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A Venerable Profession Enters the Global Economy: South Carolina Lawyers and the General Agreement on Trade in Services (GATS)

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Ross: A Venerable Profession Enters the Global Economy: South Carolina
**A VENERABLE PROFESSION ENTERS THE GLOBAL ECONOMY:
SOUTH CAROLINA LAWYERS AND THE GENERAL AGREEMENT
ON TRADE IN SERVICES (GATS)**

I. INTRODUCTION

This Comment examines whether and how South Carolina rules governing the admission to the practice of law may change as a result of globalization and the General Agreement on Trade in Services (GATS).¹ Many lawyers may feel somewhat insulated from the effects of globalization if their practices rarely, if ever, take them beyond the one or two states where they are members of the bar. However, the odds of a lawyer maintaining a purely local practice where she never meets a client from another country, never needs to interpret a contract for a foreign corporation, and never deals in any way with a foreign entity, are shrinking rapidly due to globalization.²

The United States is part of a global economy where trade in services plays an increasingly important role. "In 2004, U.S. exports of services totaled \$340 billion, nearly doubling over the past 10 years."³ Legal services constitute a significant portion of exported services. In 1999, for example, legal services ranked third among all U.S. service exports.⁴ Legal services also pave the way for the globalization of other industries. No business would build a factory overseas without specific assurances of legal protection for that investment. Thus, the resolution of the GATS legal services issue may significantly affect not only the globalization of South Carolina's legal profession but also South Carolina's attractiveness to foreign investment in other industries.

To gain admission to the South Carolina state bar, one must receive a law degree from an American Bar Association (ABA)-approved law school and pass the

1. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Amex 1B, General Agreement on Trade in Services, 33 I.L.M. 1125, 1173 (1994) [hereinafter GATS], available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (Last visited Apr. 21, 2006).

2. Globalization is the "[e]xpansion of global linkages, organization of social life on global scale, and growth of global consciousness, hence consolidation of world society." The Globalization Website—Globalization Glossary, <http://www.sociology.emory.edu/globalization/glossary.html#G> (last visited Jan. 5, 2006). Over thirty years ago, Chief Justice Burger wrote of "the rapidly shrinking 'one world' we live in" and noted that "[a] large number of American nationals are admitted to the practice of law in more than a dozen countries; this will expand as world trade enlarges." *In re Griffiths*, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting).

3. Office of the United States Trade Representative, Free Trade in Services: Opening Dynamic New Markets, Supporting Good Jobs (2005), http://www.ustr.gov/Document_Library/Fact_Sheets/2005/Free_Trade_in_Services_Opening_Dynamic_New_Markets,_Supporting_Good_Jobs.html.

4. Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 995 (2001) (citing BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, U.S. INTERNATIONAL SERVICES, CROSS-BORDER TRADE IN 1999 AND SALES THROUGH AFFILIATES IN 1998, 130–31 (Oct. 2000), available at [http://www.ita.doc.gov/td/sif/Trade%20Data%20\(1999\).pdf](http://www.ita.doc.gov/td/sif/Trade%20Data%20(1999).pdf)).

South Carolina bar examination.⁵ There are strict limitations on the practice of law by non-members of the bar.⁶ The GATS, on the other hand, provides that member countries' domestic regulations must be neither "more burdensome than necessary to ensure the quality of [legal services]" nor "a restriction on the supply of [legal services]."⁷ The GATS also provides for a "progressively higher level of liberalization" of foreign access to domestic markets—including U.S. legal markets—in the coming years.⁸ Questions arise when examining South Carolina's practice-of-law rules in light of the GATS: Do the provisions conflict? Who decides whether they conflict? If they do conflict, which provision prevails?

The potential effect of the GATS on the legal profession in South Carolina has not received much attention. The ABA website⁹ and several law review articles¹⁰ do an excellent job of predicting and describing the GATS' potential effect on the legal profession nationally. However, the American legal profession is not regulated nationally; it is regulated state-by-state. In South Carolina, the South Carolina Supreme Court—with the assistance of the South Carolina Bar Association ("SC Bar")—determines who may provide legal services within the state.¹¹

Unlike the ABA's website,¹² there is currently no information on the GATS on the SC Bar's website.¹³ To date, neither *South Carolina Lawyer*—the monthly publication of the South Carolina Bar—nor the *South Carolina Law Review* has printed an article about the GATS. When the federal government made a request for comments from the legal profession prior to the current round of the GATS-related negotiations,¹⁴ no South Carolina law firm or law-related organization responded.¹⁵ Unfortunately, if South Carolina lawyers do not actively monitor the South Carolina-specific effects of the GATS, they may be taken off guard. Once they feel its impact locally, it may be too late to guide the issue's development.

Part II outlines South Carolina's current rules and its position on the proposed ABA Model Rule on Foreign Legal Consultants. Part III describes the United States Supreme Court's jurisprudence regarding state regulation of the practice of law. Part IV provides background on the GATS and briefly examines its salient

5. Rule 402(c), SCACR.

6. Rules 404, 405, SCACR.

7. GATS, *supra* note 1, at 1173.

8. *Id.* at 1180–81.

9. A.B.A. Ctr. for Prof'l Responsibility, Materials about the GATS and Other International Agreements, http://www.abanet.org/cpr/gats/gats_home.html (last visited Oct. 9, 2005).

10. Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667 (1997); Sydney M. Cone, III, *Legal Services in the Doha Round*, 37 J. WORLD TRADE 29 (2003); Terry, *supra* note 4, at 989.

11. S.C. Code Ann. § 40-5-40 (2001); Constitution of the South Carolina Bar, <http://www.sbar.org/about/constitution.asp> (last visited Mar. 18, 2006).

12. A.B.A. Ctr. for Prof'l. Responsibility, *supra* note 9.

13. See South Carolina Bar, <http://www.sbar.org> (last visited Oct. 9, 2005).

14. Public Comments for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization (WTO), 65 Fed. Reg. 16,450, 16,451 (Mar. 28, 2000).

15. See Terry, *supra* note 4, at 1062–63 n.255 (listing and describing the few submissions regarding legal services).

provisions. Part V analyzes the potential conflicts between the GATS and current South Carolina rules in light of the existing United States Supreme Court jurisprudence, and discusses the policy arguments for and against adoption of rules that are more welcoming to foreign lawyers. Part VI concludes by suggesting actions lawyers can take to help guide the development of this issue.

