Legal Services in the World Trade Organization (WTO) and U.S. Effect

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Summary

This report provides a broad overview of the treatment of legal services under the World Trade Organization (WTO) agreements and its potential effect on laws and rules governing the provision of legal services by foreign lawyers in the United States and legal ethics rules.

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Introduction[1]

As the role of lawyers in most countries has evolved from advocates regulated by local courts and their rules to legal advisors for transactions in economic activities, the increase in cross-border provision of legal services led to the inclusion of such services in the trade agreements and negotiations under the WTO, over the objections of some countries. The scope of agreements under the WTO has expanded over the years to cover issues and sectors not traditionally considered to fall within trade laws and regulations through periodic multilateral negotiations that are called "rounds," the latest being the Doha Round. The commitments the United States has made and may make in current and future negotiations could affect domestic regulation of the legal profession, including ethical issues.

Legal Services in the WTO

Legal services are classified as part of professional services, which in turn are under the business services sector covered by the General Agreement on Trade in Services (GATS), concluded as part of the Uruguay Round of the General Agreement in Tariffs and Trade that created the WTO. Under the GATS, WTO countries undertake obligations with regard to all service sectors, including most-favored-nation treatment (MFN) under GATS Article II;[2] transparency under GATS Article III; the notice and publication of relevant domestic laws and measures; judicial or administrative review of domestic regulation under GATS Article VI(2); and recognition agreements under GATS Article VII.[3]

In addition to the general obligations under the GATS, the United States included legal services in its schedule of commitments under the GATS; not all WTO countries included legal services in their schedules. Such schedules set forth specific additional obligations made by a WTO country with respect to specific service sectors, including any limitations or qualifications to obligations undertaken. These obligations include market access under GATS Article XVI, national treatment[4] under GATS Article XVII, and any other additional commitments under GATS Article XVIII, including those regarding qualifications, standards or licensing matters. A schedule also summarizes obligations as they apply via four modes of supply—(1) cross-border supply, the ability of non-resident service suppliers to supply services cross-border into a WTO country; (2) consumption abroad, the ability of a WTO country's residents to buy services located in another

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[1] For more information, including links to law review articles and WTO documents, see the American Bar Association (ABA) Web page on the GATS and legal services at http://www.abanet.org/cpr/gats/home.html, last visited on August 29, 2008. See particularly, Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 Vanderbilt J. of Transnational Law 989 (2001).

[2] This is the obligation to treat service suppliers from a given WTO country no more or less favorably than a service supplier from any other WTO country. MFN is termed normal-trade-relations (NTR) in U.S. domestic law.

[3] This GATS article permits the recognition by a WTO country of foreign education, experience, or licensing as satisfying requirements for domestic authorization or licensing to supply services, whether by harmonization with the requirements of the other country or mutual recognition agreements. In the case of a recognition agreement, the WTO member must give other interested WTO members the opportunity to negotiate participation in the agreement. In the case of unilateral recognition/harmonization, the WTO member must give other WTO members the opportunity to show that its qualifications or licenses should be recognized also.

[4] National treatment refers to the obligation to treat service suppliers of other WTO members no less favorably than domestic service suppliers.

WTO country; (3) commercial presence, the ability of foreign service suppliers to establish a branch or representative office in a WTO country, sometimes referred to as the right of establishment; and (4) movement of natural persons, the ability of foreign individuals to enter and stay in a WTO country's territory to supply a service. The U.S. schedule sets forth its obligations in terms of limitations and qualifications under the laws and/or rules governing the practice of law by foreign lawyers and foreign law firms in each of the States, the District of Columbia, the U.S. territories, and before certain federal agencies, such as patent prosecution before the U.S. Patent and Trademark Office (USPTO).

As part of the sectors subject to WTO negotiations in the Doha Round, legal services are potentially subject to changes. Indeed, several members have sought concessions from the United States regarding legal services. Such changes could affect the laws and rules governing foreign lawyers and foreign law firms in each of the 50-plus jurisdictions in the United States and the federal agencies. Such laws and rules comprise the bar admission of lawyers who are admitted to practice in a foreign jurisdiction or who are foreign nationals and the eligibility of foreign legal consultants and foreign firms to provide legal services in the United States. Rules regarding foreign legal consultants may address the applicability to such consultants of ethics rules and disciplinary procedures for attorneys.

The European Union, which together with the United States has the most active trade in legal services among WTO members,[5] is seeking several new legal services concessions from the United States.[6] One significant change sought by the European Union is to eliminate the requirement in the U.S. states and territories that qualified U.S. lawyers providing legal services must be "natural persons," not law firms or other organizational/corporate persons. This apparently is not a requirement in some other WTO countries. The EU and the United States also propose eliminating the U.S. requirement that an attorney admitted to the patent bar for the purpose of prosecuting a patent before the USPTO must be a U.S. citizen.

