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# GATT as a Framework for Multilateral Negotiations on Trade in Legal Services

Dean N. Menegas\*

Barriers to the practice of law by foreigners exist in the laws of most nations.<sup>1</sup> No global multilateral agreement currently regulates transnational legal practice. Properly modified, the concepts and procedures of the General Agreement on Tariffs and Trade (GATT),<sup>2</sup> which regulates national barriers to trade in goods, could provide an effective framework for multilateral negotiations on trade in legal services.

The fundamental GATT obligations contained in the national treatment provision<sup>3</sup> and the most-favored-nation clause,<sup>4</sup> and GATT methods of creating excep-

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1. See generally TRANSNATIONAL LEGAL PRACTICE (D. Campbell ed. 1982) [hereinafter cited as TRANSNATIONAL PRACTICE]; S. CONE, THE REGULATION OF FOREIGN LAWYERS (3d ed. 1984).

All barriers arise either from the laws of national and regional governments or from the regulations of national and regional bar associations. This note assumes that the national governments of the GATT signatories have the authority to negotiate reductions in the barriers discussed. Whether such a situation actually exists is a point of contention in a number of jurisdictions, notably the United States. A recent student note suggests that the federal government does have the power to regulate foreign attorneys, despite the power of state bar associations and the tradition of state regulation of the legal profession. See Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1812-22 (1983) [hereinafter cited as Note, *Making Room*].

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. 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). Throughout this note, the term GATT will be used to refer both to the treaty and to its signatories.

3. The GATT national treatment provision requires that imports be accorded "treatment no less favourable" than domestic products with respect to all laws and requirements affecting the products' "offering for sale." GATT, *supra* note 2, at art. III, para. 4. It further requires that no internal taxes, laws, or regulations be applied "so as to afford protection to domestic production." *Id.* at art. III, para. 1.

4. The GATT most-favored-nation (MFN) clause holds that any advantage, favor, privilege, or immunity granted to a product of any country by a contracting party must be granted to the like products of all other contracting parties. See GATT, *supra* note 2, at art. I.

tions to those obligations,<sup>5</sup> could be adapted to an agreement on legal services. GATT policies regarding quotas<sup>6</sup> could also play a role in this agreement, as could the concept of reciprocity.<sup>7</sup> The negotiators of such an agreement could utilize the GATT negotiation procedures employed during the Tokyo and Kennedy Rounds of trade negotiations,<sup>8</sup> and incorporate GATT dispute settlement mechanisms.<sup>9</sup>

While a number of commentators have discussed the adaptability of the GATT to problems of trade in services,<sup>10</sup> none have specifically addressed its applicability to lawyering or other professional services. Part I considers the GATT's progress on services issues to date. Part II identifies and classifies the barriers to transnational legal practice. Part III explores the possibility of liberalizing many of these barriers through the application of GATT substantive concepts and the use of GATT procedural mechanisms.

## I. THE GATT AND TRADE IN SERVICES

With few exceptions, the GATT presently deals only with barriers to trade in goods.<sup>11</sup> The Agreement's language does not expressly exclude services, however, and GATT parties have often attempted to include services in the organization's negotiations. The first of these attempts came in 1959, when GATT members approved a recommendation on freedom of contract in transport insurance.<sup>12</sup>

The Tokyo Round of Multilateral Trade Negotiations (MTN) failed to make much progress in the area of trade in services, despite the expectations and efforts of U.S. negotiators. Some of the negotiated agreements, or "codes," do directly

5. See *id.* at art. XX, XXI.

6. See *id.* at art. XI.

7. The concept of reciprocity is most clearly enunciated in GATT, *id.* at art. XXVIII (bis).

8. The Kennedy Round, held in Geneva from 1964-67, was the sixth round of GATT tariff negotiations. The Tokyo Round of Multilateral Trade Negotiations (MTN), the seventh and most recent GATT round, focused on the reduction of non-tariff barriers to trade in goods. It was held in Geneva from 1973-79.

9. See GATT, *supra* note 2, at arts. XXII, XXIII.

10. See, e.g., R. SHELPI, *BEYOND INDUSTRIALIZATION* 167-69 (1981); Note, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 *FORDHAM INT'L L.J.* 371 (1982) [hereinafter cited as Note, *Threshold Problems*]; Note, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 *INT'L TRADE L.J.* 281 (1982-83) [hereinafter cited as Note, *Legal Problems*].

