

GATS, LEGAL SERVICES, AND BAR EXAMINERS: WHY SHOULD YOU CARE?†

by Laurel S. Terry

In the next few months or the next few years, bar examiners around the country may receive a letter from the U.S. Trade Representative or their state's foreign trade office. These letters may ask bar examiners questions such as:

- Do you want foreign lawyers to be able to practice in your jurisdiction, and if so under what conditions?
- and
- Do the lawyers who are licensed in your state want access to any foreign markets?

It is also possible that these trade officials may ask these questions in a much more technical fashion. They might, for example, ask questions such as:

- What is your response to the request that the U.S. Trade Representative received on June 30, 2002, from _____ (foreign country), in which [that foreign country] asked for a change in your state's rules about the conditions under which foreign lawyers may become members of your bar?
- Do you have an opinion about the classification system that should be used for legal services in the Doha Round of WTO negotiations?
- Do you believe there should be any changes

made to the way the U.S. has "scheduled" legal services in Modes 1, 2, 3, or 4, or any limitations removed in the *market access and national treatment* columns of the U.S. *Schedule of Specific Commitments*?

- What is your position about whether the 1998 *Disciplines for the Accountancy Sector* could and should be applied to the legal profession in your state?

If you are like most lawyers in the U.S. and the world, you may not have thought particularly hard about the more simple questions and you probably have very little idea what the more technical questions mean and no idea how these questions should be answered. This is understandable because these questions involve trade law terms. Most lawyers are not trade lawyers and are not familiar with trade law terminology. For better or worse, however, bar leaders and regulators will soon have to become familiar with this particular trade law terminology if they want to participate in important ongoing discussions and decisions about legal services.

This report is the first in a series intended to provide bar examiners with background information about the General Agreement on Trade in Services (GATS), recent developments in the WTO that are

†This report is taken from the Executive Summary of the International Bar Association's (IBA's) *GATS Handbook*. Professor Terry thanks the IBA for permission to use the summary for this report.

relevant to legal services, and the possible effects of these developments on bar admission rules in the U.S. Although many lawyers and bar examiners are unaware of the fact, legal services are now covered by the World Trade Organization (WTO) trade agreements. Because the U.S. is a member of the World Trade Organization (along with 143 other countries), some U.S. rules governing legal services are now subject to the GATS.

Although the WTO has already experienced developments that are important to legal services and to U.S. bar examiners, the impetus for this report is the fact that *new developments are currently underway*. When Erica Moeser invited me to periodically contribute reports to THE BAR EXAMINER about the GATS, I told her that I was pleased to do so because I think it is important for bar examiners to be aware of these ongoing developments.

WHAT SHOULD BAR EXAMINERS KNOW ABOUT THE GATS AND LEGAL SERVICES?

The purpose of this section is to try to convey the “big picture” of the GATS and its implications for legal services, and to persuade you that it is important to be aware of the developments in the WTO. The WTO, or World Trade Organization, was created in 1994 in a document entitled *Agreement Establishing the World Trade Organization*. There were several other agreements attached or “annexed” to the *Agreement Establishing the World Trade Organization*. Therefore, when a country decided to join the WTO, that country also agreed to abide by the terms of the annexed agreements.

One of the agreements annexed to the *Agreement Establishing the World Trade Organization* is the *General Agreement on Trade in Services* or “GATS.”¹ The GATS was the very first multilateral trade agreement that applied to services, rather than goods. The GATS

applies to all trade in services, including legal services. Thus, health services, engineering services, accounting services, architecture services, tourism services, and all other kinds of services imaginable are covered by the provisions of the GATS.

The WTO Secretariat, which is based in Geneva, Switzerland, is the administrative body of the WTO. The WTO Secretariat has about 500 staff members and is headed by a director general. It does not have branch offices outside Geneva. Unlike some other international bureaucracies, the Secretariat does not have a decision-making role. It is the WTO Member States who themselves decide policy. The WTO Secretariat is responsible for synthesizing the information collected from WTO Member States, preparing minutes of meetings, collecting statistics, and preparing analyses. In July 1998, the WTO Secretariat issued a “sectoral analysis” of legal services, which is probably the Secretariat document most relevant to legal services.