II. SOUTH CAROLINA RULES

A. *Current Rules on Admission to Practice Law*

South Carolina's rules for admission of foreign lawyers are moderate when compared to other states. For example, in fifteen states, lawyers must be residents of the state to be eligible to practice law there.¹⁶ South Carolina does not have such a requirement.¹⁷ In nineteen states and three territories, graduates of foreign law schools remain ineligible to take the bar examination and cannot be admitted to the bar.¹⁸ That means foreigners (even those whose legal studies focused to some extent on U.S. law or who have already practiced international law for years) must spend three years and many thousands of dollars to receive a J.D. degree from a U.S. law school, or succeed in convincing a state supreme court that they personally deserve to be exempt from the ineligibility rule.¹⁹

South Carolina does not require a J.D. from an ABA-approved school, but does require an advanced law degree (LL.M. or S.J.D.) from an ABA-approved law school for a foreign law school graduate to be eligible for the bar examination.²⁰ While the burden of any return to full-time study would be a heavy one for a practicing lawyer, the South Carolina rule is less stringent than the J.D. requirement because it requires only one or two years of study rather than three. Only nine other states have similar rules granting foreign law graduates with advanced law degrees from ABA-approved schools automatic eligibility to take the bar examination.²¹

A more lenient rule than the advanced law degree requirement would be to accept degrees from certain foreign law schools as equivalent to a J.D. Nineteen states either accept degrees from foreign law schools that train students in English common law or that provide training equivalent to American law schools.²² States use various mechanisms to determine equivalency, such as having a committee

16. U.S. INT'L TRADE COMM'N, U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES 15-16 (1997), available at <http://permanent.access.gpo.gov/web sites/ftp.usite.gov/ftp.usite.gov/pub/reports/studies/gats97.pdf>.

17. *Id.*

18. NAT'L CONFERENCE OF BAR EXAM'RS AND A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2002, at 27-28 (Erica Moeser & Margaret Fuller Corneille eds., 2002) [hereinafter ABA COMPREHENSIVE GUIDE].

19. See *In re Application of Gluckselig*, 697 N.W.2d 686 (2005) (discussing a foreign citizen's request for waiver of Nebraska's rule disallowing graduates of foreign law schools to sit for its bar).

20. ABA COMPREHENSIVE GUIDE, *supra* note 18, at 28.

21. *Id.* at 27-28.

22. *Id.*

analyze the programs of foreign law schools to determine whether a foreign law school is equivalent to a law school in that particular state.²³

B. *The Foreign Legal Consultant Rule*

The Foreign Legal Consultant (FLC) concept originated in New York. New York lawyers were setting up offices in London and Paris, smoothing the legal pathway to Europe for their New York clients.²⁴ Europe wanted reciprocity; British and French lawyers wanted to have similar law practices in New York, but they did not want to get American law degrees.²⁵ The New York Bar created a rule under which a foreign attorney can act as an FLC without having to take the bar examination.²⁶ FLCs may not practice U.S. law nor hold themselves out as members of the bar, but they may provide legal advice on their home country's law and international law while in New York.²⁷ The New York rule, more or less unchanged, became the ABA Model Rule for FLCs.²⁸ Twenty-six states have adopted the model rule, but South Carolina is not among them.²⁹ The ABA is encouraging states to adopt the FLC rule as a way to support the United States Trade Representative (USTR) in GATS negotiations.³⁰

Twenty-four states, including South Carolina, have refused to adopt the FLC rule, creating a point of contention between the states and the USTR.³¹ In further GATS negotiations, the USTR wants to be able to offer other countries access to the FLC market in the U.S., but cannot effectively do so unless the remaining twenty-four states relent and adopt the FLC rule.³² The issue of alleged pressure from the USTR to allow FLCs in all states came up at the "emergent issues" session of the Conference of Chief Justices in January 2005.³³ South Carolina Supreme Court Chief Justice Toal said her state is "very conservative on this issue."³⁴

South Carolina has a *pro hac vice* rule that is somewhat similar to the FLC rule because it allows for limited access to practice law within the state.³⁵ However,

23. See George D. Pappas, *Bar Admission Rules and Foreign Lawyers: U.S. State Barriers Challenged in a Global Economy*, MALET STREET GAZETTE (2000), available at www.malet.com/Articles/US%20Barriers%20Foreign%20Grad.pdf.

24. A.B.A. Section of Int'l Law and Practice, *Report to the House of Delegates, Model Rule for the Licensing of Legal Consultants*, 28 INT'L. LAW. 207, 212 (1994).

25. *Id.* at 212-13.

26. *Id.* at 213-14; N.Y. CT. R. § 521.1 (McKinney 2005).

27. N.Y. CT. R. § 521.3 (McKinney 2005).

28. A.B.A. Section of International Law and Practice, *supra* note 24.

29. A.B.A. Ctr. for Professional Responsibility Joint Committee on Lawyer Regulation, *Foreign Legal Consultant Rules 5* (2005), http://www.abanet.org/cpr/jclr/for_legal_consultants.pdf.

30. *Id.* at 1; A.B.A. Comm'n on Multijurisdictional Practice, *Report 201H*, at 1 (2002), <http://abanet.org/cpr/mjp/201h.doc>; Leonard Post, *States Pressured to Admit Foreign Lawyers*, LAW.COM, Feb. 8, 2005, <http://www.law.com/jsp/article.jsp?od=1107783316649>.

31. Post, *supra* note 30.

32. *Id.*

33. *Id.*

34. *Id.*

35. Rule 404, SCACR.

there are two important differences between the FLC rule and South Carolina's *pro hac vice* rule. First, South Carolina's rule strictly limits *pro hac vice* admission. A lawyer who resides in South Carolina and "is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina" may not practice under the *pro hac vice* rule.³⁶ Further, a lawyer may not "provide legal services [under the *pro hac vice* rule] in more than three matters in a 365-day period."³⁷ An FLC, on the other hand, can remain in New York for an unlimited time and work on an unlimited number of matters for an unlimited number of clients.³⁸ Second, attorneys admitted *pro hac vice* in South Carolina "may appear . . . in any action or proceeding before a tribunal of [South Carolina] if an attorney admitted to practice law in South Carolina is associated as attorney of record."³⁹ In contrast, an FLC is not allowed to represent clients in the courts of the state.⁴⁰

III. THE UNITED STATES SUPREME COURT'S JURISPRUDENCE ON THE PRACTICE OF LAW

Regulation of the legal profession preceded the Union.⁴¹ The colonies governed their respective bars even before becoming states.⁴² For that reason, courts have traditionally viewed regulation of the legal practice as one of the powers reserved to the states under the Tenth Amendment.⁴³ Early on, most states allowed foreign lawyers to appear before their courts.⁴⁴ States gradually shifted toward increasingly stringent requirements for admittance to their respective state bars, such as requiring attendance at qualifying law schools, passage of bar examinations, or significant periods of law practice in other jurisdictions.⁴⁵ As part of that shift, many states also required U.S. citizenship of those who wish to practice law.

