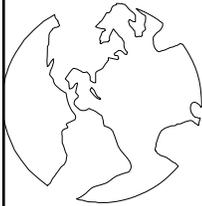




## GATS & Multijurisdictional Practice



General Counsel Committee,  
National Center for State Courts  
Washington, D.C., May 10, 2005  
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## My Goals for this Talk



- to educate you about the GATS
- to motivate you to follow the GATS' developments
- to do all of this without making your eyes glaze over

## Why Should You Care About This?



- **GATS will happen with or without the legal profession**
- **It's better to provide input now than complain later**
- **We live in a global world and foreign lawyers are a fact of life**

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## Why Clients May Want Foreign Lawyers

**U.S. International Trade in Goods and Services**

	1992	2003
Exports	\$617 billion	\$1.02 trillion
Imports	\$656 billion	\$1.5 trillion

**U.S. Trade in Legal Services**

	1992	2003
Exports	\$1.36 billion	\$3.38 billion
Imports	\$311 million	\$879 million

State	2004 Merchandise Exports & Rank	2002 Property-type U.S. Investment by Foreign Co.'s
Texas	\$117 billion (1 <sup>st</sup> )	\$102 billion
Hawaii	\$404 million (50 <sup>th</sup> )	\$8.2 billion

## Reasons for Foreign Lawyers: #2

### 2000 U.S. Census - Foreign Born Residents

State and Rank	Number of FB Residents	% increase since 1990	State Rank in % increase
California (1st)	8.9 Million	37.2%	37 <sup>th</sup>
Missouri (27th)	151,000	80.8%	26 <sup>th</sup>
Wyoming (51st)	11,205	46.5%	35 <sup>th</sup>
Entire U.S.	31.1 million	57.4%	---

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## Selected ABA MJP Recommendations

- In 2002, the ABA MJP Commission adopted 9 recommendations
- MJP Rec. #2 was Rule 5.5 (temporary practice & corporate counsel provision)
- MJP Rec. #9 is a model rule for temporary practice for foreign lawyers
- MDP Rec. #8 recommends adoption of the ABA Foreign Legal Consultant Rule
- Status report re adoption of Recs. 8 & 9

## The GATS....What's That?

- The GATS is a multilateral trading agreement
- The GATS was the first world trade agreement to cover trade in services
- The GATS applies to legal services
- It's part of the 1994 *Agreement Establishing the World Trade Organization* (the WTO)



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## What is the WTO?



- The WTO has 148 Member States
- Agreements include the GATS, GATT, TRIPS, & Dispute Resolution Agreement
- Headquartered in Geneva, ≈500 staff
- The WTO Secretariat makes no policy decisions, but writes minutes, analyses
- All decisions are made by the WTO Members themselves, including the US



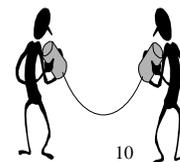
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## What's the 4 Part Structure of GATS?

<p><b>1. <u>Basic commitments</u></b></p> <ul style="list-style-type: none"> <li>• Transparency</li> <li>• MFN treatment (no reciprocity)</li> <li>• <u>Doesn't</u> give access to foreign L's</li> </ul>	<p><b>2. <u>MFN exemptions</u></b></p> <ul style="list-style-type: none"> <li>• permits reciprocity &amp; non-MFN treatment</li> <li>• only 8 countries adopted</li> </ul>
<p><b>3. <u>"Schedules of Specific Commitments"</u></b></p> <ul style="list-style-type: none"> <li>• in 1994, countries chose which sectors to list</li> <li>• listing means additional requirements</li> <li>• the US listed legal services</li> <li>• can have any rules if disclosed</li> </ul>	<p><b>4. <u>Ongoing Obligations</u></b></p> <p><b><u>TRACK 1:</u></b></p> <ul style="list-style-type: none"> <li>• Art. XIX – requires further liberalization &amp; negotiations in 5 years;</li> </ul> <p><b><u>TRACK 2:</u></b></p> <ul style="list-style-type: none"> <li>• Art. VI (4) requires creation of necessary disciplines</li> </ul>

