Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services

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LIBERALIZING INTERNATIONAL TRADE IN LEGAL SERVICES: A PROPOSAL FOR AN ANNEX ON LEGAL SERVICES UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES

Michael J. Chapman*
Paul J. Tauber**

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INTRODUCTION

The legal services industry is experiencing a fundamental transformation. Thirty years ago, legal markets were almost exclusively national; today, a global legal market is emerging and evolving at a considerable pace. Unfortunately, further globalization is hindered by the failure of national regulatory systems to respond effectively.

Globalization has made domestic regulation more difficult because it increases the complexity of the interactions between lawyers, the legal system, and the authorities responsible for regulating the legal profession. As the process of globalization has blurred the distinction between national and international legal issues, an international regulatory regime governing transnational legal practice has become essential. However, national authorities have resisted the creation of such a regime, and transnational legal practice remains largely unregulated.

Because the most important factor inhibiting the further globalization of the legal services industry is the current structure of national regulations, this Note proposes the creation of a system to impose multinational discipline on the exercise of authority by domestic regulators of the legal profession. In Part I, the Note begins with a discussion of the globalization of law firms and the expansion of international trade in legal services. In Parts II and III, the Note describes the current state of regulatory barriers facing lawyers in the United States, the European Union (EU), and Japan and analyzes the difficulties of liberalizing international trade in legal services. Part IV continues with an overview of the General Agreement on Trade in Services (GATS) and an analysis of how it applies to trade in legal services. Finally, in Part V, the Note offers a proposal for a multilateral regime to govern international trade.


in legal services. Due to peculiarities of the legal services industry and inherent negotiating difficulties, an Annex on Legal Services under the GATS would be the most effective means available to bring about a significant liberalization of trade in legal services.

I. INTERNATIONALIZATION OF LAW FIRMS AND INTERNATIONAL TRADE IN LEGAL SERVICES

Since the end of World War II, significant economic and political events have fueled the globalization of law firms and spurred a corresponding increase in international trade in legal services. Table 1 shows that as opportunities have emerged, law firms have responded. For example, the first wave of U.S. lawyers to enter the European market closely followed the enactment of the Marshall Plan. Similarly, the creation of major financial institutions, such as the Eurobond and Eurodollar markets in the 1960s and 1970s, prompted many U.S. firms to open branch offices in London and Paris.

In the past decade the global expansion of law firms has been remarkable. U.S. firms have been especially aggressive. In 1980, 35 of the current 700 largest U.S. law firms maintained a total of 165 foreign offices. By 1994, 114 of these firms supported 340 foreign branches.

7. Data were compiled from profiles of the 700 largest U.S. law firms published in Law Firm Profiles, Of Counsel 700, May 2-16, 1994, at 63. These data were supplemented with firm profiles contained in LEXIS, Career Library, Empdir File (January 22, 1995) and with telephone interviews with individual law firms. The data presented in this table has several important limitations. First, coverage extends only to the foreign offices with at least one full-time attorney of the largest 700 U.S.-based firms. Second, the totals for new offices are for new offices that remained open through 1994. Thus, some undercoverage is expected because several small firms have foreign branches and because many offices which were opened in previous years, particularly during the late 1980s, were closed by 1994. The latter source of undercoverage results in a reduction in the magnitude of the trends shown in Table 1.

8. Future of the Legal Profession, supra note 2, at 432.


10. Abel, supra note 3, at 738.

11. Id.

12. Supra note 7.

13. Supra note 7.
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Table 2, which reflects the amount of U.S. legal services sold abroad,\(^4\) shows that between 1986 and 1993, U.S. exports in this sector expanded from $97 to $1,453 million.\(^5\) Table 3, which reflects the amount of foreign legal services purchased by U.S. citizens,\(^6\) shows that U.S. imports of legal services simultaneously increased from $40 to $326 million.\(^7\)

Four recent events have triggered dramatic responses from U.S. law firms: the announcement of the EC 1992 initiative, the relaxation of regulatory barriers in Japan, the collapse of communism in Eastern Europe and the Soviet Union, and the development of the North American Free Trade Agreement (NAFTA).\(^8\) As law firms expanded to take advantage of these opportunities, trade in legal services simultaneously increased.

A. EC 1992

Anticipation of the 1992 Single Market Program instigated a surge of new office openings in Brussels during the late 1980s. Table 1 reveals that between 1987 and 1993, the number of branch offices of U.S. law firms in Brussels increased from 8 to 34. During the same period, the total number of branch offices in all EC countries more than doubled, from 66 to 134. More dramatically, Table 2 illustrates that U.S. exports of legal services to the EC grew 1,124 percent during the period, from $55 to $673 million. Finally, from 1987 to 1993, the total value of trade in legal services between the United States and the EC expanded from $66 to $809 million.


\(^{15}\) Sondheimer & Bargas 1994, *supra* note 14, at 98, 132 tbl. 9.4; Sondheimer & Bargas 1992, *supra* note 14, at 82, 116 tbl. 9.1. All import and export data are reported in nominal terms.


Table 2: U.S. Exports of Legal Services by Country (millions of U.S. dollars)

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Note: Exports represent payments to U.S. law firms.
D: Data suppressed.
Table 3: U.S. Imports of Legal Services by Country (millions of U.S. dollars)

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Note: Imports represent payments to foreign law firms.
D: Data suppressed.
*: Less than $500,000.
B. Japan

In 1987, Japan reduced the severity of its regulatory barriers against foreign lawyers, resulting in an increase in the number of U.S. offices in Tokyo from four to fifteen in one year. Table 1 shows that by 1991, the number of U.S. firms with offices in Japan reached twenty-nine. Table 2 demonstrates that from 1986 to 1991, U.S. exports of legal services to Japan jumped from $11 to $360 million. The total amount of trade in legal services between the two countries grew from $17 to $386 million over the same time period.

C. Eastern Europe

The opening of markets in Eastern Europe and the former Soviet Union brought a striking response by U.S. law firms. Table 1 reveals that in the five years between 1989 and 1994, the number of U.S. offices in Eastern Europe and the former Soviet Union ballooned from four to fifty-eight. Table 2 shows that U.S exports of legal services to the region grew from $0 to $13 million between 1989 and 1993.

D. NAFTA

The negotiation and subsequent implementation of the NAFTA prompted U.S. firms to open 14 new offices between 1988 and 1993, in Canada and 14 in Mexico, as shown in Table 1. Corresponding trade figures from Tables 2 and 3 reveal that between 1988 and 1993, U.S. exports of legal services to Canada rose from $20 to $97 million, while exports to Mexico grew from $1 to $19 million. In addition, the total amount of trade in legal services between the United States and its NAFTA partners has expanded enormously, reaching $147 million by 1993.

Although the globalization of the legal services industry is particularly visible when analyzing U.S. law firms, firms based in other countries are undergoing similar transformations. Non-U.S. firms, particularly from large commercial centers, have recognized that they must compete internationally and have responded to many of the same opportunities,

19. Abel, supra note 3, at 765.
particularly the opening of markets in Eastern Europe and the adoption of the Single Market Program.\textsuperscript{22} In addition, over fifty-five foreign-based firms had established offices in the United States by 1993.\textsuperscript{23} Finally, European law firms have a significant presence in Asian legal markets.\textsuperscript{24}

The response of the legal service sector to these events suggests that significant opportunities for expanding trade exist if the remaining impediments can be reduced or eliminated. As demonstrated below, a key factor inhibiting further globalization is the existing regulatory structure which governs national legal markets and the lack of multilateral discipline over the behavior of national regulators. Therefore, the establishment of a global regulatory regime can be expected to foster the continued development of transnational legal practices, contribute to the further globalization of law firms, and result in a marked increase in global trade in legal services.