In 1973, the United States Supreme Court heard the appeal of Fre Le Poole Griffiths, a citizen of the Netherlands, who had become a resident of Connecticut, attended a U.S. law school, and was in every way qualified to take the Connecticut

36. Rule 404(b), SCACR.

37. Rule 404(h), SCACR.

38. N.Y. Ct. R. § 521.1 (McKinney 2005).

39. Rule 404(a), SCACR.

40. N.Y. Ct. R. § 521.3 (McKinney 2005).

41. Geoffrey C. Hazard, Jr., *State Supreme Court Regulatory Authority Over the Legal Profession*, 72 NOTRE DAME L. REV. 1177, 1177 (1997).

42. *Id.*

43. *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 662–663 (1973) (Rehnquist, J., dissenting) ("The States traditionally have had great latitude in prescribing rules and regulations concerning technical competence and character fitness, governing those who seek to be admitted to practice law." (citing *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961))); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring) ("Admission to practice in a State and before its courts necessarily belongs to that State.").

44. *In re Griffiths*, 413 U.S. 717, 719 (1973) (quoting *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872)).

45. *See, e.g.*, Rule 402(c)(3), SCACR (requiring attendance at approved law school); Rule 402(c)(5), SCACR (requiring passage of bar examination).

bar examination, except that she was not a U.S. citizen, and a Connecticut rule barred aliens from the practice of law in that state.⁴⁶ The Court struck down the rule on Fourteenth Amendment equal protection grounds, applying strict scrutiny because alienage is a suspect classification.⁴⁷ The Court recognized that there is a “substantial” state interest in assuring that members of the bar are fit to practice law, meaning that they are well-trained in the law of the state and they can in good faith keep their oath to defend the Constitution.⁴⁸ However, the Court found that the U.S. citizenship requirement was not “necessary to the promoting or safeguarding of this interest.”⁴⁹ In other words, a non-citizen of good character, trained in U.S. law, was perfectly fit to practice law.⁵⁰

In his dissent, then-Justice Rehnquist disputed that alienage should be a suspect classification,⁵¹ and argued that rational basis, rather than strict scrutiny, should be applied.⁵² Justice Rehnquist stated that the Court should uphold the Connecticut rule because the distinction between citizens and aliens was “not . . . irrational” in determining qualifications to practice law.⁵³ Justice Rehnquist paraphrased the state’s rationale for the distinction that “citizens as a class might reasonably be thought to have a significantly greater degree of understanding of our [American] experience” than non-citizens, and therefore citizens would be better qualified to practice law than non-citizens.⁵⁴ As a matter of constitutional law, alienage is a suspect classification requiring strict scrutiny in equal protection cases. However, Justice Rehnquist’s approach is informative because, as a general rule, the Court applies a rational basis standard to state bar qualification rules that do not involve alienage.⁵⁵

In response to *Griffiths*, the states that required U.S. citizenship for admission to the bar ceased to do so.⁵⁶ No current South Carolina rules regarding the practice of law would be subject to strict scrutiny under the Fourteenth Amendment because none of the rules involve discrimination based on suspect classifications or

46. *In re Griffiths*, 413 U.S. 717, 718 (1973).

47. *Id.* at 721–22 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

48. *Id.* at 725–26.

49. *Id.* at 725.

50. *Id.* at 723.

51. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting) (dissenting from the Court’s opinions in both *In re Griffiths* and *Sugarman v. Dougall*).

52. *Id.* at 653–54.

53. *Id.* at 664.

54. *Id.*

55. *See, e.g., Schware v. Board of Bar Exam’rs*, 353 U.S. 232, 239 (1957) (“A State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.” (citing *Douglas v. Noble*, 261 U.S. 165, 168 (1923); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319–20 (1866))).

56. Some states do, however, require U.S. residency. The United States excepted from GATS requirements the rules of those states that require either U.S. residency or in-state residency for the practice of law: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, and Wyoming. U.S. INT’L TRADE COMM’N, *supra* note 16, at 15–16.

infringement on fundamental rights.⁵⁷ If foreign lawyers challenge other rules regarding qualifications to practice law, they will find courts less receptive because a court will uphold any rule that is rationally related to qualifications for practice.⁵⁸ A foreign lawyer may still attempt to argue that some rules are not rationally related to fitness to practice. For example, some commentators argue that the requirement in many states (including South Carolina) that would-be lawyers attend ABA-approved law schools is overly broad and excludes potential applicants with functionally equivalent educations because the ABA only looks at U.S. law schools.⁵⁹

IV. THE GATS

A. *Background of the GATS*

Many international agreements govern trade in goods, usually setting tariffs and quotas for various products. The GATS, however, “is the first ever set of multilateral, legally-enforceable rules covering international trade in services.”⁶⁰ the GATS is Annex 1B to the agreement that created the World Trade Organization (WTO) in 1994.⁶¹ From the United States’s perspective, the GATS is technically not a treaty, but part of a Congressional-Executive Agreement that established U.S. participation in the WTO in December of 1994.⁶² The Executive branch generally submits treaties to the Senate for advice and consent, whereas Congressional-Executive Agreements are “simply acts of Congress, ordinary legislation which

57. See *Moore v. Supreme Court of S. Carolina*, 447 F. Supp. 527, 530–31 (D.S.C. 1977) (holding with regard to a South Carolina rule requiring graduation from an ABA-approved law school to take the bar examination, that “no suspect classification is involved” and “no fundamental right is violated”).

58. See *id.* at 529 (“[The rule], despite the harshness of its application to the plaintiff, has a rational basis, and therefore, is constitutional.”).

59. Pappas, *supra* note 23.

60. World Trade Organization, WTO News: 2001 News Items, WTO Publishes Guide to the General Agreement on Trade in Services (GATS) (Sep. 24, 2001), http://www.wto.org/english/news_e/news01_e/guide_gats_e.htm (last visited Apr. 5, 2006).