11. Throughout the GATT there are specific references to goods as well as to concepts such as tariffs and dumping which generally relate more to goods than to services. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 529 (1969).

12. R. KROMMENACKER, *WORLD-TRADED SERVICES: THE CHALLENGE FOR THE EIGHTIES* 143-47 (1984).

affect services, however.<sup>13</sup> In addition, the parties initiated a procedure for the bilateral negotiation of issues not dealt with multilaterally, and some grievances tabled along these lines did concern services.<sup>14</sup> Nevertheless, many were disappointed by the results of the MTN in the services area. They attributed the lack of substantial progress to the MTN's specific focus on non-tariff barriers to trade in goods and to the lack of sufficient data regarding service industries and their problems.<sup>15</sup>

The past four years have seen slow yet significant progress. Despite the United States' emphasis on services at the 1982 GATT ministerial meeting,<sup>16</sup> the joint communique issued at meeting's end merely invited interested parties to study services issues further and to exchange information among themselves through organizations such as the GATT.<sup>17</sup> At the 1984 annual GATT meeting, however, the United States succeeded in including services in the organization's work program; the resulting GATT negotiating body formed to discuss trade in services held its first formal meeting in January 1985.<sup>18</sup> The new GATT round of trade negotiations will almost certainly include discussion of services, despite the objections of some developing countries that liberalization of trade in this area will slow their economic growth.<sup>19</sup> Although the focus thus far has been upon

13. These include the agreement on customs valuation which concerns transport and construction costs, and the agreement on technical barriers to trade which affects testing regulations. *Id.* at 148-53.

14. Parties tabled requests respecting regulations on insurance, transportation, preshipment inspection, motion pictures, radio and television commercials, and patents. *Id.* at 154-55.

15. See *id.* at 148; Cohen & Morante, *Elimination of Nontariff Barriers to Trade in Services: Recommendations for Future Negotiations*, 13 LAW & POL'Y INT'L BUS. 495, 509 (1981); see also Note, *Threshold Problems*, *supra* note 10, at 394 n.156.

16. At their November 1981 session, the GATT contracting parties decided to convene their next session at the ministerial level. American research on services issues was stepped up before the meeting, and the United States submitted a number of topics to the ministers for prior consideration. See Office of the U.S. Trade Representative, Briefing Packet: International Trade in Services (Nov. 1982) (available from Office of the USTR) [hereinafter cited as USTR Briefing Packet].

17. *GATT Ministerial Meeting Communique*, 7 U.S. IMPORT WEEKLY (BNA) 301 (Dec. 1, 1982).

18. *GATT Body Begins Slowly in Discussion of Services Trade*, 2 INT'L TRADE REP. (BNA) 176 (Jan. 30, 1985).

19. See Lewis, *U.S. Wins Trade Talk Go-Ahead*, N.Y. Times, Oct. 3, 1985, at 27. The new round, starting in 1986, will last for several years. U.S. demands to include services in the negotiations are supported by the European Community and Japan. India and Brazil lead the opposition. *Id.* But see *Chairman of 'Wise Men's' Panel Says Report Should Aid Summit Talks*, 2 INT'L TRADE REP. (BNA) 494 (Apr. 3, 1985) (a panel of GATT advisers, while recommending exploration of methods of expanding services trade, remains pessimistic about short-term prospects for progress on services). Private sector trade advisers, in a report to the USTR, also supported the inclusion of services in a new round of talks. See *Top Private Sector Trade Policy Advisers Approach New GATT MTN Round With Caution*, 2 INT'L TRADE REP. (BNA) 727-28 (May 29, 1985).

services closely linked to trade in goods, such as banking and insurance, there is greater consensus on the need for liberalization than in the past, as well as a greater amount of information about the problem.<sup>20</sup>

A number of unique features make the GATT an appropriate forum for multilateral negotiations on trade in services. First, GATT concepts are familiar to all parties—a problem that seems intractable at first may seem less so if it is examined under the rubric of, for instance, most-favored-nation (MFN) analysis. Second, GATT negotiating procedures have proven to be effective methods for concluding multilateral agreements. Third, the GATT provides a process for dispute settlement, as well as a venue for informal discussion (bilateral and multilateral) of trade problems.<sup>21</sup> Finally, the GATT has a broad membership which is formally committed to the reduction of trade barriers.<sup>22</sup> Although past efforts have been generally unencouraging, recent commentary<sup>23</sup> and developments portend a promising future for negotiation of trade-in-services agreements within the GATT framework.