II. OVERVIEW OF NATIONAL REGULATION OF FOREIGN LEGAL PROFESSIONALS

The regulation of lawyers has historically been a domestic policy issue. In order to uphold the integrity of their laws and the judicial systems, countries have enacted elaborate regulatory schemes to control who may provide legal services and how they are provided.\textsuperscript{25} The regulation of the legal profession varies significantly between countries due to differences in culture, history, economics, and the structure of the legal profession.\textsuperscript{26} An outgrowth of most systems of national regulation of lawyers is the creation of a monopoly for qualified, domestic providers of legal services.\textsuperscript{27} In most cases, the regulations not only prohibit unqualified domestic persons from providing legal services but also prevent foreign lawyers from entering the domestic market.

During the last two decades, globalization of the legal services industry has increased the general awareness of the effects of national

\textsuperscript{22} Future of the Legal Profession, supra note 2, at 428, 435–36; Toulmin 1994, supra note 1, at 47.

\textsuperscript{23} Compiled from A.B.A. GUIDE TO FOREIGN LAW FIRMS (James R. Silkenat & Howard B. Hill eds., 2d ed. 1993). The ABA listing contains information about many of the major law firms in some 130 countries; however, it is not intended to be complete. Thus, the presence of foreign-based law firms is understated.

\textsuperscript{24} Abel, supra note 3, at 767–68, 850, 853.

\textsuperscript{25} Kelly C. Crabb, Note, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 COLUM. L. REV. 1767, 1788–89 (1983).

\textsuperscript{26} Gerald L. Greengard, Obstacles to the Implementation of the Treaty of Rome Provisions for Transnational Legal Practice, 7 MICH. Y.B. INT'L LEGAL STUD. 113, 123 (1985).

\textsuperscript{27} Crabb, supra note 25, at 1770.
regulations, particularly as they affect foreign lawyers. Some measures that restrict the activities of foreign lawyers are objectively justifiable, based on the need to ensure the quality of legal services provided in the domestic market. However, others are discriminatory and primarily designed to shield the domestic industry from foreign competition. The discussion below highlights some of the common barriers to international trade in legal services.

A. Regulatory Measures Inhibiting Transnational Practice

The common regulatory measures which create barriers to trade in legal services can be divided into three broad categories. The first group is comprised of measures designed to protect the public from unqualified foreign attorneys and to compensate for differences in training across legal systems. These measures include educational requirements, experience requirements, and restrictions on the types of legal advice that a foreign lawyer is permitted to provide.

A second category includes regulations designed to hinder the ability of otherwise qualified foreign lawyers and foreign law firms to provide services in the domestic legal market. Such measures include discriminatory taxes, personnel hiring restrictions, limitations on the use of firm names by foreign firms, partnership and association restrictions, and residency requirements.

The final group of regulations consists of measures that effectively prohibit legal practice by foreign attorneys solely on the basis of their nationality. These regulations include citizenship requirements for local bar membership, limitations or prohibitions on foreign ownership, and visa requirements.

B. Rationale Behind Restrictions on Trade in Legal Services

Governmental officials, local attorneys, and bar associations offer a number of arguments for restricting the access of foreign lawyers to


30. Id.

domestic legal markets. In developing their regulations, national governments often justify their policies with both legitimate and illegitimate arguments. The result is the enactment of a patchwork of regulations which includes both reasonable and unnecessarily protectionist rules.

Five common rationales upon which national authorities rely to deny access to foreign attorneys are explained below.

1. Lack of National Loyalty and Shared Cultural Values

Legal systems and the provision of legal services are intimately related to the history, politics, and culture of a nation. This is especially true when the legal services involve the administration of justice through the national court system and when the legal services affect the personal and property rights of individual citizens. In such situations, national authorities may have legitimate concerns about the involvement of legal professionals who do not share the values of the local community, because their activities may frustrate attempts to achieve "justice," as it is locally understood.

2. Lack of Necessary Competence

National authorities have articulated two related reasons for questioning the competence of foreign attorneys. First, because they do not have control over the foreign country's educational standards or certification procedures, national authorities may have general concerns about the foreign attorney's competence to practice law. Second, because attorneys are formally trained only in the law of their domestic jurisdiction and not in the law of foreign countries, national authorities may have specific concerns about the competence of foreign attorneys to practice domestic law. This anxiety is magnified when fundamental differences exist between the respective legal systems.

32. Crabb, supra note 25, at 1788–89.
34. Id.
35. Greengard, supra note 26, at 123.
36. Crabb, supra note 25, at 1770.
37. Id. at 1789.
38. Id. at 1789–90.
39. Id. at 1795–96.
40. For example, substantial differences exist between systems based on civil and common law.
3. Inability to Redress Injury to Citizens by Foreign Attorneys

Malpractice by foreign attorneys poses serious potential problems for national regulators. Foreign attorneys may not be accustomed to local ethics rules, which may differ from or conflict with the rules in the lawyer's home jurisdiction, potentially making them more susceptible to malpractice claims. Furthermore, judgments against foreign attorneys may be impossible to enforce if the attorneys in question do not have significant ties to the foreign country.

4. Interference with the Development of the Domestic Legal Industry

Local authorities sometimes express concern that foreign lawyers and firms will overwhelm the local firms, stifling the development of the local bar. This argument is essentially an "infant industry" argument applied to the legal services industry. However, substantial evidence suggests that isolating a domestic industry from competition prevents it from building the necessary skills to compete successfully in the global market.

5. Lack of Reciprocal Access to Foreign Legal Markets

Concerns about reciprocal access to legal markets represent significant barriers to transnational practice. National bar associations tend not to want foreign lawyers to be able to compete in the local legal market if domestic lawyers are kept out of the foreign lawyer's home legal market. Asymmetric access to legal markets combined with the inherent difficulty of assessing the degree of openness of individual legal markets represent a fundamental obstacle to greater liberalization of trade in legal services.

41. Crabb, supra note 25, at 1801.
42. Nevertheless, it should be noted that no serious malpractice complaints were filed against foreign lawyers in any of four major European cities. Abel, supra note 3, at 752.
43. Crabb, supra note 25, at 1801.
44. Id. at 1806.
46. Abel, supra note 3, at 748.
47. Model Rule, supra note 28, at 215.
48. Abel, supra note 3, at 758.
49. Stewart, supra note 33, at 20; see infra part IV.A.
C. Benefits of Liberalizing Domestic Regulations

Progress toward liberalizing international trade in legal services will be beneficial to domestic and foreign lawyers and will strengthen national legal service industries. Specifically, reducing barriers against foreign lawyers should serve the interests of consumers, increase the competitiveness of domestic law firms, and facilitate international transactions. Four key benefits are discussed below.

1. Benefits to Domestic Consumers of Legal Services

The most visible effect of governmental regulation of legal services is that it typically results in the establishment of a cartel in the domestic legal services market — complete with high barriers to entry, restrictive practices, and monopoly pricing.\(^{50}\) In cartelized markets, prices paid by consumers tend to be higher and fewer goods or services tend to be provided than in competitive markets.\(^{51}\) Thus, when national authorities constrain access to the domestic legal market by foreign providers, they limit the amount of legal services available and increase the price of such services to consumers.\(^{52}\) The higher prices and the reduced quantity of legal services supplied may leave the needs of some consumers unsatisfied.\(^{53}\)

Furthermore, the cartelization of domestic legal markets makes local lawyers relatively unresponsive to the demands of legal consumers.\(^{54}\) Particularly in the fields of international law and commercial transactions, the presence of foreign lawyers creates a powerful incentive for domestic lawyers to increase their capabilities, knowledge, and service.\(^{55}\) Thus, if domestic and foreign lawyers are able to compete, the quality of services rendered to clients can be expected to improve.