In addition, there has been consideration of whether disciplines (WTO parlance for certain guidelines) on domestic regulation in the legal services sector should be adopted and applied. This may be accomplished by negotiation of a discipline specific to legal services or by application of the existing Disciplines on Domestic Regulation in the Accountancy Sector[7] to legal services. Under GATS Article VI(4), disciplines on domestic regulation are developed "[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services." Disciplines aim to ensure that requirements are not more burdensome than necessary to ensure quality of service and that licensing procedures are not *per se* restrictions on the supply of the service. After the accountancy disciplines were developed and adopted, there was active consideration and debate about whether they should be extended to legal services, which the International Bar Association recommended against.

Any substantive Doha Round concessions or any agreement to a legal services discipline by the United States would obligate it, under GATS Article I(3)(a), to take reasonable measures to ensure that each of its political subdivisions observes such agreements. This could pose

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[5] WTO Council for Trade in Services, Legal Services Background Note, S/C/W/43 at 8 (1998); Sydney M. Cone, *Legal Services in the Doha Round*, 37 J. of World Trade 29, 32 (2003).

[6] EU Initial Request to the United States, available at http://www.esf.be/pdfs/countries/USA%202003.pdf.

[7] WTO Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 (1998).

federalism issues, since the rules governing practice in a state are a matter for the highest court of a state or for its legislature and not traditionally a matter for federal legislation or policy. The U.S. Trade Representative (USTR) does not make WTO commitments with which the United States is not in a position to comply. This is the reason the current schedule of commitments notes obligations in terms of which states have certain requirements, such as in-state residency for licensure. In accordance with §102 of the Uruguay Round Agreements Act (URAA),[8] the USTR has consulted with several states concerning the negotiating position of the United States on legal services, apparently to consider what changes these states would be amenable to observing.

If the United States were to commit to liberalizing the rules for foreign lawyers or firms to provide legal services in the United States, any related complaint against the United States could be brought only by another WTO country and would be resolved through the WTO dispute settlement system. An individual foreign attorney or firm could not bring a complaint because disputes can only be brought by one WTO country against another WTO country. Nor could an individual attorney or firm bring a suit domestically for noncompliance with a WTO obligation. WTO agreements are not self-executing international agreements, so obligations under those agreements must be implemented through domestic legislation or other domestic measures. Section 102 of the Uruguay Round Agreements Act (URAA)[9] provides that only the United States may bring an action to declare a state law invalid because it is inconsistent with an Uruguay Round agreement and that no private person may challenge a state or local law or other measure on the grounds that it is not consistent with an Uruguay Round agreement.

Certain U.S. Rules Relating to Foreign Lawyers

The global nature of business, including legal services, and its continued growth has necessitated the consideration and adoption of rules concerning multijurisdictional practice of law. In 2007, 71 persons were licensed as foreign legal consultants in the United States across 16 jurisdictions. Twenty-nine jurisdictions have a rule permitting the licensing of foreign legal consultants.[10] Some adopted a version of the ABA Model Rule on Foreign Legal Consultants (first approved in 1993, most recently revised in 2006), itself modeled on the New York rule first adopted in 1974.[11] Others adopted their own rule differing significantly from the ABA Model Rule.[12] The ABA Model Rule provides that foreign legal consultants may be licensed to provide certain legal services in a jurisdiction without an examination, if they are members in good standing in a recognized legal profession in a foreign country. They are not actually admitted as members of the bar in the host jurisdiction in the United States and are prohibited from providing certain services, such as appearing in court to represent a client or giving advice on U.S. law or a state law in the United States. Foreign legal consultants would be able to provide advice on the laws of their foreign home countries.

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[8] P.L. 103-465, 108 Stat. 4809, 4815 (1994), codified at 19 U.S.C. § 3512.

[9] P.L. 103-465, 108 Stat. 4809, 4815 (1994), codified at 19 U.S.C. § 3512. See CRS Report RS22154, *World Trade Organization (WTO) Decisions and Their Effect in U.S. Law*, by (name redacted).

[10] ABA Table, dated August 28, 2008, available at http://www.abanet.org/cpr/mjp/recommedations.pdf and table by Prof. Laurel Terry, dated June 5, 2008, available at http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.

[11] Available through the ABA website at http://www.abanet.org/cpr/mjp/FLC.pdf.

[12] *See* Carole Silver, *A Comparative Analysis of U.S. Foreign Legal Consultant Rules* (2003), available at http://www.abanet.org/intlaw/calendar/annual03/Annual0317.01-17.03.pdf.