61. GATS, *supra* note 1, at 1167.

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

World Trade Organization, What is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Apr. 5, 2006).

One of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War. So while the WTO is still young, the multilateral trading system that was originally set up under GATT is well over 50 years old.

WORLD TRADE ORGANIZATION, THE WTO IN BRIEF 3, available at http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

62. Uruguay Round Agreements Act § 101, 19 U.S.C. § 3511 (1994); DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 167 (2001).

enacts an international obligation by a majority vote of both the House and Senate, with the President's signature."⁶³ Treaties and Congressional-Executive Agreements have the same legal effect,⁶⁴ so this Comment will use the terms interchangeably. Therefore, as a "treaty," the GATS is "the supreme Law of the Land" in the United States.⁶⁵

The scope of the GATS is enormous; it covers virtually all types of services in almost all major countries. Currently 149 countries, including the United States, are members of the WTO.⁶⁶ Committing to the GATS is part of the WTO accession process, which means the GATS will not only bind the original WTO member countries, but also bind all countries joining the WTO after its creation in 1995.⁶⁷ The only services that the GATS explicitly excludes are government-provided.⁶⁸ The GATS categorizes all other services into twelve sectors: business; communication; construction and engineering; distribution; educational; environmental; financial; health related and social; tourism and travel related; recreational, cultural and sporting; transport; and other services not included elsewhere.⁶⁹ The business services sector is divided into five sub-sectors: professional, computer, research and development, real estate, rental/leasing, and other business services.⁷⁰ "Legal services" is a sub-sub-sector classified under professional services.⁷¹ Although legal services provisions "have not figured prominently under the GATS,"⁷² potentially, the GATS legal services provisions could have significant repercussions, not only for the legal profession in terms of the economics of law practice and the content of rules governing practice,⁷³ but also for the clients of cross-border legal practices.

WTO trade negotiations take place in rounds, each of which may last for several years. During the Uruguay Round (1987-1993), countries agreed to include legal services under the GATS and drafted provisions regarding legal services.⁷⁴ Those provisions became effective January 1, 1995.⁷⁵ The GATS also contains a provision that called for further negotiations within five years of the creation of the

63. BEDERMAN, *supra* note 62, at 166.

64. *Id.* at 167.

65. U.S. CONST. art. VI, cl. 2.

66. There were 149 members of the WTO as of December 11, 2005. World Trade Organization, Understanding the WTO: The Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 5, 2006).

67. GATS, *supra* note 1 at 1150.

68. GATS, *supra* note 1, at 1169; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, TRADE FACTS, THE WTO GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) AND THE STATES: THE FACTS (2005), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file790_7577.pdf.

69. WTO, SERVICES SECTORAL CLASSIFICATION LIST (1991).

70. *Id.*

71. *Id.*

72. Cone, *supra* note 10, at 29.

73. *Id.* at 30; Terry, *supra* note 4, at 998.

74. Cone, *supra* note 10, at 29.

75. *Id.*

WTO.⁷⁶ That round of negotiations—the Doha Round—has already begun and is ongoing.⁷⁷ In the negotiation process, the USTR speaks for the United States. When legal services are being discussed, the USTR “looks for guidance to the [ABA].”⁷⁸

B. Basic GATS Provisions

1. Provisions of General Applicability

To understand what the GATS requires of the United States, one must first look at the agreement itself and understand what it requires of all its signatories. Transparency and domestic regulation are two key provisions that apply to all signatories and all types of services, though for simplicity’s sake, this Comment will interpret them exclusively in terms of legal services entering the United States. Transparency means that the United States must publish or otherwise make publicly available all of its rules, including individual states’ rules, that govern legal services.⁷⁹ Domestic regulation means that U.S. regulation of legal services will be subject to rules, or “disciplines,” that the Council for Trade in Services (a WTO body) is currently developing.⁸⁰ The GATS states that the purpose of the forthcoming disciplines is to ensure that domestic rules regarding the practice of law are: “(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; [and] (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”⁸¹ The disciplines also must not conflict with any provision in the U.S. Schedule of Specific Commitments.⁸²

76. GATS, *supra* note 1 at 1180.

77. World Trade Organization, The Fourth WTO Ministerial Conference, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Apr. 5, 2006).

78. Cone, *supra* note 10, at 35.

79. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

Where publication as referred to in [the preceding paragraph] is not practicable, such information shall be made otherwise publicly available.

GATS, *supra* note 1, at 1170.

80. “With 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, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.” *Id.* at 1173.

81. *Id.*

82. *Id.*; see U.S. INT’L TRADE COMM’N, *supra* note 16.

The GATS considers four distinct methods of supplying services.⁸³ “Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member.”⁸⁴ For example, a lawyer in Great Britain who provides legal services by phone, fax, mail, or email to a client in the United States is engaging in cross-border supply. “Consumption abroad refers to situations where a service consumer . . . moves into another Member’s territory to obtain a service.”⁸⁵ A client who uses legal services while in a foreign country as a tourist or immigrant alien is consuming abroad. “Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member’s territory to provide a service.”⁸⁶ For example, commercial presence occurs when a law firm established in one country sets up a relatively permanent office in another country. Large U.S. law firms have engaged in this expansion sooner and in greater numbers than most other countries’ law firms. U.S. firms want to continue foreign expansion, but many countries are asking for greater access to U.S. legal markets in return. “Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service.”⁸⁷ This would include non-citizens engaging in everything from temporary practice of law under the *pro hac vice* rule⁸⁸ to lifelong careers as full-fledged members of the bar.

This Comment focuses on the third and fourth modes of supply: commercial presence and presence of natural persons. Specifically, the focus is on foreign law firms, lawyers, and law graduates from other WTO member countries who wish to practice law in South Carolina.

2. *Specific Commitments*

Each GATS signatory uses a schedule of specific commitments to customize how the GATS will apply to them.⁸⁹ Each country’s schedule of specific commitments accepts or rejects certain provisions (in addition to the provisions of general applicability). The United States—along with most other signatories—includes three primary commitments on its schedule:⁹⁰ (1) “Market access,” which means that the United States may “not maintain or adopt,” on either a statewide or national basis, certain numerical limitations, maximum quotas, or other restrictive measures on foreign lawyers and firms practicing within the United

83. World Trade Organization, The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Apr. 5, 2006).

84. *Id.* (emphasis removed).