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52. Abel, *supra* note 3, at 748.

53. For example, some Japanese believe that the result of their system that strictly controls the number of lawyers and access to litigation-based remedies is a deficiency of justice. Heilemann, *supra* note 50, at 4; Tasuku Matsuo, *Globalization Demands Opening to Foreign Lawyers; Restrictions Protect Domestic Profession Not Clients*, NIKKEI WKLY., December 21, 1992, at 7.

54. Abel, *supra* note 3, at 748. For example, in response to greater competition, domestic firms may increase the number of hours worked and change their billing practices to satisfy the preferences of their clients. *Id.*

55. *Id.*; Peter Roorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141, 146 (1993).
A study of the effects of the deregulation of legal services in housing conveyances in Great Britain provides some insights into the potential benefits of terminating a cartel in a legal services market.\textsuperscript{56} The study demonstrated that price discrimination became more difficult and costs to consumers decreased by about one-third as competition increased.\textsuperscript{57} In addition, the authors suggested that the quality of service increased at all price levels due to deregulation.\textsuperscript{58} Although the study was narrow in scope, it is important evidence that both commercial entities and individuals could benefit substantially from increased competition in the legal services industry.

2. Improving the Efficiency of the Legal Services Industry

Legal services are an integral part of commercial transactions.\textsuperscript{59} An inevitable result of greater economic integration is larger numbers of commercial transactions involving multinational clients who want advice on transnational concerns. In such transactions, local law problems are often either integrated into or accessory to the international issues.\textsuperscript{60} Segmented markets for legal services increase costs of these transactions not only by necessitating the employment of separate attorneys in each jurisdiction involved in the transaction but also by inhibiting the acquisition of multi-jurisdictional expertise by lawyers.\textsuperscript{61} Thus, direct benefits of liberalizing trade in legal services include greater efficiency in the provision of legal services and a consequential reduction in the costs of conducting trade in goods and other services.

3. Facilitating International Transactions

Liberalization of trade in legal services will also provide indirect benefits to the world trading system. By creating greater opportunities to

\textsuperscript{57} Id. at 55.
\textsuperscript{58} Id.
\textsuperscript{60} Goebel 1989, supra note 21, at 511. For example, experienced transnational lawyers are often required to facilitate capital movements, foreign investment, and international trade transactions, and to resolve tax issues. Roger J. Goebel, Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice, 15 FORDHAM INT'L L.J. 556, 556-57 (1991-92) [hereinafter Goebel 1992].
become experienced in addressing multi-jurisdictional legal problems, liberalization will enable lawyers more effectively to "bridge the cultural gap" that exists in many international transactions. A myriad of issues can arise when constructing a transaction that must satisfy requirements of two or more legal systems with differing experiences, traditions, and institutions. Greater exposure to multi-jurisdictional problems will make lawyers more effective in serving their clients.

4. Strengthening National Legal Institutions

A final benefit of reducing the barriers to international trade in legal services is that international competition appears to strengthen domestic legal institutions, particularly domestic law firms. For example, an increase in international competition is thought to have contributed significantly to the strengthening of German and Canadian law firms and to an improvement in their international competitiveness. Conversely, Japanese law firms, which operate in a heavily regulated and relatively closed domestic legal market, remain small and tend to be less competitive internationally. In addition to strengthening law firms, greater openness appears to help countries maintain an independent legal system.

D. Summary

Any attempt to liberalize trade in legal services must strike a balance between the concerns of national regulators regarding the practice of foreign attorneys and the benefits of increased international competition in the global legal market. Some of the restrictions imposed on foreign lawyers by national regulators are objectively justifiable and facilitate the effective and reliable provision of legal services in the domestic market. Such restrictions should not be sacrificed in an attempt to increase international competition. However, many of the restrictions on foreign lawyers are unreasonably discriminatory and should be eliminated. The primary goal of the proposal outlined below is to preserve sufficient flexibility for domestic regulators to ensure the competent and efficient provision of legal services in their market while substantially increasing international competition.

63. Id. at 448-50.
64. Future of the Legal Profession, supra note 2, at 447-48; Abel, supra note 3, at 781.
65. Abel, supra note 3, at 767.
66. Barton, supra note 61, at 104.
III. NATIONAL BARRIERS TO TRANSNATIONAL PRACTICES IN THE UNITED STATES, THE EUROPEAN UNION, AND JAPAN

During the last decade, trade in legal services became a significant trade issue for the United States, the Member States of the EU, and Japan. In international negotiations over legal services, these countries have been the most active participants. This section briefly outlines the regulation of foreign lawyers within the United States, the EU, and Japan and describes the international trade conflicts that have developed among them.

A. The United States

It is relatively difficult for foreign attorneys to practice law in the United States. The credentialling and disciplining of attorneys is controlled by each state through its court system or integrated bar association. Although each state has enacted its own set of requirements, in most states foreign lawyers cannot practice law, even the law of their home country, unless they are full members of the state bar.

However, the U.S. legal market is gradually opening. In 1973, the U.S. Supreme Court waived the citizenship requirement for admission to state bars. Furthermore, sixteen states and the District of Columbia permit foreign lawyers to become licensed foreign legal consultants. As a legal consultant, a foreign lawyer may conduct an international practice in the United States without passing the bar examination or becoming a full member of the state bar, subject to some limitations. In 1994, the

68. Toulmin 1994, supra note 1, at 52.
71. Model Rule, supra note 28, at 213. Currently, the only way a foreign lawyer may practice law in the United States, with some limited exceptions, is to "attend an accredited law school, sit for the bar examination, and become a full member of the bar." Id.; see also Crabb, supra note 25, at 1789.
74. Model Rule, supra note 28, at 215. The most important limitation is that foreign legal consultants generally may not practice local law. Id.
American Bar Association (ABA) issued a Model Rule in an effort to encourage harmonization of state regulations over legal consultants. Although the Model Rule is not binding on any jurisdiction, the ABA resolution which accompanied the Model Rule urges all United States jurisdictions to adopt rules for licensing legal consultants which conform to the language of the Model Rule.

B. The European Union

Within the EU, the credentialling and disciplining of foreign attorneys is primarily the responsibility of the authorities of the individual Member States. The treatment of foreign lawyers varies considerably among the Members of the EU. For example, barriers to entry are relatively low in the United Kingdom and Belgium and relatively high in Germany. Although credentialling remains largely the prerogative of the Member States, the EU has implemented Union-wide programs to reduce barriers to transnational practice. These initiatives substantially facilitate the ability of lawyers from Member States to practice law throughout the EU. However, they have not improved access to EU legal markets for lawyers from non-Member State countries.

In the EU, the effort to establish Union-wide rights of practice for attorneys from Member States is closely linked to the overall goal of achieving a fully integrated market within the EU, with complete freedom of movement for persons, goods, services, and capital. In the past twenty years, four significant initiatives were launched to facilitate the transnational activities of EU lawyers.

75. Id. at 208-12.
76. Id. at 207.
78. Abel, supra note 3, at 801.
80. Model Rule, supra note 28, at 218.
81. Barsade, supra note 79, at 322. Nevertheless, for lawyers from non-EU countries, transnational practice is possible. Roorda, supra note 55, at 150. Some U.S. lawyers have even developed practices that involve advising clients on matters of European law. Id. Furthermore, a few foreign firms handle litigation before the European Court of Justice in conjunction with an associate admitted in any EU country. Id.
82. Goebel 1992, supra note 60, at 559.
In 1977, the EC adopted the Legal Services Directive. The Services Directive was the first significant institutional step taken to liberalize trade in legal services within the EC. The most notable provisions of the Services Directive allow qualified lawyers, who are nationals of a Member State, to provide a broad range of cross-border legal services, including advice on local law. The Services Directive effectively eliminated most obstacles to engaging in a transnational legal practice within the EC.