Currently, there are two different sets of events ongoing in Geneva of which bar examiners should be aware (and in which they may want to participate). The first ongoing activity is the development of horizontal disciplines on domestic regulation. The second development is the new Doha Round of negotiations for further liberalization of trade in services. Although there is some overlap between these two “tracks” or developments, they are different and bar examiners should be aware of both. Each of these developments is explained in greater detail below.

Disciplines on Domestic Regulation

The basis for the “disciplines track” is as follows. In December 1998, the WTO policy-making body for services, which is called the Council for Trade in Services and which includes representatives from all

WTO Member States, issued a document called *Disciplines for the Accountancy Sector*. As its name suggests, this document applies only to accounting services. This document was prepared pursuant to GATS Article VI, which requires the WTO Council for Trade in Services (or its delegate) to prepare disciplines on domestic regulation to ensure, among other things, that licensing and qualification measures are not more burdensome than necessary to fulfill a legitimate objective and do not constitute barriers to trade. The *Disciplines for the Accountancy Sector* contains twenty-six paragraphs.

Currently, there is a WTO entity called the Working Party on Domestic Regulation that is studying whether the *Disciplines for the Accountancy Sector* can and should be extended “horizontally,” that is, to all service sectors, including legal services. Many service sector representatives, including representatives of legal services, have argued that their sector deserves its own discipline. Thus, among the issues that WTO Member States will have to resolve are whether to adopt a horizontal discipline and whether legal services should be included within the coverage of that horizontal discipline or whether legal services should have its own discipline. Each WTO Member State is entitled to participate in the Working Party on Domestic Regulation.

Some WTO Member States have already issued statements indicating whether, in their view, the *Disciplines for the Accountancy Sector* should be extended horizontally to all other service sectors.

[T]HERE IS A WTO ENTITY CALLED THE WORKING PARTY ON DOMESTIC REGULATION THAT IS STUDYING WHETHER THE *DISCIPLINES FOR THE ACCOUNTANCY SECTOR* CAN AND SHOULD BE EXTENDED “HORIZONTALLY,” THAT IS, TO ALL SERVICE SECTORS, INCLUDING LEGAL SERVICES.

Some bar associations also have issued position papers in which they indicate which provisions in the *Disciplines for the Accountancy Sector* they find acceptable and which provisions they find unacceptable. The WTO Member States have agreed that each of them should consult their own domestic organizations about these issues. Although the U.S. representatives have reported on domestic consultations with some service sectors, they have not reported on domestic consultations with legal services representatives.

Doha Round of Negotiations for Further Liberalization

The second ongoing “track” of development of which bar examiners should be aware is the new

Doha Round of negotiations to further liberalize trade. Bar examiners should know that the GATS itself *required* WTO Member States to engage in negotiations for progressive liberalization within five years of the signing of the GATS. This new round of negotiations originally was referred to as either GATS 2000 or as the “built-in agenda” negotiations. As part of the GATS 2000 negotiations, WTO Member States agreed to try to submit negotiating proposals by December 2000. By mid-2001, several countries, including the U.S., had submitted proposals that addressed legal services in some fashion. The other countries that have already submitted negotiating proposals that address legal services include Australia, Canada, Columbia, the European Union, India, Japan, Kenya, and Switzerland.

In order to understand this second “track” of events, however, one must know that in November 2001, in Doha, Qatar, WTO Member States agreed to begin a new comprehensive round of negotiations. The Doha Ministerial Declaration explicitly recognized the work that had already been done in the GATS 2000 negotiations and stated that the new round should build on that work.²

The Doha Ministerial Declaration specified the dates for the various stages of the negotiations and the date by which the final negotiations should be completed. According to paragraph 15 of the Doha Ministerial Declaration, WTO Member States are to submit their initial “requests” for specific commitments to other countries by June 30, 2002. On March 19, 2002, the Office of the U.S. Trade Representative published a Federal Register notice, in which it requested, by May 1, 2002, suggestions for the contents of the U.S. Doha Round “requests.”³

After these “requests” are received, WTO Member States will consider them and then respond in a document called an “offer.” The Doha Ministerial Declaration specified that the initial “offers” of specific commitments (liberalization) should be transmitted by March 31, 2003. The final round of negotiations is to be completed no later than January 1, 2005.

