

Third Annual IBA Bar Leaders' Conference:

Skills Transfer in Developing Jurisdictions

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Summary of Remarks

- Introduction
- An Overview of the IBA-WTO Resolutions
- An Overview of the GATS
- GATS and the IBA's Draft Liberalization and Skills Transfer [LAST] Resolution
- Current Developments



The IBA's Role in the WTO



- The WTO wants to hear from groups whose membership includes all WTO Members
- The IBA has taken a leading role in working with the WTO (and the UN and OECD)
- Some Examples

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Existing IBA WTO Resolutions



- **1998:** "Core Values," GATS & Deregulation
- **1998:** *Principles for Establishment of Foreign Lawyers*
- **2001:** *Criteria for Recognition*
- **2003:** Resolution on GATS Terminology
- **2003:** Resolution on GATS Accountancy Disciplines
- **2005:** Began work on new "LAST" Resolution
 - builds on the 1998 establishment resolution

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The GATS [General Agreement on Trade in Services]

- Basic obligations (e.g. Article III on transparency)
- Optional obligations
 - If a sector (legal services) is listed on one's "Schedule," then: *except as otherwise noted*, one must comply with:
 - Article XVI (market access) and
 - Article XVII (national treatment)
- Services are scheduled using "Modes of Supply"
 - **Mode 1** (inbound product); **Mode 2** (outbound client)
 - **Mode 3** (foreign firms); **Mode 4** (inbound foreign lawyer)

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Sample GATS Schedule

SECTOR-SPECIFIC COMMITMENTS WTO Services Database Output

Modes of supply: 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
Australia				
1. Business Services				
A. Professional Services				
a) Legal services	1) None	1) None		
Home country law, including public international law (CPC 861**)	2) None	2) None		
	3) Natural persons practising foreign law may only join a local law firm as an employee or as a consultant; and may not enter into partnership with or employ local lawyers	3) At least one equity partner in a firm engaged in advising on foreign law matters must be a permanent resident (NSW, Victoria); at least one equity partner in a foreign law firm must be resident for a minimum period of 180 days per calendar year (Queensland)	3) Joint offices involving revenue-sharing between foreign law firms and Australian local law firms are permitted in NSW, Victoria, Queensland and Tasmania subject to the foreign law firms satisfying certain requirements, including in relation to liability, standard of conduct and professional ethics	
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section		

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“Scheduling” Legal Services

- Approximately 50 countries “scheduled” legal services (counting each EU member)
- This means a country agrees to comply with:
 - Article 16 (Market Access) and
 - Article 17 (National Treatment)



EXCEPT AS OTHERWISE NOTED!

- “Skills transfer” provisions can be one kind of “otherwise noted” exception
- Peter Köves will discuss examples

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Bottom Line: **The Intent of the LAST Resolution**

- To reflect the reality of global legal practice
 - foreign lawyers do practice home country & int’l law
- To encourage countries to “schedule” legal services – an otherwise optional commitment
- To give developing countries tools to benefit from cross-border international practice
 - This tool has been used in other service sectors
- To continue the IBA’s dialogue with the WTO

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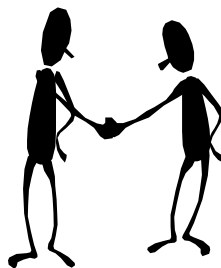
History of the Draft IBA Resolution

- Prague, 5-2005: Seeming consensus that IBA bars are willing to make GATS legal commitments under certain conditions
- IBA WTO Group was asked to draft a resolution
- London, 5-06 & Zagreb, 5-07:
 - LAST resolution draft discussed at 1st IBA Bar Leaders Conference and 2nd Bar Leaders Conference
 - Discussion of LAST resolution led to discussions about foreign-local lawyers employment and partnership
 - A “forms of establishment” resolution was also drafted
- Singapore, 9-07: LAST draft resolution debated
- Amsterdam, 5-08: LAST resolution revised to reflect Singapore debates

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The New Draft

- Builds on the IBA's prior resolutions
- Reflects the IBA commitment to liberalization in a manner consistent with core values
- Balances importer and exporter concerns



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To Address Importer Concerns

- Recognizes the right of countries to use skills transfer provisions
 - This is only for countries that have not already *scheduled* legal services
- Recognizes that skills transfer is part of exporters' professional obligations

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To Address Exporter Concerns

- (3) Consistent with the general requirements of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skill Transfer as contemplated by Paragraphs 3 and 4 of this resolution: (i) should be transparent; (ii) should not be unreasonably burdensome; (iii) should not discriminate as between Foreign Lawyers and/or (iv) should not be adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.
- (4) Proprietary or secret information protected

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To Read More About It



➤ IBA WTO Working Group Page

http://www.ibanet.org/barassociations/WTO_Working_Group.cfm

➤ Draft resolution in IBA Buenos Aires Council Agenda (9-08)

➤ See also IBA, Singapore Agenda, Draft LAST Resolution (Agenda, p. 147)

http://www.ibanet.org/images/downloads/Executive%20office/August_2007_Council_Agenda_Part_03.pdf

➤ See also ABA GATS-Legal Services WebPage

<http://www.abanet.org/cpr/gats/home.html>

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Appendix

The 1998 Establishment Resolution

- It contained general principles for regulation
- As a compromise, it recognized that Bars might adopt either a full licensing or limited licensing approach
- It did not (and could not at that time) resolve the “forms of association” issue
- Historically, there have been very different views on this forms of association issue

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II. Common Regulatory Principles

The Common Regulatory Principles set forth below should govern any regime regulating the establishment of Foreign Lawyers:

- A. Authority to Regulate. The Host Authority has the legitimate right to regulate the establishment of Foreign Lawyers.
- B. Fairness and Uniform Treatment. Regulation and/or admission of Foreign Lawyers should be fair, non-discriminatory, and based upon uniformly applied, objective criteria. Any restrictions on the practice of Foreign Lawyers should be justifiable in the public interest in the Host Jurisdiction.

