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Lawyers spend a great deal of critical time regulating themselves—establishing meaningful standards for entry into their profession and drawing up disciplinary actions to insure proper behavior. As "officers of the court," attorneys have always been driven by particularly strong motivations to live by principles of the highest order. However, the inherent complexities of the legal profession inevitably result in complex regulations, and those who administer them are not easily driven to change. As regulators, they have profound reasons for establishing certain limitations on entry into the profession, oftentimes as a consequence of unfortunate experiences.

Perhaps the most difficult question facing legal professional associations is how to treat outsiders, particularly attorneys from foreign countries. The issue has become more acute as the growth of international trade and investment has led attorneys, following their clients, to attempt to establish themselves permanently in foreign legal jurisdictions. In fact, over the past three years the problem of transnational legal practice has, at least between the United States and Japan, become a trade issue in its own right. As U.S. lawyers attempt to tear down Japanese barriers against foreign legal "consultants," foreign attorneys in the United States struggle against similar obstacles in the District of Columbia, Illinois, and California.

Recently, those in the United States concerned with trade negotiations have emphasized the problems of U.S. service industries in foreign markets. We have discovered that lawyers as well as accountants, architects, and engineers face serious problems in doing business abroad. Most of these problems relate to professional certification or, as in the case of Japan, to the ability of foreign

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attorneys to consult on matters relating to foreign and international law. Although those who establish and maintain professional standards have little sympathy for the view that their judgments should be questioned by trade specialists, principles of trade are nevertheless becoming relevant to these heretofore sacrosanct rules because many of them are simply protectionist. They serve essentially one function—to deny foreigners the opportunity to engage in a profession for which they are totally qualified.

While professional certification standards may never be subordinated entirely to trade principles, outside scrutiny cannot be avoided so long as such standards are unreasonably burdensome and restrictive. In some instances, trade institutions may be the only forum for bringing out the restrictive nature of a rule that is viewed by its perpetrators as inherently sovereign. The evolution of the services economy, including the professional services, has brought such restrictive practices into sharper focus, and it is useful to review recent developments in U.S. trade policy that are responsive to these new issues.

I. United States Trade Policy for Services

In 1974, Congress authorized the President to include service transactions in the Tokyo Round of trade negotiations.[1] Little was known about the problems affecting the service sectors and U.S. trade officials readily concluded that it would be impossible to negotiate understandings for services other than those related to the entry of merchandise into customs. At the conclusion of the Tokyo Round, however, U.S. service industries began making a plausible case that trade in "invisibles" would be enhanced by the same principles of the General Agreement on Tariffs and Trade (GATT)[2] that govern trade in goods.

At the time, a number of changes in the U.S. economy pointed to the emerging service sectors as the most promising areas for future growth. Having always possessed a strong service economy, the United States capitalized on the information revolution and peculiar adjustments in post-war demographics and the growth of two-income households to generate service industries that went beyond the span of economic prediction. New data transmission technologies enabled services to be provided on a larger, more ambitious scale. Architecture and design plans were beamed off satellites to remote areas of the world where major construction projects were launched by U.S. firms. Financial transactions, rang-

1. The original authority to enter into agreements with foreign countries to reduce barriers to trade in services is included in section 102 of the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1982 (codified as amended at 19 U.S.C. § 2112 (1982)). This authority is limited to nontariff barriers to trade in services and expires on January 2, 1988. 19 U.S.C. §§2112(b), (g)(3).

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1977, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The GATT has been modified in several respects since 1947. The current version is reprinted in 4 Contracting Parties to GATT, Basic Instruments and Selected Documents (1969).

ing from bank fund transfers to complex credit analyses, made Wall Street the mecca for world finance. An aging population generated an explosion of new leisure time activities and an enormous growth in health care services. The dramatic change in the role of women in the economy generated numerous service activities from day-care centers to time-saving habits of food consumption. The new competition generated by the deregulation of the airline, trucking, securities, and banking sectors also spurred service sector growth.