In 1988, all Member States of the European Economic Community adopted a code of professional ethics for EC lawyers. The CCBE Code was developed by the Council of the Bars and Law Societies of the European Community and serves as a framework of principles of professional conduct that apply to all cross-border activities of EC lawyers. The Code resolved the problem of how to decide cross-jurisdictional ethical issues by requiring lawyers to abide by the terms of the CCBE Code or the more restrictive local code, if applicable. Many members of the CCBE and the ABA believe that a worldwide code of professional ethics, similar to the CCBE Code, could be negotiated.

In 1989, the Council of Ministers adopted the Directive on Recognition of Higher Education Diplomas. The purpose of the Directive was to facilitate the ability of professionals to pursue their professions in other Member States. Under the Directive, an EC national admitted to the bar in a Member State may become a full member of the bar of any other Member State provided that the lawyer passes an aptitude test.
Finally, to further advance the goal of complete freedom of movement for lawyers throughout the EC, the CCBE drafted a directive on the right of establishment for EC lawyers.\textsuperscript{96} The CCBE Draft Directive proposes a set of rules to govern the establishment of EC lawyers within EC Member States.\textsuperscript{97} Its terms do not affect the rights of lawyers from non-Member States.\textsuperscript{98} Currently the CCBE Draft Directive is being discussed and revised within the EC Commission.\textsuperscript{99}

\textbf{C. Japan}

In Japan, the barriers to entry faced by foreign attorneys are extremely high.\textsuperscript{100} Of the industrialized countries, Japan’s regulations on foreign lawyers are the most stringent and discriminatory.\textsuperscript{101} The credentialling, supervision, and discipline of lawyers is governed by the Federation of Japanese Bar Associations, the Nichibenren.\textsuperscript{102} Any foreign attorney who wishes to practice in Japan must secure the approval of the Ministry of Justice and the Nichibenren.\textsuperscript{103}

The rules governing foreign attorneys in Japan are contained in the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, which was enacted in 1987.\textsuperscript{104} Under the Special Measures Law foreign lawyers are strictly prohibited from practicing

\begin{footnotes}
\footnotetext[97]{For a more detailed discussion of the CCBE Draft Directive, see infra part IV.A.}
\footnotetext[98]{Barsade, supra note 79, at 322.}
\footnotetext[99]{Toulmin 1994, supra note 1, at 50.}
\footnotetext[100]{Of the industrialized countries, Japan’s regulations on foreign lawyers are the most stringent and discriminatory.}
\footnotetext[101]{Barsade, supra note 79, at 322.}
\footnotetext[102]{Toulmin 1994, supra note 1, at 50.}
\footnotetext[103]{Except for a few attorneys admitted to practice between 1945 and 1955, foreign attorneys were forbidden to practice prior to 1986.}
\footnotetext[104]{Lee, supra note 101, at 110. The Nichibenren is particularly powerful, because it was created by statute and vested with broad supervisory and disciplinary authority. Christopher Sheehey, Note, Japan’s New Foreign Lawyer Law, 19 LAW & POL’Y INT’L BUS. 361, 379 (1987). Because it functions as a private professional association as well as a quasi-governmental regulatory agency, the Nichibenren is effectively immune from oversight. Id.}
\end{footnotes}
Japanese law, employing or entering into partnership or fee-sharing arrangements with Japanese lawyers, using their official firm names, or appearing in Japanese courts. In addition, foreign lawyers wishing to practice in Japan must have at least five years of experience prior to entering the country. Finally, the Special Measures Law conditions the ability of a foreign lawyer to practice in Japan on reciprocal treatment of Japanese lawyers in the foreign lawyer's home country.

In December 1993, the Nichibenren approved several proposals to modify the regulations governing foreign lawyers. These reforms were very minor and were rejected by the Ministry of Justice because they conflicted with governmental policy encouraging deregulation. The Ministry of Justice then drafted and submitted its own proposal to the parliament. The reforms that were incorporated into the Ministry of Justice proposal would permit Japanese and foreign law firms to establish joint offices and would relax the reciprocity requirement. Although the terms of the reforms have not been finalized and the parliament has yet to act, substantial restrictions are expected to remain.

IV. INTERNATIONAL TRADE DISPUTES OVER LEGAL SERVICES

Recently, attempts to liberalize international trade in legal services have been conducted in a number of contexts. For example, the United States and the EU have exerted substantial pressure on Japanese officials in bilateral, trilateral and multilateral discussions to reduce restrictions on foreign lawyers. In addition, the United States and the EU have

105. Special Measures Law, supra note 104, at 613.
106. USTR REPORT, supra note 59, at 167. However, Japanese lawyers may employ foreign lawyers. Goebel 1989, supra note 21, at 484.
107. USTR REPORT, supra note 59, at 167; Goebel 1989, supra note 21, at 484.
108. Lee, supra note 101, at 104. The Special Measures Law also constrains the ability of foreign lawyers to represent parties in arbitrations conducted under Japanese law. USTR REPORT, supra note 59, at 167.
109. USTR REPORT, supra note 59, at 167. Legal experience acquired in Japan may not be counted toward the five year requirement. Id.
112. Id.
113. Bill Drafted to Permit Foreign Lawyers to Practice in Japan, DAILY YOMIYURI, March 17, 1994, at 12.
114. Id.
115. Id.
116. As a result of heavy pressure by the U.S. government and the ABA, the Special Measures Law was enacted in 1987. Model Rule, supra note 28, at 215–16. More recently, the United States and the EU have sought relaxation of certain restrictions of the Special Measures
engaged in extensive negotiations to obtain geographically broader access to each other's legal services markets. 117

A. The Fundamental Problem of Reciprocity

Progress toward liberalization has been limited due in large part to conflicts over "reciprocity." 118 In general, national authorities have been unwilling to provide greater access to foreign lawyers unless they are confident that their lawyers will receive functionally equivalent rights of access to foreign legal markets. 119

Reciprocity has inhibited the liberalization of trade in legal services in two distinct ways. First, reciprocity-related concerns have increased the magnitude of the challenges faced by the negotiators. 120 National authorities are very reluctant to tolerate asymmetric access to legal markets. Nevertheless, negotiators are often constrained in their ability to address these concerns. It is frequently unclear whether negotiators have the authority to commit to opening the domestic legal market when national officials do not have direct control over the licensing of legal professionals. When national authorities do not control the licensing of legal professionals, negotiators are predictably unconvinced by the assurances of their trading partners that commitments to open domestic legal markets will be implemented. 121 This dilemma is currently an issue in the United States and in the EU, because the primary authority for setting rules governing lawyers resides at the state and Member State level, respectively. 122

Second, even when countries purport to liberalize their rules, access to the domestic market may not improve if reciprocity requirements are incorporated into the rules. For example, although sixteen U.S. states have enacted laws creating foreign legal consultant status, states typically have conditioned this status on reciprocal access to the foreign market for state lawyers. 123 Similarly, under Japan's Special Measures Law, a
prerequisite for access to the Japanese legal market is reciprocal access for Japanese lawyers. This network of reciprocity provisions results in "lowest common denominator liberalization," in which liberalization proceeds no faster than the rate at which the most restrictive country is willing to liberalize its rules.

The problem of lowest common denominator liberalization is expected to impede significantly the liberalization of legal service markets under GATS.