85. *Id.* (emphasis removed).

86. *Id.* (emphasis removed).

87. *Id.* (emphasis removed).

88. Rule 404, SCACR.

89. GATS, *supra* note 1, at 1179–80.

90. Again, this Comment will interpret the provisions only in terms of legal services entering the United States, although the provisions may apply to any services that any country includes in its schedule.

States or a particular state;⁹¹ (2) “National treatment,” which means that the United States may not do anything that “modifies the conditions of competition” to favor U.S. lawyers over foreign lawyers.⁹² At the same time, the United States need not “compensate for any inherent competitive disadvantages which result from the foreign character of the [foreign lawyers];”⁹³ and (3) “Progressive liberalization,” which means that the U.S. agrees to continue periodic negotiations with GATS signatories, with the goal of allowing other signatories greater ability to provide legal services within the United States, while allowing “due respect for [U.S.] policy objectives” regarding legal services.⁹⁴

The market access and national treatment provisions only apply to services that a country lists in its schedule.⁹⁵ Even when a country lists a service in its schedule, that country may insist on remaining “unbound” as to certain modes of supply of that service, thus opting out of the market access and national treatment provisions as to those modes of supply.⁹⁶ Alternatively, a country may indicate that an existing domestic law governing a certain service is exempt from full compliance with the market access and national treatment provisions of the GATS;⁹⁷ however, future laws would have to comply with market access and national treatment.⁹⁸

The U.S. Schedule of Specific Commitments (U.S. Schedule) breaks down the application of the market access and national treatment provisions state-by-state.⁹⁹ The U.S. Schedule includes the laws of some states regarding requirements for admission to practice law, and exempts those laws from full accord with the market access and national treatment provisions.¹⁰⁰ South Carolina’s laws are not included in the U.S. Schedule.¹⁰¹ The U.S. Schedule does, however, specify that some states—including South Carolina—will remain “unbound” as to the market access provision for legal services rendered through the “commercial presence” and “presence of natural persons” modes of supply.¹⁰² Thus, the full weight of the GATS provisions is not yet upon South Carolina; only the general GATS provisions apply to foreign lawyers seeking to practice law within the state.

However, the progressive liberalization provision applies to all U.S. laws regarding legal services, meaning that the liberalization of South Carolina’s rules could be at issue in any current or future negotiations. The Doha Round of

91. GATS, *supra* note 1, 1179–80.

92. *Id.* at 1180.

93. *Id.*

94. *Id.* at 1180–81.

95. World Trade Organization, Services: Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Apr. 5, 2006).

96. *Id.*

97. *Id.* “In many cases it will be seen that there are textual descriptions of bound commitments which indicate limitations on market access or national treatment.” *Id.*

98. *Id.*

99. U.S. INT’L TRADE COMM’N, *supra* note 16.

100. *Id.* at 17–33.

101. *Id.*

102. *Id.* at 34.

negotiations is currently ongoing and could provide for future rounds.¹⁰³ The USTR has assured states that “nothing the U.S. is offering in these negotiations would require the states to make any change in their laws or regulations that they have not already adopted or agreed to adopt.”¹⁰⁴ While that may be the case now, the USTR’s position could change in the future if the need arises to make concessions in the area of legal services in exchange for concessions by other members regarding other types of services.¹⁰⁵ The progressive liberalization clause means that liberalizing state laws will be an issue for the foreseeable future; it is in the discretion of the various negotiators whether and how hard to press the issue. In other words, situations could conceivably arise in which there would be significant pressure to change certain laws due to the GATS.¹⁰⁶

V. POTENTIAL CONFLICTS BETWEEN GATS PROVISIONS AND SOUTH CAROLINA RULES

GATS provisions may conflict to some extent with current South Carolina rules regarding admission to practice law. This Part will first outline the areas where no potential conflict exists, and then examine areas where conflict may arise.

The GATS will not affect laws that already comport with its requirements. For example, the transparency requirement will have little or no effect on South Carolina because the state’s requirements for admission to practice law are already publicly available in the South Carolina Appellate Court Rules. GATS transparency might someday require consolidated publication of each state’s rules in one nationally centralized location,¹⁰⁷ but such a requirement would have only a minimal effect on South Carolina.

The GATS also will not conflict with existing laws to the extent that its provisions allow deference to the national and sub-national policies of the various signatories. For example, the GATS is not intended to prevent countries from maintaining the quality of services offered to their citizens. South Carolina has consistently stated that it restricts who may practice law only as a means to maintain the high quality of legal services for state residents.¹⁰⁸ There may come

103. World Trade Organization, *supra* note 77.

104. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 68.

105. Professor Terry alludes to the Uruguay Round negotiations in which the USTR agreed not to include legal services in the U.S. Schedule, but included them at the last minute in exchange for concessions from Japan regarding semiconductor patents. *See* Terry, *supra* note 4, at 1089.

106. *See id.*; Pappas, *supra* note 23.

107. The complex web of state-by-state regulation may itself be seen as a barrier to foreigners wishing to come to the U.S. to practice law. DEAN BAKER, PROFESSIONAL PROTECTIONISTS: THE GAINS FROM FREE TRADE IN HIGHLY PAID PROFESSIONAL SERVICES 5–6 (2003), available at <http://www.cepr.net/publications/protectionists.pdf>. However, the GATS does not require that domestic regulations be simple; only that they be transparent, or in other words, published.

108. *See, e.g.,* Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 486–87, 560 S.E.2d 612, 617 (2002) (“[South Carolina’s] duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous

a time when South Carolina would have to convince a WTO body that the state's rules are not "more burdensome than necessary to ensure the quality of the service,"¹⁰⁹ but as long as the state can do so, there would be no need to change the rules.

South Carolina's laws also avoid direct conflict with the GATS to the extent that Congress insists that implementation of the GATS within the U.S. shall not conflict with state laws.¹¹⁰ There was no such provision in Congress's enactment of the original GATS agreement.¹¹¹ It is unclear, however, whether further negotiations will apply the GATS to legal services within South Carolina, or whether Congress would, as a condition of approval, require consistency between any provision that would apply to state laws and the existing state laws. Of course the GATS signatories have not yet agreed on the legal services disciplines, so Congress certainly has not had the opportunity to pass any implementing legislation. Therefore, we cannot yet know the extent to which Congress will tilt the balance of implementation toward state rules and away from any disciplines that might conflict with those rules.