## II. BARRIERS TO TRANSNATIONAL LEGAL PRACTICE

A wide array of barriers hinders trade in legal services; this note separates them into four distinct types.<sup>24</sup> Type I barriers are intended to treat foreign law firms and lawyers as foreign businesses. They include financial barriers such as

20. See *Informal Session Makes Some Progress on Inclusion of Services in New Round*, 2 INT'L TRADE REP. (BNA) 494 (Apr. 3, 1985). For discussion of past difficulties, see R. KROMMENACKER, *supra* note 12, at 156 and Note, *Legal Problems*, *supra* note 10, at 286 n.32.

21. R. KROMMENACKER, *supra* note 12, at 131. The GATT secretariat plays an essential role in facilitating such discussions by monitoring and promoting progress in the negotiations and by acting as a clearinghouse for proposals. *Id.* at 132.

22. See 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 48 (1984) [hereinafter cited as USTR SERVICES STUDY].

23. Raymond Krommenacker argues that the application of GATT principles is absolutely essential for the reduction of barriers to services trade. R. KROMMENACKER, *supra* note 12, at 164. For other optimistic assessments of the potential and advisability of a trade-in-services agreement under GATT, see for example Brock, *A Simple Plan for Negotiating on Trade in Services*, 5 WORLD ECON. 229, 238 (1982); Cohen & Morante, *supra* note 15, at 516; and Note, *Threshold Problems*, *supra* note 10, at 392. *But see* Gray, *A Negotiating Strategy for Trade in Services*, 17 J. WORLD TRADE L. 377, 385-87 (1983) (contending that the Organization for Economic Cooperation and Development would prove a better forum because its membership is restricted to developed countries, who have increasingly service-oriented economies, and excludes developing countries, who would prefer to focus upon trade in goods and to protect their infant service industries from external competition).

24. For country-by-country information on many of these barriers, see TRANSNATIONAL PRACTICE, *supra* note 1, and S. CONE, *supra* note 1.

discriminatory taxes and restrictions on the repatriation of fees,<sup>25</sup> personnel hiring restrictions,<sup>26</sup> and rules regarding the use of firm names.<sup>27</sup>

Type II barriers are designed to protect domestic lawyers from foreign competition. All barriers are protectionist in some sense since their effect, generally, is to limit foreign practice. Type II barriers, however, either openly reflect protectionist motivations or have no other justification. These protectionist barriers include regulations governing the length of stay or frequency of practice of foreign lawyers,<sup>28</sup> the "needs" test (requiring proof of domestic demand for a firm's particular talents before entry is allowed),<sup>29</sup> and restrictions on partnerships between domestic and foreign lawyers.<sup>30</sup>

Type III barriers are meant to protect the public from incompetent lawyers. Some are designed to compensate for national differences in substantive and procedural law. These measures include educational requirements such as certification by domestic legal educators,<sup>31</sup> and restrictions on the types of legal advice foreign lawyers may provide.<sup>32</sup> Laws requiring foreign lawyers to have a minimum number of years of experience in their own countries also fall under this heading.<sup>33</sup> Conflicts between different codes of ethics or professional responsibility raise additional type III barriers.<sup>34</sup>

Type IV barriers, which focus on the nationality of the legal practitioner, are, on their face, the most discriminatory of all barriers against foreign lawyers, and the most effective. Citizenship requirements<sup>35</sup> and citizenship-based requirements such as visa and work permit requirements<sup>36</sup> and ownership restrictions—

25. USTR Briefing Packet, *supra* note 16, at No. 14; Cohen & Morante, *supra* note 15, at 499; Note, *Legal Problems*, *supra* note 10, at 301.