## To Understand the US *Schedule*

- **You will need to master its terminology:**
  - Legal services are delivered in Modes 1-4
  - Commitments are made according to Modes
  - Market Access (GATS art. 16)
  - National Treatment (GATS art. 17)
  - “Disciplines” apply to certain kinds of domestic regulation measures (GATS art. VI)
- **Help is available in the IBA GATS Handbook**



## GATS Enforcement Mechanisms

- The GATS is enforced through retaliatory trade sanctions by governments, after a decision by the WTO appellate body
- The USTR Fact Sheet says the GATS does not override the states' ability to regulate
- The GATS does not create a private cause of action



## More Enforcement Information

- Most GATS obligations stem from what is listed on the U.S. *Schedule*
- Legal services are on the US *Schedule*
- States can “discriminate” against foreign lawyers if disclosed
- Countries can withdraw from WTO upon notice, etc.



## What's Happening in the WTO?

### TRACK 1:

Doha Development  
Agenda (DDA)  
Negotiations



### TRACK 2:

Working Party on  
Domestic Regulation:  
Should the “*Disciplines  
for the Accountancy  
Sector*” apply to lawyers  
& others?

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## More About Track 1 and Doha

- GATS requires “*progressive liberalization*”
- The 11/01 Doha Declaration originally set a deadline of Jan. 1, 2005 to end negotiations



- Negotiations stopped in Sept. 03, revived in Aug. 04, with 5/05 the new target for “offers”
- It's not clear when the Doha negotiations will end – some hope for December 2006

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## More About Track 2 - Disciplines



- GATS §6(4) required creation of “any necessary disciplines” – perhaps none are
- In 1998, a WTO body issued *Disciplines for the Accountancy Sector*
- A WTO body is now considering whether to apply the *Disciplines* “horizontally”

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## More About Track 2 - Disciplines



- WTO Members agreed to conduct “domestic consultations” on using the *Disciplines*
- Many countries have not sought input on applying the *Disciplines* to lawyers
- In Dec. 2002, the WTO sought NGO input about applying the *Disciplines* to others
- The IBA held a day-long *Forum*, then adopted a resolution suggesting changes
- The UIA also submitted comments

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## Meanwhile... in the US....



### TRACK 1 – the Doha Negotiations:

- US outbound “requests” track the ABA Model Foreign Legal Consultant Rule
- US 3/03 legal services “offer” repeated the 1994 U.S. *Schedule* – which is out of date
- US wants to update its offer by May 2005
- There’s a debate about whether the US can or should automatically list existing lawyer rules
- There may be issues about whether the current *Schedule* is accurate and what to do if it is not

## Meanwhile... in the US....



### TRACK 2 – the Disciplines:

- Neither the ABA nor the U.S. has taken an official public position on applying the *WTO Accountancy Disciplines* to lawyers
- The U.S. circulated a Transparency paper in Feb. 2005
  - Offer a prior comment period for new regulations
  - Set up inquiry points for questions about regulations

## A Possible “To Do” List

- Offer comments to your state Supreme Courts re MJP Rec’s 8 & 9 (in my view, adopt them if you want regulated foreign lawyers rather than unregulated)
- Offer comments to the USTR and state courts about GATS Tracks 1 and 2
- Think about other issues to address  
(Should states have rules for foreign L’s who want to take the bar? Foreign FLCs?)

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## Summary



- The GATS is here and its mandate is directly relevant to lawyers
- There is no easy model to follow for trade negotiations in a federal system
- We can’t change the global world, so let’s figure out how to adapt to GATS
- States should consider international MJP issues separate from the GATS

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## To Read More About It....

- **See the ABA Center for Professional Responsibility GATS Webpage, [http://www.abanet.org/cpr/gats/gats\\_home.html](http://www.abanet.org/cpr/gats/gats_home.html)**
- **Multiple *Bar Examiner* articles are available on the “articles” page of the ABA GATS webpage**
- **Read the IBA GATS Handbook, (available on the ABA GATS webpage)**
- **Contact [LTerry@psu.edu](mailto:LTerry@psu.edu) for URLs to statistics**