A. Enforcement of GATS Provisions

If foreign lawyers felt South Carolina rules did not comply with the GATS, what would be their recourse? There is no private right of action to enforce the treaty in the United States or any other country.¹¹² The GATS provides a process in which an aggrieved foreign lawyer would have to speak to the government of his home country, which would then enter talks with the U.S. Government.¹¹³ If the two governments did not succeed in resolving the dispute, they could go before a WTO body, which would use formal dispute settlement procedures, possibly including the WTO court in Geneva.¹¹⁴ The final remedy could involve one country imposing trade sanctions on the other.¹¹⁵

On one hand, this dispute resolution process does not seem too troubling. The likelihood that a foreign lawyer, or group of lawyers, will be so set on practicing

preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

109. GATS, *supra* note 1, at 1173.

110. For example, the implementing legislation for the North American Free Trade Agreement (NAFTA) states "[n]o provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect" and "[n]o State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid." 19 U.S.C. § 3312 (a)(1), (b)(2) (1994).

111. Uruguay Round Agreements Act, 19 U.S.C. § 3511 (1994) (indicating congressional approval of "the trade agreements . . . resulting from the Uruguay Round of multilateral trade negotiations").

112. Terry, *supra* note 4, at 1013.

113. GATS, *supra* note 1, at 1182; Terry, *supra* note 4, at 1013–14.

114. Terry, *supra* note 4, at 1012–13.

115. *Id.* at 1013.

law in South Carolina that they will formally complain to their home country's government if the state does not allow them to practice is slight. If the lawyers do file a complaint, the likelihood that the foreign government will find it worthwhile to negotiate with the United States, and risk souring a trade relationship with this country through seeking to impose trade sanctions, all so that one lawyer or group of lawyers can practice in this state, is similarly slight. The possibility of international conflict over this issue seems far-fetched to some scholars.¹¹⁶ On the other hand, the possibility exists, and the worst case would indeed be drastic.¹¹⁷

Suppose the U.S. Government wants to avoid or end the GATS enforcement process, and is willing to allow the foreign lawyer to practice in South Carolina, but South Carolina is adamant that it will not admit the foreign lawyer. The first step in that legal analysis would entail a consideration of the Supremacy Clause of the United States Constitution, which specifies that treaties are "the supreme Law of the Land."¹¹⁸ In theory, this means that where a state law does not conform to a treaty, the treaty prevails. Article III of the Constitution gives courts the power to enforce a treaty against a state: "The judicial Power shall extend to all Cases . . . arising under . . . Treaties."¹¹⁹

However, the United States Supreme Court has not used this constitutional power to enforce treaties as extensively as one might guess. For example, the case of *Volkswagenwerk Aktiengesellschaft v. Schlunk*¹²⁰ arose under the Hague Service Convention, a treaty governing service of process on international parties.¹²¹ In *Schlunk*, the plaintiff served Volkswagen in two ways: he served a dealership in the United States as well as the corporate headquarters in Germany.¹²² The Court held the Hague Service Convention would apply only to the service of process in Germany.¹²³ The Court avoided deciding whether the service on the German headquarters complied with the Hague Service Convention by relying on the state long-arm statute, the Due Process Clause, and principles of agency to find that the service on the U.S. dealership was sufficient.¹²⁴ Ultimately, *Schlunk* and several

116. See, e.g., Burr, *supra* note 10, at 690 (indicating while "sovereignty is always an issue when international commitments and local law conflict . . . the sovereignty issue will not be as important as it has been in the past"); Cone, *supra* note 10, at 40 (arguing "governments may find that, in the interests of clients and in the context of multilateral trade negotiations, it is desirable or at least expedient to provide greater cross-border access to establishments of law firms from other countries").

117. Terry, *supra* note 4, at 1087-88.

118. "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

119. *Id.*

120. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

121. *Id.* at 696-97.

122. *Id.* at 706-07.

123. *Id.* at 707.

124. *Id.* at 707. The Court characterized the U.S. Volkswagen dealer as an agent of the Volkswagen company without doing an in-depth agency analysis. *Id.*

other cases¹²⁵ demonstrate that the Court will not apply treaties every time a treaty could be applicable—the Court prefers using other laws and principles where possible.

It is also important to remember that the GATS is primarily aspirational, merely setting out a framework of goals for further negotiation. The specific requirements for implementation of those goals are the subject of ongoing negotiation; they are not yet part of any signed treaties, and Congress has not had an opportunity to enact them. Consequently, there is no way for courts to apply them yet. The current state of the GATS is thus analogous to Congress having passed a law authorizing a federal agency to create certain regulations.¹²⁶ The law itself tells us little about the demands it imposes—the regulations will reveal the requirements for compliance.¹²⁷

Finally, the fact that the GATS does not provide for a private right of action may mean that no case will ever “arise under” the GATS.¹²⁸ It is difficult to imagine who would have standing to sue over alleged GATS violations other than private individuals and firms—precisely those to whom the GATS denies a right of action.

For all these reasons (judicial restraint in applying treaties, lack of specificity in GATS requirements, and absence of a private right of action), a foreign lawyer wishing to practice in South Carolina would need to frame their case in terms of something other than the GATS itself. The most likely candidate would be the Fourteenth Amendment, which is in some degree of tension with the Tenth Amendment with regard to the regulation of the practice of law.

B. Application of Practice Rules to Lawyers from Sister States

There is no case law in which foreign lawyers (meaning from outside the United States) have challenged South Carolina rules regarding admission to practice within the state. Perhaps it is possible to see how such a case might turn out by considering the treatment of attorneys from other U.S. jurisdictions who apply to practice in South Carolina.

125. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 536 (1987) (concluding that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters “was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad”); *Whitney v. Robertson*, 124 U.S. 190, 195 (1888) (“[S]o far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.”) (quoting *Head Money Cases*, 112 U.S. 589, 599 (1884)); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate [international law] if any other possible construction remains.”).

126. See *Terry*, *supra* note 4, at 1019 (stating that “the GATS is somewhat similar to the U.S. administrative system in which one cannot understand one’s obligations simply by reading the statute, but must instead wait to find out what the administrative agency regulations say”).