Additionally, five jurisdictions have rules that expressly refer to temporary practice by foreign lawyers, some similar to the ABA Model Rule for Temporary Practice by Foreign Lawyers (approved in 2002).[13] This ABA Model Rule provides that foreign lawyers not admitted in a U.S. jurisdiction may provide legal services in that jurisdiction in certain circumstances, including, among others, where they are working with a lawyer admitted to practice in that jurisdiction or where they are advising clients with regard to legal proceedings in a foreign jurisdiction where they are admitted to practice.[14]

U.S. Ethical Implications

The WTO Secretariat has noted that WTO countries generally require foreign legal consultants to submit to the local code of ethics as a prerequisite to licensing in the host country.[15] The WTO has observed that the legal profession does not consider this a major obstacle to trade in legal services. There are certain common principles shared by the national legal ethical codes, including rules on conflicts of interest, loyalty to the client, and confidentiality. The WTO has observed, for example, that the EU has developed a common legal ethics code applicable to some EU countries; the U.S., Japanese and European lawyers' professional associations have compared their ethical codes and found no serious differences; and a bilateral agreement exists between the ABA and its counterpart for England and Wales with regard to mutual recognition on matters such as ethical standards. However, the agreements of such associations are not binding on the U.S. jurisdictions whose courts or legislatures would implement such recognition in conjunction with the bar disciplinary authorities. Negotiations in the Doha Round of the WTO could help resolve ethical issues that have arisen in the cross-border provision of legal services.

The prohibition against the unauthorized practice of law is a basic tenet of U.S. legal ethics;[16] therefore, any new agreement under WTO auspices that may affect the regulation of legal services providers admitted to the practice of law in a foreign jurisdiction could have implications for ethical compliance. However, U.S. legal ethics rules or codes have recognized that business demands and the mobility of society necessitate refraining from unreasonable territorial limitations.[17] Any liberalizing of licensing requirements could facilitate the operations of law

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[13] ABA Table and Terry Table, *supra* note 10. Additionally, Terry notes that North Carolina's rule may be interpreted as permitting temporary practice by foreign lawyers, and that the Committee on the Unauthorized Practice of Law of the District of Columbia Court of Appeals issued Opinion 14-04, stating that the incidental practice of law by a foreign lawyer was permitted.

[14] Available at http://www.abanet.org/cpr/mjp/201j.pdf.

[15] WTO Council for Trade in Services, supra note 5, at 14-16.

[16] See the ABA Model Rules of Professional Conduct, Rule 5.5 and the ABA Model Code of Professional Responsibility, Canon 3 requiring a lawyer to assist in preventing the unauthorized practice of law (hereinafter Model Code) (although the Model Rules superseded the Model Code, the legal ethics rules in some states remain based on the Model Code).

[17] ABA Model Code of Professional Responsibility, Ethical Consideration 3-9, footnotes omitted:

> Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the

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firms.[18] ABA Opinion 01-423, dated September 21, 2001, found that U.S. law firms may include partners who are foreign lawyers, as long as the arrangement complies with U.S. and foreign law, and the foreigners are members of a recognized legal profession in the foreign jurisdiction. It cautioned that U.S. lawyers must avoid assisting in the unauthorized practice of law by foreign lawyers in the United States.

ABA Opinion 01-423 further noted that many countries recognize only a narrow attorney-client privilege. Some legal authorities cite the opinion in a European Union (EU) case, *Australian Mining & Smelting Europe Ltd. v. Commission*,[19] as supporting the proposition that attorney-client privilege does not apply to attorneys not admitted to practice in the EU.[20] In response, the ABA passed a resolution that attorney-client privilege should apply to non-European Union attorneys. In a more recent case, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, the EU Court of First Instance declined to consider whether the discriminatory non-recognition of privilege with respect to non-EU lawyers violated certain EU principles.[21] A paper summarizing a discussion on *Cross-Border Travel Traps: Protecting Client Confidences at the Frontier* at the ABA Section of International Law 2007 Fall Meeting discusses the problems posed for U.S. attorneys by the narrower European view of profession privilege/confidentiality with regard to attorney-client communications.[22]

With regard to disciplinary measures and proceedings, U.S. legal professional groups have submitted letters to the USTR supporting local disciplinary jurisdiction over foreign attorneys and disciplinary reciprocity with foreign jurisdictions in Doha Round negotiations.[23]

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presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

[18] The case of *In re Catherine T. Lynott*, M.R. 21789 (Ill. September 18, 2007), summary available via http://www.nobc.org/developments/default.aspx, concerning a lawyer who was an Irish national admitted to the bar in Ireland, is an example of the type of problem currently faced by foreign lawyers wishing to practice in the United States. Although licensed to practice in New York and in a federal district court in Illinois, she could only be admitted in Illinois (1) by reciprocity, after getting a U.S. law degree, moving to New York and practicing there for five years, or (2) by examination, after moving to Ireland and practicing there for five years. The Illinois Supreme Court denied her petition for a waiver so that she could sit for the exam.

[19] Case 155/79, 1982 E.C.R. 1575 (1982).

[20] See discussion in Cone, *supra* note 5, at 34-35.

[21] Joined Cases T-125/03 and T-253/03, 2007 E.C.R. ___, at ¶ 174, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML.

[22] At 13-16, available at http://www.abanet.org/intlaw/fall07/materials/CrossBorderTravelTrapsProtectingClientConfidences.pdf, last visited August 29, 2008.

[23] See letters of the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers, available at http://www.abanet.org/cpr/gats/track_one_position.html.

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