



GATS & Multijurisdictional Practice



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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 st) | \$102 billion |
| Hawaii | \$404 million (50 th) | \$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 th |
| Missouri (27th) | 151,000 | 80.8% | 26 th |
| Wyoming (51st) | 11,205 | 46.5% | 35 th |
| 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

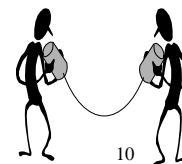
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What's the 4 Part Structure of GATS?

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

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

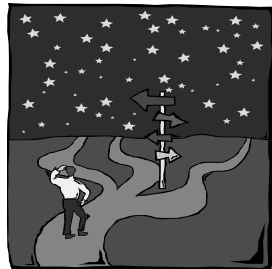
- Most GATS obligations stem from what is listed on the U.S. *Schedule*
- Legal services are on the US *Schedule*
- States can “discriminate” against foreign lawyers if disclosed
- Countries can withdraw from WTO upon notice, etc.



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**
- **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 for URLs to statistics**