127. *Id.*

128. See U.S. CONST. art. III, § 2.

Precedent indicates that South Carolina has traditionally not been a welcome place for out-of-state attorneys who attempt to practice in this state.¹²⁹ In *Moore v. Supreme Court of South Carolina*,¹³⁰ the South Carolina Supreme Court refused to allow a Georgia attorney with a degree from a non-ABA-approved law school to take the bar examination in South Carolina.¹³¹ The court was not willing to consider whether his education was equivalent to that available at an ABA-approved law school, nor would the court consider his many years of presumably competent legal practice in Georgia.¹³² For an individual to sit for the South Carolina bar examination, that person is required to have a law degree from an ABA-approved law school, and the South Carolina Supreme Court was unwilling to make an exception in Moore's case.¹³³ Foreign lawyers with an advanced law degree from an ABA-approved law school are allowed to take the South Carolina bar examination; the question remains, if Moore had had such an advanced law degree, would the court have allowed him to take the South Carolina bar examination?¹³⁴ If South Carolina were to follow the lead of other states in recognizing more foreign law schools as the equivalent of ABA-approved law schools, then how could South Carolina justify not giving the same consideration and recognition to other states' law schools, which may also be the equivalent to ABA-approved law schools?¹³⁵

In *Hawkins v. Moss*,¹³⁶ an attorney from New Jersey sought admission to practice in South Carolina without taking the South Carolina bar examination.¹³⁷ The South Carolina Supreme Court refused to make an exception for this out-of-state attorney, and the Fourth Circuit agreed, finding the attorney's Fourteenth Amendment claims unpersuasive.¹³⁸ If South Carolina adopted the ABA Model Rule on FLCs,¹³⁹ should lawyers like Hawkins be able to take advantage of such a rule? FLCs are not required to take the bar examination of the state where they are

129. South Carolina has been welcoming in one specific, exceptional situation—in the aftermath of Hurricane Katrina:

In recognition of the devastation and disruption of daily life suffered by residents of Louisiana, Mississippi and Alabama as a result of Hurricane Katrina, we offer our support to the lawyers admitted to practice in those states, and who have been displaced due to Hurricane Katrina, by relaxing our rules for admission pro hac vice and for admission to the practice of law in the State of South Carolina.

In re Relaxation of Rules for Admission Pro Hac Vice and for Admission to Practice of Law for Lawyers Displaced by Hurricane Katrina, Shearouse Adv. Sh. No. 36, at 1 (S.C. Sept. 19, 2005).

130. 447 F. Supp. 527 (1977).

131. *Id.* at 528.

132. *Id.* at 528–29.

133. *Id.*

134. ABA COMPREHENSIVE GUIDE, *supra* note 18, at 28.

135. See Terry, *supra* note 4, at 1087 (stating “if foreign lawyers are granted greater rights than domestic lawyers, the domestic lawyers will object . . . to this ‘reverse discrimination’ and will lobby for equal treatment.”).

136. 503 F.2d 1171 (4th Cir. 1974).

137. *Id.* at 1174.

138. *Id.* at 1178–80.

139. A.B.A. Section of Int'l Law and Practice, *supra* note 24, at 208–09.

practicing law, because they do not practice the law of that state.¹⁴⁰ There is an argument that if South Carolina adopted the rule on FLCs, an attorney like Hawkins should be allowed to come to South Carolina and practice only the law of his home state and international law, just as FLCs from overseas could come to South Carolina and practice the law of their home country and international law.

Perhaps South Carolina and other states with similar rules are less concerned about lawyers from abroad invading their state's legal profession and more concerned about the possibility of having to expand their state's legal profession to include lawyers from other states if they include lawyers from abroad. For example, the likelihood that lawyers from Charlotte or Atlanta would take business away from South Carolina attorneys seems more realistic than attorneys from Tokyo or Sao Paulo doing so. Attorneys from neighboring states pose more of a threat to South Carolina's legal profession because of their geographical proximity, language and cultural similarity, and familiarity with the needs and concerns of clients in the southeastern United States. Distinctions between foreign and out-of-state attorneys raise another question: Is economic protectionism the purpose of the existing barriers to entry in the legal profession? There is a strong argument that economic protectionism is the motive underlying most barriers to out-of-state lawyers,¹⁴¹ but South Carolina courts have explicitly stated that the purpose of their barrier rules is not protectionism.¹⁴² A recent law journal article explained how rules for admission of out-of-state lawyers can appear to relate to genuine concerns about qualifications, yet, in fact be purely protectionist by design and in effect.¹⁴³ Protectionist domestic regulations are precisely what the GATS seeks to eliminate.¹⁴⁴ If the GATS succeeds in eliminating barriers that protect against entry from abroad, it may also weaken the legal arguments supporting barriers that protect against entry from across state lines.

140. See *supra* text accompanying notes 26–28.

141. See, e.g., BAKER, *supra* note 110, at 6 (“Each state currently sets its own rules for who is allowed to practice law, often applying criteria that serve no obvious purpose, except to . . . set up protectionist barriers for the purpose of not having to compete with lawyers from other states.”)

142. Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law.

Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 486–87, 560 S.E.2d 612, 617 (2002) (citing *State v. Buyers Service Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

143. Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 144–50 (2004).

144. GATS, *supra* note 1, at 1173.

C. Policy Considerations

To the extent that lawyers currently practicing in South Carolina are aware of the GATS legal services provisions, they may have concerns about rewriting the rules for admission to the bar to allow more foreign lawyers to practice here. There are probably at least three reasons for those concerns: (1) protectionism, in terms of protecting one's own livelihood from encroaching competitors; (2) uncertainty of gaining anything other than the reciprocal opportunity to practice law abroad more easily, which may not be of interest to most local lawyers; and (3) concern that delete foreign-trained lawyers may be less capable of representing and counseling clients within the state as opposed to local lawyers. These concerns are sincere, but the extent to which these concerns are well-founded is at least debatable.