Today, three of every four jobs in the United States' non-agricultural work force are in service industries,[3] and the Bureau of Labor Statistics estimates that in the next ten years, these sectors will account for nine of every ten new jobs.[4] Services currently make up approximately 63 percent of U.S. gross national product.[5] While the statistics inadequately measure our services exports, one estimate placed the U.S. share at $60 billion in 1980.[6] Recent technological developments and the evolution of many U.S. corporations into multinationals has given further momentum to the search for new service markets abroad. The service sectors have, in many instances, become the engine of growth for goods producing sectors whose ability to compete abroad has been enhanced by information technologies, transportation, and financial systems that make a commercial difference. Another important trend has been the proclivity of large multinationals to spin off their legal, advertising, and accounting departments, permitting them to operate as separate entities, serving a variety of customers. None of this would be possible without recent developments in communication and analysis that enable professional services of varying sizes to compete in the global marketplace.

Significantly, during the services "boom" of the 1970s, U.S. services exports are estimated to have increased by no more than 18 percent in proportion to goods exports.[7] In 1980, the United States Trade Representative submitted to the Organization for Economic Cooperation and Development (OECD)[8] an illustrative list

3. ECONOMIC CONSULTING SERVICES INC., THE INTERNATIONAL OPERATIONS OF U.S. SERVICE INDUSTRIES: CURRENT DATA COLLECTION AND ANALYSIS 3 (1981) (prepared for the U.S. Department of State and the U.S. Trade Representative).

4. Personick, *A Second Look at Industry Output and Employment Trends Through 1995*, MONTHLY LAB. REV., Nov. 1985, at 26.

5. BUREAU OF ECONOMIC ANALYSIS, DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 69 table 6.1 (July 1984). The table covers the years 1980 through 1983.

6. OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. NATIONAL STUDY ON TRADE IN SERVICES: A SUBMISSION BY THE UNITED STATES GOVERNMENT TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE 117 (1984).

7. *Id.* at 60.

8. The OECD is composed of Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, the Irish Republic, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Yugoslavia is a member with special status.

of 250 barriers to services exports experienced by U.S. firms.[9] By 1985, the list included over 500 barriers.[10] Thus while those at the Tokyo Round were not ready for service sector negotiations, the frustration of the service industries was growing.

In 1982 trade in services became the principal issue at the GATT Ministerial where, for the first time, the issue was presented formally as one that deserved attention under GATT rules. Most countries, including many from the industrialized world, reacted with the same indifference that U.S. trade negotiators had in 1975. Developing countries, led by Brazil and India, maintained, as they do today, that the GATT is not a document capable of dealing with transactions that do not physically enter customs. Since that time, most of the principle trading nations of the GATT have analyzed the role of services in their national economies and have considered seriously the prospect of establishing disciplines based on GATT principles to liberalize trade in these sectors. Nearly all of the members of the OECD favor negotiations on services in the next GATT trade round. A number of important developing countries share this goal though the issue continues to be characterized as a North-South affair, and some developing countries remain skeptical, fearing a colonization of their service sectors by large U.S. firms that will inhibit the development of their national service sectors. Nonetheless, the progress of the last four years in getting countries to understand service sector problems, and in determining how these problems may be made subject to binding international rules, has been dramatic. In November 1985, at its annual meeting, the GATT contracting parties established a preparatory committee whose agenda includes the development of services issues as a topic for future negotiations. Services trade negotiations are indeed inevitable.

II. United States Negotiating Objectives

Many challenges face those who will draw up trade rules covering services. The most immediate of these is whether to establish understandings on a sector-by-sector basis or to create an encompassing set of general principles. Admittedly no set of general rules could begin to cover every issue peculiar to every sector in every country; however, a few principles may be adopted that would work toward liberalization in all sectors. The United States has proposed a conceptual framework of such rules, most of which are borrowed from the GATT, through which it will seek parallel sector understandings that deal individually with the unique problems faced by each service industry.

9. Office of the U.S. Trade Representative, Selected Examples of Services Trade Barriers (1981) (submission to the OECD) (copy on file, U.S. Trade Representative).