These developments mean that by July 2002, the U.S. Trade Representative will be receiving requests from other countries in which these countries may ask to have specific U.S. bar admission rules changed for their lawyers who seek to practice in the U.S. The U.S. Trade Representative will have to respond to these specific requests. In order to advise the U.S. Trade Representative of your state’s position, you will need to understand the background of these requests.

In short, bar examiners need to know that there is a whole new world out there regarding legal services and that U.S. trade representatives will soon be engaged in negotiations about liberalization of the conditions under which foreign lawyers may practice in the U.S. Because these negotiators often are not lawyers and because legal services may be “bundled” or swapped as part of a deal involving other goods or services, bar examiners may want to prepare themselves so that they can respond to any specific questions from the trade representatives and any specific requests from other countries. As the WTO web page explains: “This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities [including legal services] is the most pertinent example.”

WHAT IS GATS: A HANDBOOK FOR IBA MEMBER BARS?

I hope that the above section has convinced you that it is important to learn something about the GATS’ application to legal services. If so, you will be happy to know that you have some assistance. The International Bar Association (IBA) recently issued to its Member Bars, a document entitled *GATS: A Handbook for IBA Member Bars*. The IBA has generously agreed to make this handbook available, without cost, to bar associations, bar admission agencies, or lawyers interested in receiving a copy. The handbook is in question-and-answer format and is designed to give lawyers all the information they need to know about the GATS and legal services.

As you might imagine, giving someone an “instant education” in trade law as applied to legal services does not make for fast or easy reading. The

IBA GATS Handbook is dense and detailed. The reason for this “nitty-gritty detail” is to provide a single resource, tailored to legal services, that bar associations, bar admission agencies, and lawyers can consult in order to respond to questions such as those posed at the beginning of this report.

The *IBA GATS Handbook* is based in large part on an article I wrote last year that is entitled *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*.⁴ While the law review article has more footnotes and complete citations to sources, the *IBA GATS Handbook* is more accessible since it is in question-and-answer format; the *IBA GATS Handbook* also is more up-to-date since it includes the developments that occurred in November 2001 at Doha and since it reflects my deeper understanding of the GATS as a result of my three-day visit to the WTO in Geneva in February 2002, as part of an IBA delegation.⁵

Not everyone who reads this report will want or need to master all of the details in the *IBA GATS Handbook* related to the GATS. On the other hand, at some point in time, every bar admissions office may need or want to find *someone* who can respond to

EC Draft “Requests” Leaked by *The Guardian* Newspaper

On April 17, 2002, *The Guardian* newspaper in London published an article on its website entitled “**Secret documents reveal EU’s tough stance on global trade**” by John Vidal, Charlotte Denny and Larry Elliott. The bottom of the article included hotlinks to PDF copies of the March 6, 2002, discussion drafts of the European Community’s (EC’s) proposed “requests” for the Doha Round of Negotiations (which are still called GATS 2000 in these documents.) See <http://www.guardian.co.uk/globalisation/story/0,7369,685670,00.html>. *The Guardian’s* publication of these documents created quite a stir since these documents were confidential and stated at the top: “Member States are requested to ensure that this text is not made publicly available and is only circulated to the officials concerned.”

While one cannot know the exact content of the EC’s “requests” to the United States until the requests actually are submitted (presumably by the June 30, 2002 Doha deadline for initial “requests”), the leaked documents give bar examiners a feeling for the types of demands that the U.S. Trade Representative will be receiving about legal services and about which bar examiners may be asked to opine.

The portion of the leaked EC discussion draft that is directed towards legal services states:

EC request to the United States of America

The USA has committed this sector only partially. The EC requests that this sector is committed as follows:

Legal Services (CPC 861)

In several States, this sub-sector is not committed or partially committed for practice of international public law or of third country law (additional commitments).