The appropriate response to the first two concerns is that globalization is inevitable and is already occurring rapidly. South Carolina has a lot to gain economically from getting "on board" early, and has a lot to lose if it lags behind. A more welcoming policy toward foreign lawyers will help attract and retain foreign investment in the state and help South Carolina businesses expand abroad. Multinational companies need lawyers with global experience. These companies need lawyers who understand the company's history and background, who fluently speak the language of the company's decision makers, and who understand the relationship between foreign law, international law, and South Carolina law. If states respond to the GATS by quickly adapting their rules to allow for something similar to FLCs—regardless of whether anything actually requires them to do so—these states will make it increasingly easier for foreign corporations in those states to hire counsel with a global legal background, which could attract more foreign investment. When major international transactions occur in a state that has tough restrictions on foreign legal practice, clients may prefer to outsource the legal work related to those transactions to major centers of international practice.¹⁴⁵ This in turn prevents the lawyers of that state from gaining international legal experience, making it less likely that the next international client will choose to use their services. This continuing cycle may be difficult to break.¹⁴⁶

The appropriate response to the third concern—the adequacy of representation by foreign-trained lawyers—is threefold: (1) lowering the entry barriers for foreign lawyers would not hold them to a lower standard than local lawyers, (2) enforcement mechanisms already exist to hold lawyers accountable who do not fulfill their duties to their clients, and (3) clients actually benefit from having the option of hiring a foreign lawyer. If new rules lowered the entry barriers to the point where anyone could come into the state and practice law, then consumers of legal services (clients) would be put at risk. However, both the GATS and the decisions of the United States Supreme Court allow entry barriers to the extent those barriers

145. Cone, *supra* note 10, at 39.

146. *Id.* at 39–40.

are “based on . . . competence”¹⁴⁷ and meet the appropriate level of scrutiny with regard to the state’s legitimate “interest [in assuring] the requisite qualifications of persons licensed to practice law.”¹⁴⁸

Currently, there are existing mechanisms to deal with incompetent or unethical lawyers: sanctions and malpractice suits. While it would certainly be undesirable to flood the judicial system with disciplinary proceedings and malpractice suits, there is no evidence that foreign lawyers would be less competent or less ethical than domestic lawyers.

Finally, “[c]lients . . . benefit when they are able to choose among a broad spectrum of potential suppliers [of legal services], domestic and foreign. It is the local bar, not the local client, that is likely to sound the alarm that foreign lawyers are coming.”¹⁴⁹ If a client operates a business across state lines, the client may prefer a lawyer who is familiar not only with South Carolina law but is also familiar with the law of the other states where the client operates. The same is true for clients who operate a business across national borders. Sound legal advice regarding the law of both South Carolina and other jurisdictions helps pave the way for South Carolina businesses to compete in a global economy and for South Carolina to attract global investment. Moreover, one way to have more lawyers in South Carolina who are competent practitioners of the law of more than one jurisdiction is to make it easier for competent lawyers from other jurisdictions to practice law here.

Another reason to adopt a more open admission policy, though perhaps the weakest reason, is to avoid a potential standoff with the federal government concerning the extent to which South Carolina may maintain rules that differ from what the nation agrees to under the GATS. The “worst-case scenario”¹⁵⁰ could lead to the following: GATS negotiations result in disciplines that are clearly inimical to South Carolina rules, and the United States changes South Carolina’s current “unbound” status to bind the state to the GATS.¹⁵¹ A foreign lawyer then wishes to practice in South Carolina. The South Carolina Supreme Court, adhering to existing rules, does not allow the lawyer to practice with in the state. The foreign lawyer follows the enforcement procedures in the GATS, successfully arguing to his home country government and to the WTO court in Geneva that South Carolina’s rules violate the GATS provisions. Trade sanctions are imposed on the United States, hampering the national economy to the extent that the federal government is eager to end the sanctions. The federal government then convinces the Supreme Court that South Carolina’s power to regulate its state bar under the Tenth Amendment

147. GATS, *supra* note 1, at 1173.

148. *In re Griffiths*, 413 U.S. 717, 722 (1973).

149. Cone, *supra* note 10, at 39; *see also* Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 *FORDHAM INT’L L.J.* 1126, 1129 (1998) (“Adopting regulations allowing foreign legal consultants to practice law will permit U.S. lawyers to better serve their current clients.”).

150. Terry, *supra* note 4, at 1087–90.

151. *See supra* note 102 and accompanying text.

is subordinate to the supreme law of the land—which the Supremacy Clause defines to include treaties, including the GATS.

Such an overt conflict with these kind of drastic results is unlikely to occur in any state.¹⁵² Also, while conceivable, this worst-case scenario is not at all likely to occur in South Carolina. First, the aggrieved foreign lawyer would probably recognize that the time and cost of the GATS enforcement procedures (as well as the risk of an unsuccessful outcome) are much greater than the time and cost of getting an LL.M. degree at an ABA-approved school and then taking the South Carolina bar examination. An even easier avenue for the foreign lawyer to take would be for that lawyer to skip the LL.M. degree and simply take the bar examination in a different state, a state that is more open to cross-border legal practice—bypassing South Carolina entirely.¹⁵³ It is impossible to know how common this latter route is or will be because it is impossible to determine how many excellent foreign lawyers never consider practice in South Carolina, or quickly drop consideration of it, due to the barriers they encounter.

VI. CONCLUSION

As a matter of policy, regardless of whether the GATS ever requires changes to South Carolina rules, South Carolina should continue to make it easier for foreign lawyers and law firms to provide legal services within the state. One method of making these changes would be to adopt some version of the ABA Model Rule on FLCs. Another method would be to create procedures that would recognize some foreign law degrees as the equivalent of those from ABA-approved law schools, which would require less time and expense for foreign lawyers than the current requirement of getting an advanced law degree from an ABA-approved law school.

No matter what position a person believes is best from a policy standpoint, it is crucial first for more lawyers to be aware of the GATS legal services provisions and their potential implications for the state bar. When a critical mass of South Carolina lawyers reach such awareness, they can voice their concerns to the South Carolina Supreme Court, the ABA, and Congress. Attorneys can ask the South Carolina Supreme Court to propose rules for foreign lawyers that would still maintain the high standards of the legal profession. Attorneys can request the ABA to convey their concerns to the USTR for consideration in the ongoing Doha Round

152. Terry, *supra* note 4, at 1075–76.

153. For example, Nebraska did not allow Richard Gluckselig, a foreign law graduate, to sit for the Nebraska bar examination because he did not have a J.D. from an ABA-approved law school. On appeal, the Nebraska Supreme Court found that Gluckselig was qualified to take the Nebraska bar examination because he had taken nineteen credit hours at the University of Nebraska College of Law, received an LL.M. from the University of Michigan, and passed the New York bar examination. *In re Application of Gluckselig*, 697 N.W.2d 686, 689–90 (Neb. 2005). Someone less determined to practice in Nebraska might have simply practiced in New York after passing the New York bar examination, rather than appealing the ruling of the Nebraska State Bar Commission, passing over Nebraska altogether.

negotiations. Finally, attorneys can urge their congressional representatives to enact only those GATS commitments that appropriately take the profession's concerns into account.

Eve Ross

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