B. Legal Services and the General Agreement on Trade in Services

When the GATS became effective on January 1, 1995, global trade in service sectors became subject to legally enforceable, multilateral discipline for the first time. With the GATS, the Members sought "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization."127

1. Uruguay Round Negotiations and Legal Services

Legal services were included in the GATS negotiations at the insistence of the United States. Given the substantial differences among national regulatory systems, U.S. negotiators initially envisioned a special annex on legal services, similar to the Annex on Financial Services, to specifically address the regulatory barriers facing lawyers. Under the terms of the GATS, obligations of such an annex would be binding on all GATS members and would have required all GATS members to afford foreign lawyers some minimum level of access to their legal markets.

Ultimately, the U.S. approach in the multilateral negotiations was rejected. Instead, in the approach that was adopted in the final version of the GATS, trade in legal services is governed by the same rules that apply to most other service sectors. Under these rules, the opening of

124. Id. at 214; see also supra note 11.
125. Model Rule, supra note 28, at 216.
127. GATS, supra note 6, at 3.
128. Toulmin 1994, supra note 1, at 52.
129. Stewart, supra note 33, at 19.
130. GATS, supra note 6, pt. II, art. XXIX.
131. Stewart, supra note 33, at 19; Dillon, supra note 67, at 10-11.
132. Stewart, supra note 33, at 19.
legal markets to foreign lawyers is achieved through a multilateral negotiation process, with Members offering improved access to their legal markets in exchange for concessions from other Members. The level of liberalization actually achieved in any given service sector, including legal services, will vary from country to country, depending on the outcome of various “horsetrades” during the negotiation process.

2. Overview of the GATS

The GATS has two basic components. The first component establishes a framework for regulating trade in services and contains a set of general multilateral rules that apply to national regulations governing such trade.133 This component also contains a series of annexes that address issues in certain service sectors.134 The second component consists of a set of schedules which lists specific commitments that apply to the service sectors that Members have agreed to include in their schedules.135

The basic strategy of the GATS for liberalizing trade has been described as a “positive list” approach.136 Unless an industry is scheduled, it is automatically excluded from many of the most meaningful terms of the GATS.137 However, once a Member includes a sector in its schedule, all of the obligations incorporated in the GATS apply to the sector, unless the Member lists a specific exception in its schedule.138 Under this system, achieving significant trade liberalization requires Members both to include sectors in their schedules and to progressively reduce the level of trade barriers in scheduled sectors over time. Several of the key aspects of the GATS are outlined below.

a. Most Favored Nation Obligation

The unconditional Most Favored Nation (MFN) obligation is a core general obligation of the GATS:139 each service supplier from a Member

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134. GATS, supra note 6, at 28–37. It is expected that the Annex on Legal Services proposed in this Note, if adopted, would be added to this portion of the Agreement.
135. Hoekman, supra note 133, at 922.
137. Broadman, supra note 136, at 286.
must receive from other Members treatment no less favorable than is accorded to other foreign service suppliers.\textsuperscript{140} This obligation applies to trade in all service sectors covered by the GATS,\textsuperscript{141} regardless of whether the Member has undertaken specific commitments in a sector.\textsuperscript{142}

In the Uruguay Round negotiations, a number of Members expressed concerns about the unconditional MFN obligation because it allows "countries with restrictive policies to [maintain] their status quo and 'free ride' in the markets of more open countries."\textsuperscript{143} To address this problem, an Annex on Article II Exemptions was created which specifies conditions under which a Member may be exempted from the MFN obligations.\textsuperscript{144} The Annex provided Members with a one-time opportunity at the entry into force of the GATS to unilaterally create MFN exceptions with respect to other Members.\textsuperscript{145} Without such an exception, service providers from all Members must receive MFN treatment.\textsuperscript{146}

b. Specific Commitments

In addition to creating general obligations,\textsuperscript{147} the GATS also provides a legal basis for negotiating the multilateral elimination of barriers to trade in services.\textsuperscript{148} For most service industries, the primary impediments to trade are embedded in the regulatory systems of Members which restrict the access of foreign suppliers of services to domestic markets and which provide competitive advantages to domestic suppliers.\textsuperscript{149} The GATS negotiations are designed to improve market access and to reduce

\begin{itemize}
\item 140. GATS, supra note 6, pt. II, art. II. It should be emphasized that MFN only requires that all foreign suppliers be treated uniformly; it does not require domestic and foreign service providers to receive the same treatment.
\item 141. Article I defines the scope of the Agreement and establishes which sectors are covered. Id. art. I. "Virtually all existing services are included in the GATS framework." Broadman, supra note 136, at 287; see also supra note 19.
\item 142. GATS, supra note 6, art. II; Broadman, supra note 136, at 287.
\item 143. Hoekman, supra note 133, at 922.
\item 144. Id.
\item 145. GATS, supra note 6, Annex on Article II Exemptions. After the entry into force of the Agreement, MFN exemptions must be authorized under the terms of the WTO. Id.
\item 146. The following countries have invoked an MFN exemption for Legal Services: Brunei Darussalam, GATS/EL/95 (on file with authors); China, GATS/EL/19 (on file with authors); Dominican Republic, GATS/EL/28 (on file with authors); and Singapore, GATS/EL/76 (on file with authors).
\item 147. Part of the GATS provides for general obligations including transparency, and ensuring that domestic regulations are administered in a reasonable, objective and impartial manner. GATS, supra note 6, pt. II, arts. III & IV. Where specific commitments are made regarding professional services, Members shall establish procedures to verify the competence of professionals of other Members. Id. art. IV, § 6.
\item 148. Broadman, supra note 136, at 285.
\item 149. Id.
\end{itemize}
discrimination against service suppliers based on nationality. Consequently, "[t]he negotiations on national treatment and market access for services in the GATS constitute the equivalent of tariff negotiations for goods in the [General Agreement on Tariffs and Trade]."

(i) Market Access

Market Access is a negotiated right and obligation under the GATS. A Member is obliged to provide market access to services suppliers from other Members only in those sectors which the Member has included in its schedule. Although market access is not defined under the GATS, Members satisfy their market access obligation by agreeing to forego six types of regulatory measures.

(ii) National Treatment

National Treatment is a second negotiated right and obligation under the GATS. If a Member includes a service sector in its schedule of National Treatment obligations, that Member must "accord to services and services suppliers of any other Member . . . treatment no less favourable than that it accords to its own like services and services suppliers." This obligation essentially prohibits discrimination against foreign providers of services.

c. Negotiation Process

The scheduling of market access and National Treatment commitments is accomplished through a process of multilateral trade negotiations, consisting of a series of bilateral "request and offer" negotiations.

150. Id.
151. Id.
152. Id.
153. GATS, supra note 6, art. XVI.
154. The six prohibited measures are limitations on: (1) the number of service suppliers allowed in a sector; (2) the total value of service transactions or assets in a sector; (3) the total quantity of service output; (4) the number of persons that may be employed; (5) the type of legal entity through which a service supplier may supply a service; and (6) the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of foreign investment. GATS, supra note 6, art. XV.
155. Broadman, supra note 136, at 286.
156. GATS, supra note 6, art. XVII.
157. Broadman, supra note 136, at 285. This process begins with each Member submitting a "request list" which identifies the concessions (specified by sector) that the Member desires from others. Then, each country develops an "offer list," based on the requests it has received, which identifies the concessions it would be willing to make in exchange for receiving favorable treatment of its requests. Finally, the Members engage in a series of bilateral
During the process of such negotiations, each Member seeks to barter improved access to specific service sectors of other Members in exchange for improving access to its own service sectors;\textsuperscript{158} cross-sectoral exchanges\textsuperscript{159} facilitate agreement. Because each Member’s final schedule will reflect this bartering process, the degree of trade liberalization in any given sector will vary significantly across different Members’ schedules.