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C. Transparency. Applicable rules and regulations (including codes of ethics and professional responsibility) governing Foreign Lawyers should be clear and consistently applied.

D. Public Purpose. Regulation should be designed and administered in a manner which promotes the interests of clients and encourages and facilitates the effective delivery of legal services to the fullest extent practicable, consistent with the protection of the public in the Host Jurisdiction, the maintenance of professional standards and independence of the legal profession of the Host Jurisdiction.

E. Access. Regulation of Foreign Lawyers should promote access to competent legal advice in on foreign law in the Host Jurisdiction, subject to appropriate safeguards consistent with these General Principles.

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Appendix: 5-08 Amsterdam LAST Draft:

- Many “Whereas” clauses followed by Council agreement to supplement the existing resolutions with this resolution:

- Countries that so far have not been willing to open their legal services market to Foreign Lawyers, or that have done so to a limited extent only as regards scope of practice rights or scope of association rights with Local Lawyers, may wish to grant Foreign Lawyers access, or greater access, to their legal services market, subject to the following:

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Amsterdam Draft Resolution - Part 2

(1) A Foreign Lawyer permitted to practice through an Establishment in a Host Jurisdiction may be required by the Host Authority to participate, directly or indirectly, in the provision of formal continuing legal education and training programs sponsored or approved by the Host Authority or other bodies responsible for the development of the legal profession of the Host Jurisdiction and open to Local Lawyers generally.

(2) A Foreign Lawyer who is permitted to practice through an Establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the context of his/her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.

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Amsterdam Draft Resolution - Part 3

- (3) Consistent with the general requirements of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skill Transfer as contemplated by Paragraphs 3 and 4 of this resolution: (i) should be transparent; (ii) should not be unreasonably burdensome; (iii) should not discriminate as between Foreign Lawyers and/or (iv) should not be adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.
- (4) No means taken pursuant to paragraph 1 should require a Foreign Lawyer to disclose information that is proprietary or confidential to the Foreign Lawyer or any client.

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Appendix: 9-07 Singapore LAST Draft:

- Many “Whereas” clauses followed by this language:
- NOW THEREFORE BE IT RESOLVED, that the IBA Council hereby reaffirms the principles set out in the Establishment Resolution and adopts, by way of supplement thereto, the following additional principles:
- (1) As contemplated by the Establishment Resolution, Foreign Lawyers who are established in a Host Jurisdiction may be required to register with, and be regulated by, the Host Authority.
- (2) A Foreign Lawyer registered with, and regulated by, the Host Authority should be entitled, at a minimum, to render advice on matters governed by the law of the Home Jurisdiction, as authorized by the Home Authority.

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Skills Transfer Resolution - Part 2

(3) A Foreign Lawyer permitted to practice in a Host Jurisdiction may be required by the Host Authority to participate, directly or indirectly, in the provision of formal continuing legal education and training programs sponsored or approved by the Host Authority or other bodies responsible for the development of the legal profession of the Host Jurisdiction and open to Local Lawyers generally.

(4) A Foreign Lawyer who is permitted to practice in a Host Jurisdiction in association with Local Lawyers may be required, in the context of his/her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom he or she practices in such association.

(5) Consistent with the general requirements of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skill Transfer as contemplated by Paragraphs 3 and 4 of this resolution: (i) should be transparent; (ii) should not be unreasonably burdensome; (iii) should not discriminate as between Foreign Lawyers and/or (iv) should not be adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.

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The Singapore Concerns

➤ **Some Importer Country Concerns:**

- Will exporters live up to their promises to transfer skills to local lawyers?
 - The track record in other sectors is not good
- Will the global firms take our best clients?
- Why is there no linkage between the grant of market access and entry visas for developing country lawyers?
- Are there safeguards to prevent abuse by exporters?
- Is technical assistance on the regulatory framework available?

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The Singapore Concerns

➤ Exporters: Possible Negative Results:

- Will it encourage countries to act more protectionist than they otherwise would?
- Will it be abused by importers who don't apply it reasonably?
- Can the built-in protections really be effective?
- The topic is not appropriate for a trade agreement

➤ Exporters: Positive Impact is Unlikely

- Is the resolution likely to encourage new GATS commitments?
- Isn't it be better to have an association resolution because that's the best way to transfer skills?

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Existing "Skills Transfer" Provisions

- Used in professional services
 - Engineering [Cote D'Ivoire]
 - Auditing services [Brunei Darussalem]
 - Veterinarian services [Guinea]
- Used in business services
 - Financial services [Philippines]
 - Banking services [Philippines]
 - Insurance services [Slovenia]
- Other services
 - Aircraft rental and sales [Brunei Darussalam]
 - Technical testing and analyses [Cote D'Ivoire]
 - Tourism or hotel services (Egypt, Fiji, Niger, Guatemala, Paraguay)

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