EC Request: For all States, extend sectoral coverage of commitments to consultancy on international public law and on law of jurisdiction where the service supplier or its personnel are qualified lawyers.

Modes 1, 2 and 3: MA* – Supply of services through a qualified US lawyer restricted to natural persons. **EC Request:** Remove this restriction.

Modes 3 and 4: MA – Supply of services through a qualified US lawyer restricted by citizenship requirement for practice before the US Patent and Trademark Office. **EC Request:** Remove this restriction.

Mode 3: MA – In 35 States this mode remains unbound for consultancy on law of jurisdiction where the service supplier is a qualified lawyer. **EC Request:** Remove and allow market access.

Modes 3 and 4: NT* – In-state residency requirement applicable in Michigan, Texas and Washington for consultancy on law of jurisdiction where the service supplier is a qualified lawyer. **EC Request:** Remove this requirement.

Mode 4: MA – This mode remains unbound in 35 States and is subject to the establishment of an in-state office in the District of Columbia, Minnesota, New Jersey, New York and Ohio. **EC Request:** Commit for all States as referred to in the section “Horizontal commitments”.

Conditions mentioned in footnotes: Prior practice requirements when licensing as foreign legal consultant in the USA. **EC Request:** Remove this requirement.

It is beyond the scope of this report to explain the substantive law of the GATS or the meaning of this draft “request.” What this document illustrates, however, is the technical nature of the GATS and the fact that the U.S. Trade Representative will soon be receiving very specific requests for very specific changes in state rules regulating foreign lawyers. Thus, bar examiners may very well want to consult the *IBA GATS Handbook* and additional resource material in order to understand what “requests” such as these might mean.

*MA=market access, NT=national treatment

questions such as those posed at the beginning of this report. The *IBA GATS Handbook* is intended to provide, as simply and as clearly as possible, the information and detail that is necessary in order to respond to such questions. The goal for bar examiners should be to learn enough about the GATS and trade law terminology to effectively participate in the important discussions and decisions that are ongoing and that may affect legal services. Among other topics, the *IBA GATS Handbook* addresses:

- the substantive provisions of the GATS;
- how the GATS' substantive provisions apply in the context of legal services;
- what has happened since the adoption of the GATS and the relevance of those events to legal services;
- where the debates have occurred with respect to legal services (and the general flavor of the disagreements); and
- the developments that lawyers and regulators of legal services might be asked to respond to.

CONCLUSION

The world has changed. In this brave new world, one must recognize that legal services are a significant part of the world's economy. As a result, legal services are now subject to major multilateral trading agreements, such as the GATS, to which the U.S. is a party. Therefore, in the future, bar examiners must be cognizant of the provisions of the GATS and the GATS' applicability to the bar admission rules that apply to foreign lawyers. Because the GATS rules and U.S. commitments are in the process of being developed now, I hope that bar examiners will find it worthwhile to educate themselves about the GATS and participate in the dialogue about these ongoing developments. ■

The IBA GATS Handbook and Professor Terry's Vanderbilt law review article are both available by contacting Professor Laurel Terry at Penn State Dickinson School of Law, 150 S. College St., Carlisle, PA 17013, or by e-mail at LTerry@psu.edu.

ENDNOTES

1. The GATT and TRIPS are two other agreements, in addition to the GATS, that were "annexed" to the *Agreement Establishing the WTO*. Many lawyers are familiar with the GATT, which focuses on trade in goods. The GATS focuses on trade in services.
2. See http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.
3. See 67 Fed. Reg. 12637 (Mar. 19, 2002).
4. 34 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 989 (2001) as revised 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW __ (2002) (forthcoming).
5. A press release describing this visit can be found at http://www.envoynews.com/iba/e_article000057769.cfm?x=69972,3545692.



LAUREL S. TERRY is a member of the faculty of Penn State Dickinson School of Law in Carlisle, Pennsylvania, where she teaches professional responsibility, comparative legal ethics, and cross border legal practice.

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.