. In order to ensure that the state supreme courts receive proper and timely notice of any Doha “requests,” I recommend that Conference of Chief Justices be added to the organizations with which the USTR Office of Intergovernmental Affairs and Public Liaison regularly communicates. The contact information for the Conference of Chief Justices is found at <http://ccj.ncsc.dni.us/>.

### **3. Increased Communication Concerning the “Requests” Received by the USTR Concerning Legal Services**

As noted above, I have found it difficult to locate information about any “requests” directed toward legal services received by the U.S. from other WTO Member States. Although the specific content of the “requests” may be confidential, I would urge the USTR to share (or permit the ISAC-13 representative to share) as much detail as possible about these “requests” and to do so as soon as possible. By way of comparison, I would point out that the British Minister for Trade and Investment, Elizabeth Symons, recently issued a consultation document that included legal services. Pages 12-15 addressed the legal services sector and summarized the “requests” that had been received. If the USTR could prepare or authorize preparation of a similar document, it would be enormously useful to those who will be responding and commenting on these “requests.”

### **IV. Substantive Issues about Which the USTR Should Particularly Solicit Comments**

As noted above, I have identified six issues relevant to legal services in the current negotiations. At this point, I would urge the USTR to particularly solicit comments from the legal profession on two substantive issues. The first issue concerns the definition of legal services to be used during the current negotiations. In March 2002, Australia proposed a definition of legal services for the negotiations. This definition is found in WTO document S/CSS/W/67/Suppl. 2 and S/CSC/W/32 (March 11, 2002).

To my knowledge, the USTR has received little or no comment about the suitability of this definition. It may be worthwhile, however, for the USTR to specifically request comments on this issue. For example, I recently circulated this proposed definition to several list serves in which I participate. One of the comments I received in response was whether items (i) and (j) applied only to lawyers who represent clients in arbitration or whether the definitions also would apply to lawyers who serve as “neutrals.” This seems to me an important question for WTO Members to resolve. Other questions about Australia’s proposed definition of legal services might emerge if the USTR specifically requested input on this issue.

The second substantive issue for which I recommend the USTR solicit comments concerns the *Disciplines for the Accountancy Sector*. I would urge the USTR to request from the ABA and any other interested organization a report about the suitability of applying the *Disciplines for the Accountancy Sector* to the legal profession. At a minimum, the USTR could ask U.S. lawyers for their reactions to the reports of the Canadian Bar Association and the Federation of Law Societies of Canada.

Finally, it may be useful for the USTR to know that there may be a lack of consensus among WTO Member States concerning the scope of “Mode 3” as applied to legal services.

The particular issue is how to “schedule” market access and national treatment limitations that affect individual lawyers who work on a permanent basis in a “foreign” country in a branch office of a law firm. (Are restrictions on individual lawyers “Mode 3” limitations or “Mode 4” limitations?) In my view, it would be desirable to have consistency in “scheduling” among WTO Member States. Thus, it may be worthwhile for the USTR to determine whether there is any disagreement among WTO Member States about the scope of Mode 3 as applied to legal services and if so, resolve that disagreement.

For your convenience, I have attached to this testimony a copy of various documents that I have referred to in this testimony. Thank you for the opportunity to provide this testimony. I would be happy to provide any additional information that may be useful.

Sincerely yours,

Laurel S. Terry  
Professor of Law

Enclosures:

1. Communication from Australia: Negotiating Proposal: Legal Services Classification Supplement, S/CSS/W/67/Suppl. 2 and S/CSC/W/32 (March 11, 2002)
2. Disciplines for the Accountancy Sector, S/L/63
3. Federation of Law Societies of Canada, Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)(Adopted by the Law Societies on Feb. 24, 2001)
4. Canadian Bar Association, Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession (August 2000)
5. GATS: A Handbook for International Bar Association Member Bars