26. Cohen & Morante, *supra* note 15, at 499.

27. USTR Briefing Packet, *supra* note 16, at No. 14.

28. Office of the U.S. Trade Representative, Selected Problems Encountered by U.S. Service Industries to Trade in Services 41 (Aug. 11, 1983) (unpublished computer printout) [hereinafter cited as USTR, Selected Problems].

29. Note, *Making Room*, *supra* note 1, at 1808.

30. USTR SERVICES STUDY, *supra* note 22, at 148; USTR Briefing Packet, *supra* note 16, at No. 14; Note, *Making Room*, *supra* note 1, at 1783.

31. USTR SERVICES STUDY, *supra* note 22, at 148. For a detailed examination of European Community perspectives on this issue, see J.-P. CRAYENCOUR, *THE PROFESSIONS IN THE EUROPEAN COMMUNITY* 41-50 (1982).

32. Campbell & Coe, *Introduction*, in *TRANSNATIONAL PRACTICE*, *supra* note 1, at 14; Note, *Making Room*, *supra* note 1, at 1778.

33. Note, *Making Room*, *supra* note 1, at 1797.

34. See Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154 (1973).

35. USTR SERVICES STUDY, *supra* note 22, at 148; Campbell & Coe, *supra* note 32, at 7-10; Note, *Making Room*, *supra* note 1, at 1772-75.

36. USTR, Selected Problems, *supra* note 28, at 41.

allowing only citizens to own property,<sup>37</sup> fall into this category, as do allegiance requirements.<sup>38</sup>

Not all the barriers listed above exist in every country. Nor do they affect all practitioners; the New York lawyer meeting with a client in Geneva to discuss the implications of a trust encounters few, if any, of the difficulties faced by the large Washington law firm attempting to establish a branch office in Geneva.<sup>39</sup> A range of intermediate situations exists, each raising idiosyncratic problems in the face of liberalization efforts.

None of these barriers to foreign legal practice are necessary to the survival of the local legal profession. Thriving, high-quality professions exist not only in the United States and Japan, where regulations highly restrictive of practice by foreigners are in force,<sup>40</sup> but also in the United Kingdom and France, where there are relatively few obstacles to practice by foreign attorneys.<sup>41</sup>

Yet some barriers to foreign legal practice do seem to be more justified, and hence more "rational," than others. The GATT's very existence reflects an international consensus that economic protectionism is presumptively bad. The GATT itself nevertheless recognizes that some barriers are justified. Blatantly protectionist measures are allowed when they protect certain industries from serious injury.<sup>42</sup> Seemingly protectionist regulations are also permissible when necessary to promote legitimate interests of the national government, including certain economic, social, and national security goals.<sup>43</sup> Thus, a national government's legitimate interest in insuring a high degree of reliability in the professions<sup>44</sup> might justify the imposition of type III barriers. Similarly, a government's legitimate interest in controlling the movement of foreigners across national

37. USTR Briefing Packet, *supra* note 16, at No. 14.

38. *Id.* at 42.

39. See Brothwood, *International Law Offices*, 1979 J. Bus. L. 10; Campbell & Coe, *supra* note 32, at 2. The barriers discussed in this note rarely affect the practitioner who travels abroad to consult with a client ad hoc on a specific matter, see Lund, *supra* note 34, at 1155, or who advises from his home office a client abroad.

40. See generally Salkin, *United States*, in *TRANSNATIONAL PRACTICE*, *supra* note 1, at 355; Fukuda, *Japan*, in *TRANSNATIONAL PRACTICE*, *supra* note 1, at 201.

41. See generally Costello, *England and Wales*, in *TRANSNATIONAL PRACTICE*, *supra* note 1, at 87; Debost, *France*, in *TRANSNATIONAL PRACTICE*, *supra* note 1, at 113.

42. See GATT, *supra* note 2, at art. XIX. This article, commonly known as the escape clause, allows the suspension of obligations or the withdrawal or modification of concessions when serious injury to domestic producers is caused or threatened as a result of obligations incurred under the GATT.

43. See GATT, *supra* note 2, at art. XX (general exception to GATT obligations for measures that, for example, are necessary to protect public morals or human, animal or plant life or health); GATT, *supra* note 2, at art. XXI (security exceptions); see also *infra* text accompanying notes 53-56.