C. Prospects for Liberalization of Trade in Legal Services under the GATS

Until the final stages of the Uruguay Round negotiations, some hope existed that the negotiations would produce a reduction of barriers to trade in legal services.\textsuperscript{160} In fact, many Members, including the United States,\textsuperscript{161} the EC,\textsuperscript{162} and Japan,\textsuperscript{163} actually included legal services in their schedules of specific commitments.\textsuperscript{164} However, an examination of their schedules reveals that the GATS does not substantially improve the ability of lawyers to engage in transnational practice because, in most cases, the commitments merely preserved existing regulatory measures.\textsuperscript{165}
While the GATS commitments do not reduce the level of protection afforded to domestic lawyers, they at least inhibit the ability of countries to tighten restrictions on foreign lawyers in the future.\footnote{GATS, supra note 6, art. XXI.}

The inability of the Uruguay Round negotiations to bring about significant liberalization of trade in legal services is not surprising. In multilateral negotiations, it is difficult both to obtain meaningful commitments on legal services and to ensure that liberalizing commitments are implemented in a manner that does not unduly burden foreign attorneys. Thus, the current structure of the GATS suggests that it is an ineffective vehicle for liberalizing trade in legal services.

The primary impediments to the liberalization of trade in legal services under the GATS are outlined below.

1. Obstacles to Obtaining Liberalizing Commitments on Legal Services

Multilateral trade negotiations under the GATS cannot be expected to generate substantial improvements in access for foreign lawyers to Member legal markets for two fundamental reasons. First, offers of improved access to domestic legal markets are expected to receive low priority in the bartering process of a multilateral trade negotiation because it is extremely difficult to ascertain the value of such concessions. Second, concerns about reciprocity and the free-rider problem created by the MFN obligation discourage Members from offering significant improvements in access to their legal markets in the context of GATS negotiations.

a. Difficulty in the Valuation of Concessions in Legal Service Sectors

As discussed above, trade liberalization under the GATS is achieved through a series of bilateral "request and offer" negotiations among the Members. For this type of negotiation to succeed, each participant must have a clear sense of the competitive strengths of its domestic industries in order to predict the domestic impact of its offers as well as to determine whether other Members have made valuable offers.\footnote{Arkell, supra note 136, at 10.} This assessment can be particularly difficult in service sector industries, because the lack of dependable data often precludes reliable quantitative analysis.\footnote{Id.}
Evaluating concessions in the legal services sector is complicated further by the complexity of national regulatory systems. As will be discussed below, the complexity of such systems creates uncertainty about the practical effects of offers, and thus, about the value of such offers to other Members. Consequently, offers in the legal services industry often are given limited weight in the bartering process. It is not surprising, therefore, that "legal services suffer from being invariably at the bottom of the [negotiating] agenda."170

b. Reciprocity and MFN

The concerns of Members about reciprocity in light of the MFN obligations under the GATS may represent the most formidable obstacle to realizing a significant liberalization of trade in legal services through GATS negotiations. As was noted above, previous attempts to liberalize trade in legal services were frustrated by disputes over reciprocity. The MFN obligation of the GATS magnifies the reciprocity problems. The MFN obligation requires that any improvements in the access of foreign lawyers to a Member's market must be applied to the lawyers of all other Members. This creates two impediments to liberalizing trade in legal services. First, the MFN clause raises the "free-rider" problem. Little incentive exists for an individual Member to provide greater access to its legal market if its lawyers will benefit automatically from any concessions made by other Members.173

Second, improving the access of foreign lawyers to the domestic market in the presence of the MFN provision opens the door to lawyers from every Member of the GATS, including lawyers with vastly different training and backgrounds. Such an obligation threatens to undermine the ability of domestic authorities and bar associations to ensure the quality of legal service provided in the domestic market. In short, the MFN obligation strongly discourages Members from offering concessions on legal services in the context of GATS negotiations.

c. Practical Value of Commitments on Legal Services is Doubtful

Even if Members agreed to schedule liberalizing commitments for the legal services sector, the practical effect of such commitments for improv-
ing opportunities for lawyers to practice in foreign markets is questionable under the GATS. The GATS contains language which a Member could easily use to close effectively its legal market, even after undertaking a specific commitment to the contrary. For example, the National Treatment obligation governs a Member's treatment of "like services and service suppliers" where a specific commitment has been scheduled. Thus, service providers who are not considered to be "like" domestic providers are not entitled to protection under the GATS.

Because substantial differences in education, training, and experience requirements exist between lawyers of different countries, Members might argue that domestic and foreign lawyers do not provide "like services" and should not be considered "like service suppliers." As a consequence, Members who have scheduled a National Treatment commitment on legal services may potentially restrict foreign access to the domestic legal market without violating their GATS obligations. The potential for such abuse is likely to keep legal services at the bottom of the GATS negotiating agenda by undermining the confidence of Members in the practical significance of any concessions on legal services.

b. The GATS as an Obstacle to Future Liberalization of Trade in Legal Services

An important consequence of the problems outlined above is that future liberalization of trade in legal services is not likely to occur within the GATS framework. A second, and more striking, consequence is that future liberalization of trade in legal services may not occur because of the GATS framework.

Because the MFN obligation is a general obligation under the GATS, it applies not only to the conduct of Members under the GATS but also to conduct outside of the GATS. As a result, when a GATS Member lowers its trade barriers in a particular sector with respect to another country, the lower barriers must be applied automatically to all GATS Members, unless the reducing Member has invoked an MFN exemption under the Annex on MFN Exemptions.

Few Members have invoked MFN exceptions in legal services. Therefore, any bilateral agreements to liberalize trade in legal services involving GATS Members will force the liberalizing Members to relax

174. Id.
175. Menegas, supra note 31, at 285; see also Jackson, supra note 172, at 138.
176. Jackson, supra note 172, at 134.
177. See supra note 146.
their restrictions governing all lawyers from all GATS Members. Given the importance of reciprocity in negotiations involving trade in legal services, this mandatory extension of improved access renders bilateral agreements to liberalize such trade almost impossible.

c. Benefits of an Annex on Legal Services

The main obstacle to achieving a significant liberalization of trade in legal services under the GATS is the tension between the approach to liberalization embodied in the GATS and intense national concerns about reciprocity. The creation of an annex on legal services could resolve this tension and achieve a substantial liberalization of trade in legal services. Under the GATS, annexes are integral parts of the agreement and are, therefore, binding on all Members for the sector covered in the annex. Consequently, an annex-based approach to liberalizing trade would bring about a coordinated reduction in obstacles to trade in legal services and avoid many of the reciprocity-related problems that have frustrated previous attempts.

V. PROPOSAL FOR ANNEX ON LEGAL SERVICES

In developing an Annex on Legal Services, two competing considerations must be balanced. An Annex must allow national regulators to retain sufficient regulatory control over their legal markets while simultaneously eliminating unreasonable and protectionist regulatory barriers. Effectively balancing these considerations will allow lawyers from all GATS Members a reasonable and practical opportunity to develop a transnational legal practice while preserving national standards of quality. This is the primary goal of the Annex on Legal Services proposed in this Note.

Both the CCBE and the ABA have recently developed proposals that attempt to strike an appropriate balance between opening legal markets and preserving the integrity of domestic legal systems. These proposals, briefly outlined below, are the CCBE’s Draft Directive on Right of Establishment for Foreign Lawyers and the ABA’s Model Rule for the Licensing of Legal Consultants. The Annex on Legal Services draws upon these initiatives and adapts their provisions to the framework of the GATS.