10. Office of the U.S. Trade Representative, An Illustrative List of U.S. Services Industries Problems in Foreign Markets (1985) (submission to the GATT) (copy on file, U.S. Trade Representative).

The proposed U.S. framework is based on six principles intended to ensure (1) transparency, (2) national treatment, (3) due process, (4) most-favored nation treatment, (5) establishment of rules governing public monopolies, and (6) establishment of procedures for consultation and dispute settlement. Each of these is crucial to successful sector understandings. Transparency would obligate countries to notify the GATT of any restrictive national practices that are inconsistent with sector understandings. A fundamental regulatory practice for many service sectors in the United States, national treatment would require that all participants treat foreign entities no less favorably then domestic concerns. In a highly regulated environment, a due process principle assuring public comment by all interested parties prior to the introduction of a regulation is absolutely critical. Most favored nation treatment will assure that the balance of rights and concessions will be extended only to countries willing to live by the agreed upon rules. Many important service sectors, including telecommunications and airlines, are owned by governments. While it is unrealistic to expect that the special area of activity reserved to monopolies could be thrown open to competition, the behavior of monopolies in related commercial activities, such as data processing and airline reservation systems, should be subject to certain rules. Finally, the conceptual framework must be contractually binding, allowing countries to redress the balance of concessions they have obtained under it. Consultation and dispute settlement procedures identical to those of the GATT would fulfill this obligation.

Individual sector agreements would serve as annotations to the framework, incorporating the agreed upon principles but dealing with additional issues critical to a particular sector. For example, rules governing the treatment of foreigners by associations administering professional standards might be included in such annotations.

There is the strong belief within the United States Government that it is critical to have at least a handful of major sector understandings in addition to the framework in order to achieve a genuine reduction of barriers to trade in services. Although the government has not yet set priorities as to which sectors should be addressed, the Services Policy Advisory Committee, a group of senior corporate executives who advise the United States Trade Representative on services trade policy, has recommended that information services be the first to receive attention. Much will depend on the consensus emerging from the parties to a services negotiation.

A second challenge lies in determining whether the GATT legal instrument should itself be amended to cover services. While there are differing opinions as to whether the GATT articles could, as a matter of law, cover the service sectors, the articles themselves are sufficiently vague that, absent clarification, they will require a formal amendment process to ensure that services fall under the GATT rules. Amending the GATT, which requires an affirmative vote of two-thirds of the contracting parties, would appear to be an impossible task in view of the continued opposition of many developing countries to the services initiative. A

more realistic alternative would be the adoption of an understanding similar to the GATT Code on Government Procurement,[11] which while it does not track specific GATT articles, is administered by the GATT Secretariat and does contain elements of the GATT that ensure that it is a legally binding document. This is a likely alternative as the agreement would apply only to those countries who signed it and individual sectoral annexes could reflect the differing interests and regulatory sensitivities of subscriber countries.

Another challenge to the negotiation of a services understanding is the exceptions and derogations that will undoubtedly arise as a result of domestic regulations that do not conform to its provisions. In some countries subnational entities are charged with regulating certain services and the federal or central government cannot, given the constitutional sovereignty of those entities, commit them to international understandings. Such a situation in the United States and Canada poses a major challenge to the governments of those countries. This problem is also reflected in the OECD Code on Invisibles Transaction,[12] which is burdened with an inordinate list of exceptions and derogations that have rendered the Code relatively impotent.

If a GATT understanding is to improve on the relatively uninspiring results of the OECD Code, it must be structured to recognize the long term process of services liberalization. It cannot become an overly ambitious document that fails to take account of regulatory reality. One approach would require each party to notify the other signatories, through the transparency provision, of those practices that are inconsistent with any of the principles of the understanding. Provided the country notifies at the outset of any exercise, such provisions would not be subject to the rights and obligations enjoyed under the arrangement. Practices not notified but found inconsistent with the principles of the understanding would be subject to consultation and dispute settlement, and eventual retaliation. Any laws or regulations adopted after the effective date of the agreement would be bound automatically by the terms of the agreement.