178. GATS, supra note 6, art. XXIX.
179. CCBE DRAFT DIRECTIVE, supra note 96.
180. Model Rule, supra note 28, at 207–12.
A. CCBE: Draft Directive on the Right of Establishment

The purpose of the CCBE proposal was to complete the freedom of movement of lawyers within the EU.\textsuperscript{181} Under the CCBE Draft Directive, any lawyer established in any Member State has the right to become established in another Member State either as an integrated lawyer or as a registered lawyer.\textsuperscript{182} An integrated lawyer is full member of the bar of the host state.\textsuperscript{183} In contrast, a registered lawyer is a full member of the bar of the home state who chooses only to become established in the host state under the home title.\textsuperscript{184} Since integrated lawyers are full members of the host bar, they are subject to essentially the same regulations that apply to any attorney in the host country.\textsuperscript{185} Consequently, the CCBE Draft Directive is devoted primarily to establishing guidelines for the regulation of registered lawyers.\textsuperscript{186}

1. Scope of Permissible Practice

Under the CCBE Draft Directive, registered lawyers are permitted to engage in most types of legal practice, including advising on the law of the host jurisdiction.\textsuperscript{187} The CCBE Draft Directive permits the authorities in the host jurisdiction to bar registered lawyers from preparing formal documents which obtain title to administer estates of deceased persons or which create or transfer interests in land.\textsuperscript{188} It also authorizes local authorities to limit the ability of registered lawyers to participate in legal proceedings.\textsuperscript{189}

\textsuperscript{181} Toulmin 1994, \textit{supra} note 1, at 50. The opportunities created by the CCBE Draft Directive will be available only to lawyers who are nationals of a Member State. CCBE DRAFT DIRECTIVE, \textit{supra} note 96, art. 1(2)(a).
\textsuperscript{182} CCBE DRAFT DIRECTIVE, \textit{supra} note 96, arts. 2-4.

For the purposes of this Note, the home state is the country in which the lawyer is a national and a member of the country's bar association. The host state is the country in which the lawyer is seeking to enter.
\textsuperscript{184} CCBE DRAFT DIRECTIVE, \textit{supra} note 96, art. 1(2)(d)-(f) \& art. 4.
\textsuperscript{185} Weil, \textit{supra} note 183, at 706; CCBE DRAFT DIRECTIVE, \textit{supra} note 96, art. 8.
\textsuperscript{186} CCBE DRAFT DIRECTIVE, \textit{supra} note 96, art. 8.
\textsuperscript{187} Weil, \textit{supra} note 183, at 707-08.
\textsuperscript{188} CCBE DRAFT DIRECTIVE, \textit{supra} note 96, art. 6(1).
\textsuperscript{189} \textit{Id.} art. 6(1)(a).
2. Rights and Privileges of Registered Lawyers

The most important right that the CCBE Draft Directive confers is a right of establishment, either as an integrated or as a registered lawyer, anywhere in the EU. Once established, the lawyer has a right to be included in any official list of lawyers published by the Member State authority responsible for registration.

The CCBE Draft Directive also creates comprehensive rights of association for lawyers of Member States. For example, it permits the creation of branch offices. By implication, it also authorizes the use of firm names. Subject to host state rules regarding the form and substance of associations between lawyers, the CCBE Draft Directive also authorizes the formation of associations which include both registered lawyers with different home jurisdictions and lawyers from the host jurisdiction. The rules governing any such association “shall be determined by the law of the host Member State.”

3. Obligations of Registered Lawyers

An initial and important obligation imposed on registered lawyers is a duty to register with the host authorities. This duty involves not only notifying the host authorities of the intent to establish but also submitting evidence demonstrating the foreign lawyer’s eligibility to practice law.

A second significant obligation incurred by a registered lawyer is a duty to carry on professional activities exclusively under the professional title of the home jurisdiction. The registered lawyer also bears an affirmative duty to “avoid any possibility of confusion with the lawyers of the host Member State.”

190. *Id.* arts. 2–4. For an outline of the procedures in the CCBE Draft Directive on how a lawyer becomes established in a foreign country, see *supra* part V.A.
191. *Id.* art. 5(2).
192. *Id.* arts. 1(h) & 11.
194. CCBE DRAFT DIRECTIVE, *supra* note 96, art. 11(3).
195. *Id.*
196. *Id.* art. 5.
197. *Id.*
198. *Id.* art. 7(2).
199. *Id.*
4. Ethics and Discipline

The final significant set of obligations incurred by registered lawyers involves conforming to the applicable code of professional responsibility. The CCBE Draft Directive states that registered lawyers are subject to the same obligations as the lawyers of the host Member State, to the extent that they are not inconsistent with the CCBE Code. The CCBE Code declares that “[a] lawyer shall not handle a matter which he knows or ought to know he is not competent to handle, without cooperating with a lawyer who is competent to handle it.” Registered lawyers are deterred from offering incompetent advice because they can be subject to discipline.

The disciplinary procedures outlined in the CCBE Draft Directive call for substantial cooperation and communication between the authorities in the home and host jurisdictions. In all disciplinary matters, the attorney in question is potentially subject to scrutiny by authorities in both jurisdictions.

B. ABA: Model Rule for the Licensing of Legal Consultants

In 1993, the ABA adopted a Model Rule for the Licensing of Legal Consultants. The purpose of the rule was to encourage the establishment of uniformity in state regulation of foreign legal consultants. Believing that “artificial and unnecessary restrictions [on foreign attorneys] can only impair the ability of American lawyers [to compete in] the international economy,” the ABA hoped to encourage states to reduce the severity of restrictions on foreign lawyers seeking to practice in the United States.

Under the Model Rule, any member of a recognized legal profession in a foreign country, at the discretion of the state court, may be licensed...
in the state as a legal consultant.\footnote{208} Prerequisites to becoming licensed are good moral character and proof of the intent to practice and maintain an office in the state as a legal consultant.\footnote{209} In deciding whether to grant the license, the Model Rule allows state authorities to consider whether state lawyers are permitted to practice in the requesting attorney’s home jurisdiction.\footnote{210} Upon approval of their application, legal consultants become “affiliated” with the local bar; they are not full members of the local bar.\footnote{211}

1. Scope of Permissible Practice

Under the Model Rule, states may prohibit legal consultants from (1) representing clients in court,\footnote{212} (2) preparing any instrument effecting the transfer or registration of real estate located in the U.S., (3) preparing will or trust instruments involving property located in the U.S. or owned by U.S. citizen, (4) preparing documents involving family law issues, or (5) rendering advice on U.S. or local law.\footnote{213}

2. Rights and Privileges of Legal Consultants

Although legal consultants are not full members of the local bar, as affiliated members they are extended many of the rights and privileges that are accorded to full members.\footnote{214} For example, all professional privileges, such as the attorney-client privilege and the work-product rule, may be invoked by legal consultants under the Model Rule.\footnote{215} Furthermore, legal consultants enjoy the same rights of association and partnership in law firms established within the state as full members of the bar do.\footnote{216}

3. Obligations of Legal Consultants

A threshold obligation of persons seeking to be licensed as legal consultants is that they must file the following documents with state

\footnote{208} Id. at 208. The Model Rule also includes two optional eligibility requirements that individual states may choose to enact. These are a legal experience requirement of 5 years and a minimum age requirement of 26 years. Id.
\footnote{209} Id.
\footnote{210} State authorities are not required to consider the rules of the foreign attorney’s home jurisdiction. Id. at 209.
\footnote{211} Id. at 210.
\footnote{212} Legal consultants are permitted to appear before a court upon admission pro hac vice pursuant to the established rules of the host courts. Id. at 209.
\footnote{213} Id.
\footnote{214} Id. at 210.
\footnote{215} Id.
\footnote{216} Id.
authorities: (1) a statement of commitment to be bound by the state's code of professional conduct and by the practice limitations of the legal consultant's license, (2) evidence of professional liability insurance, (3) a statement agreeing to notify state authorities of any change in the lawyer's standing in the relevant home jurisdiction, and (4) an instrument identifying the legal consultant's address and authorized agent within the state jurisdiction.\(^{217}\)

Once licensed, legal consultants are not permitted to hold themselves out as members of the local bar.\(^{218}\) Instead, they must use either the title "legal consultant" or the authorized title from their home jurisdiction.\(^{219}\)

4. Ethics and Discipline

As lawyers affiliated with the local bar, legal consultants are subject to the same rules of professional conduct as full members.\(^{220}\) In addition, they are subject to the same disciplinary procedures as regular bar members.\(^{221}\)

C. Proposed Annex on Legal Services

The goal of the proposed Annex on Legal Services is to provide lawyers from all GATS Members a reasonable opportunity to carry on a transnational legal practice. To reach this goal, the Annex adapts many of the substantive provisions of the CCBE and the ABA proposals to the GATS framework. The Annex also establishes an institutional framework for the regulation of transnational legal practice within the structure of the GATS.