These procedures would first achieve a standstill on new laws or regulations restricting the entry of foreign service providers and second make the notification process a meaningful one because of the incentive to effectively grandfather regulatory provisions. The inventory of notified rules under the transparency requirement would provide the basis for the next stage of negotiations. Provided there are staged sequences of trade negotiations dealing with the plethora of restrictive regulations governing services, the arrangement would have credibility as a device for systematically reducing barriers to trade in services. Because developing countries tend to have more regulations that would require notifica-

11. GATT, Agreement on Government Procurement, T.A.I.S. No. 10403,__U.N.T.S.__.

12. Organization for Economic Cooperation and Development, Code of Liberalisation of Current Invisible Operations (1982).

tion, the understanding, to a certain degree, must contain provisions for special, differential treatment that many of these countries seek.

III. The Professional Services

Professionals face numerous problems in doing business abroad. The most common difficulties involve burdensome immigration rules that prohibit free movement across borders and the inability to obtain necessary professional certification. The method chosen to deal with these problems will depend on the level of presence that professionals and professional firms wish to attain in a foreign country. In the most liberal and most desirable environment, an individual or firm would enjoy complete rights as a foreign corporate citizen. Professional certification examinations administered to foreigners would involve requirements no more burdensome than those applied to nationals. Foreign attorneys would be allowed to practice all forms of law and foreign accountants would be authorized to sign audits.

In an environment less open to international trade in services, foreign professionals could serve only as consultants or advisors. It is this type of presence currently sought by U.S. lawyers in Japan. Under such arrangements, foreign legal consultants are generally authorized to advise only on foreign and international law. Accountants and architects generally may provide appropriate assistance to the individuals responsible for a particular audit, or to the foreign architects responsible for the integrity of building design. This is the most common form of presence because it does not involve resident immigration rules—the product of a socio-political process to which trade principles are generally subordinated. The presence of foreign consultants with the expertise necessary to provide a particular service breeds joint ventures, although the local partners or associates of course remain the people legally capable of fulfilling domestic regulatory requirements.

A third type of presence involves only the use of a foreign firm's name. In such situations, all of the work is carried out by nationals. This type of presence can be of considerable importance to multinationals looking for a reliable firm to perform a service that must be carried out locally. The presumption is that a foreign firm exercises its reputable professional judgment in lending its name to local enterprises whose offices are staffed strictly by nationals.

Can an international body such as the GATT have an effect on the delicate process of enabling foreigners to establish one of these types of presences? It would be unrealistic to assume that an international referee could overturn the sovereign standards set by professional regulatory bodies. Nonetheless, countries might obligate themselves to a process whereby foreign citizens would have the opportunity to become certified to enter a given profession by meeting a special set of requirements imposed by that profession's regulatory body. Such a process is being developed by the American Board of Certified Architects, which ana-

lyzes carefully the background and education of applicants and draws up specific supplementary educational requirements before administering a certification examination. The architects are working toward a system of case-by-case qualification with the objective of providing as many foreign citizens as possible with an opportunity to be certified. In the District of Columbia, a foreign citizen with a legal education grounded in Anglican common law can be admitted to practice law after one year at a U.S. law school and completion of the bar examination.

Each of these procedures avoids some of the more overt protectionist professional standards, such as the requirement of national citizenship or graduation from a particular university. They nonetheless will not overcome certain rigidly established forms of protection such as the absolute quota the Japanese place on those who can take the bar exam, not to mention the additional quota on those who are permitted to pass the exam. (No legal jurisdiction in the United States prohibits foreign citizens from taking the bar exam.) International leadership is needed to pressure those in control of professional certification systems to remove requirements that bear no reasonable relationship to standards of professionalism. A set of international guidelines, while not adjudicatory, could provide a basis for countries to redress the balance of concessions they are entitled to under a services understanding.

The role of national professional services regulators may be inherently sovereign, but when that role defies reason, it will be transformed into a trade issue.