1. Overview of Proposed Annex on Legal Services

The proposed Annex consists of three components. The first addresses the ability of a citizen of any GATS Member to become a lawyer in any other GATS Member by imposing a narrowly defined National Treatment obligation in the area of legal services. Second, the Annex establishes a category of "Registered Legal Consultants" who are fully qualified lawyers from one Member who are permitted to establish and practice most types of law in the territory of another Member. Third, the Annex sets out the institutional and procedural provisions for the operation of the Annex. These three components are outlined below.

\(^{217}\) Id. at 210–11.
\(^{218}\) Id. at 209.
\(^{219}\) Id. at 209–10.
\(^{220}\) Id. at 210–11.
\(^{221}\) Id.
a. National Treatment Obligation

Any citizen of any Member is eligible to become a fully qualified and licensed lawyer in any other Member if the individual satisfies all requirements for bar membership that the licensing Member applies to its own citizens. Citizenship requirements for bar membership and limitations on legal practice based on nationality are not permitted.

b. Registered Legal Consultants

Accredited legal professionals from any Member are eligible to become Registered Legal Consultants in the territory of any other Member. Registered Legal Consultants are affiliated members of the host bar associations; they are not full members.

(i) Requirements For Licensing

Lawyers seeking to be licensed as Registered Legal Consultants must register with the authorities in the host Member. The host authorities shall establish and publish procedures for registration, which may include requiring proof of the lawyer's qualifications to practice law in the lawyer's home jurisdiction, proof of good moral character, and proof of liability insurance. Registration procedures must be reasonable and must not represent disguised protection.

(ii) Limitations on Scope of Practice

Host authorities may restrict the scope of the legal practice of Registered Legal Consultants. An exhaustive list of such restrictions must be published by each Member. Restrictions on the scope of practice of Registered Legal Consultants must be reasonable and must not represent disguised protection.

Host authorities may restrict the ability of Registered Legal Consultants to offer advice on host country law and to represent clients in the courts of the host country. These restrictions should not be used so as to undermine the effectiveness of the Annex.

A Registered Legal Consultant may provide any legal services that are not explicitly restricted by the host authorities.

(iii) Rights of Registered Legal Consultants

As affiliated members of the host bar association, Registered Legal Consultants must be accorded all the rights and privileges of legal
professionals in the host jurisdiction, except for the limitations on the scope of their practice.

The rights of Registered Legal Consultants include:

(a) the right of association with other members and affiliated members of the host bar,
(b) the right to establish an office to engage in the practice of law,
(c) the right to use official firm names, and
(d) the right to be included in any official listing of bar members.

(iv) Obligations of Registered Legal Consultants

Registered Legal Consultants are bound by the host jurisdiction's rules of professional ethics, to the extent that such rules are not incompatible with the GATS Common Code of Professional Conduct. Registered Legal Consultants have an affirmative duty to avoid any possibility of confusion with the lawyers of the host Member. Registered Legal Consultants must carry on their professional activities either under the title of "Registered Legal Consultant" or the title of their home jurisdictions.

(v) Discipline of Registered Legal Consultants

Registered Legal Consultants are subject to the same disciplinary procedures and consequences as full members of the host bar. Host authorities shall notify the authorities in the home jurisdiction of the results of any proceedings involving a Registered Legal Consultant in the host jurisdiction. Authorities in the home jurisdiction shall also notify host authorities of the results of any disciplinary proceedings involving the Registered Legal Consultant in the home jurisdiction.

c. Institutional Provisions

(i) Committee of Trade in Legal Services

The Council for Trade in Services shall establish a Committee on Trade in Legal Services, which shall oversee the functioning of this Annex. The primary responsibilities of the Committee are: (1) facilitating the communication of credentials and other information among the Members and (2) interpreting the GATS Common Code of Professional Conduct.

222. See infra part V.C.1.c.(ii).
223. The Committee on Trade in Legal Services is subsidiary to the Council on Trade in Services and serves to facilitate the functioning of the proposed Annex [hereinafter Committee]. GATS, supra note 6, art. XXIV.
(ii) **GATS Common Code of Professional Conduct**

The Members shall create a GATS Common Code of Professional Conduct to be applied to Registered Legal Consultants. The GATS Common Code of Professional Conduct shall establish principles for resolving conflicts in the rules of professional conduct between different Member jurisdictions.

(iii) **Dispute Resolution**

Panels for disputes on legal issues shall have the necessary knowledge and expertise relevant to the dispute.

2. Implementation of the Annex on Legal Services

Implementation of an Annex on Legal Services would require an amendment to the GATS.\(^1\) Under the terms of the WTO, the addition of a new annex to the GATS requires two-thirds of the GATS Members to accept the annex.\(^2\) Upon acceptance by two-thirds of the Members, the terms of the annex become binding on all Members of the GATS.\(^3\)

**CONCLUSION**

Admittedly, the proposed Annex on Legal Services represents an ambitious attempt to create an international regulatory regime to meet the challenges of the evolving global legal market. The successful implementation and operation of the Annex faces two significant obstacles.

First, the Annex requires the support of two-thirds of all Members of the GATS. Given the difficulty of negotiations over legal services in the Uruguay Round, obtaining the necessary support could prove to be a formidable task. Negotiators are likely to face some determined resistance from their domestic constituents, particularly regarding the provisions which give foreign lawyers the right of establishment and which call for the creation of a Common Code of Professional Conduct. Even in the United States, which has been one of the strongest proponents of the liberalization of trade in legal services, one might expect some resistance

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\(^2\) WTO, *supra* note 224, art. X.

\(^3\) *Id.* art. X(5).
to the creation of the proposed Annex. Second, even if the necessary support were secured for implementation of the Annex, its ultimate success will require an exceptionally high level of cooperation among national authorities. This degree of interaction and interdependence of national bar associations is unprecedented.

Despite these obstacles, we believe that the prospects for the creation and implementation of an Annex on Legal Services under the GATS are positive. Although a more conservative effort might arguably be more attractive in the current political environment, such an approach would be inadequate. In the absence of an ambitious multilateral effort, "the world can look forward to a growing tide of professional protectionism and petty squabbling amongst lawyers of different nations." Thus, it is imperative that national authorities embark on a decisive and concerted effort to change the regulation of foreign lawyers, because:

After years and even decades of relative inaction and inertia on the part of the legal profession in the face of rapid changes in the structure of the global economy, the face of the legal profession is now being altered at a stunning pace . . . throughout the world. We have a small window of opportunity to influence that change. If we fail to do so, the process will unquestionably go forward without us.

Negotiating and implementing an Annex on Legal Services under the GATS will be the critical first step in the right direction.

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227. Because its membership would face greater competition, the ABA has not always supported far-reaching efforts to liberalize trade in legal services. Model Rule, supra note 28, at 217. Instead the ABA has focused on more modest proposals, such as the Model Rule.
228. Stewart, supra note 33, at 22.
229. Model Rule, supra note 28, at 236.