44. USTR SERVICES STUDY, *supra* note 22, at 148; Lund, *supra* note 34 *passim*; Note, *Threshold Problems*, *supra* note 10, at 384.

borders<sup>45</sup> might justify the imposition of type IV barriers. Multilateral negotiations on legal services should attempt to eliminate unnecessary protectionist barriers while minimizing the number and impact of rational barriers.

### III. LIBERALIZATION OF THE BARRIERS

Most of the barriers to foreign legal practice can be analyzed under GATT concepts.<sup>46</sup> National treatment should be the starting point for an agreement to reduce barriers to trade in legal services. The MFN concept, a second-best solution,<sup>47</sup> should control in situations where national treatment is not desirable or practical.<sup>48</sup>

A multilateral agreement on transnational legal practice could eliminate type I and type II barriers, the major part of which are analogous to GATT-prohibited

45. See *infra* notes 58–59 and accompanying text.

46. The application of national treatment and MFN concepts to lawyering on the regional and bilateral levels indicates that the concepts may be adaptable to global agreements as well. Regional treaties applying national treatment to services in general include the Treaty of Rome and the Lomé Convention, both of which formally endorse the abolition of restrictions, within their respective communities, on the freedom of establishment and on the right to provide services. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, arts. 52, 59, 298 U.N.T.S. 11 (1958); Second ACP-EEC Convention of Lomé, Oct. 31, 1979, art. 160, 23 O.J. EUR. COMM. (No. L 347) 2, 54 (1980). (The Treaty of Rome formed the EEC in 1957. The six original Member States were Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. Denmark, the Irish Republic, and the United Kingdom joined the Community on January 1, 1973. Greece became the tenth Member State on January 1, 1981. In 1985, Spain and Portugal became Member States. This note uses the term European Community (EC) in accordance with the resolution of the European Parliament. *Resolution on a single designation for the Community*, 21 O.J. EUR. COMM. (No. C 63) 36 (1978). The Lomé Convention is an agreement between the EC and 46 African, Caribbean, and Pacific states.)

All bilateral treaties of friendship, commerce and navigation (FCN treaties) prescribe as a standard either national treatment or MFN treatment. FCN treaties set forth, among other things, the rights of individuals and firms from one state doing business in the other. The United States is presently party to FCN treaties with forty-three nations; each treaty normally treats services the same as other businesses. Professional services, however, are restricted in most of the recent treaties, generally through clauses requiring compliance with domestic education and competency standards by foreign professionals interested in private practice. Professionals are generally allowed to provide support services for businesses from their own state that are permitted the right of establishment in the other state. Some treaties restrict lawyers alone among professionals. E. Arakaki, *Treaties of Friendship, Commerce and Navigation and their Treatment of Service Industries* (Feb. 2, 1981) (available from Int'l Trade Admin., U.S. Dep't of Commerce).

47. In a situation where foreign lawyers from Country X are given better treatment in Country Y than Y's own lawyers, then MFN treatment would be preferred by Country Z's lawyers over national treatment. Since this situation is nowhere foreseeable, national treatment will always be more liberalizing than MFN treatment.

48. Such a situation is presented by type IV barriers, which focus on the nationality of the legal practitioner. See *infra* text accompanying notes 58–61.

obstacles to trade in goods. Other restrictions on foreign practice, such as education-related type III barriers, are more analogous to regulations affecting goods that are excepted under the GATT. Finally, the GATT framework is an inadequate basis for an agreement liberalizing type IV barriers, which raise questions of national sovereignty never confronted in the GATT negotiating framework.

Part A of this section discusses the applicability of GATT concepts to the different types of barriers to transnational legal practice. Part B considers the potential usefulness of GATT procedural mechanisms to the negotiation of an agreement to liberalize trade in legal services.

### A. *GATT Concepts*

The national treatment concept can most easily be applied to type I barriers. GATT article III deals directly with internal taxes on products, which are clearly analogous to internal taxes on services.<sup>49</sup> Restrictions on the repatriation of legal fees accord foreign lawyers treatment less favorable than that accorded domestic lawyers, thus discouraging foreign practitioners from offering their services for sale.<sup>50</sup> Personnel hiring restrictions and rules regarding the use of firm names both afford protection to domestic firms.<sup>51</sup>

Type II barriers could be treated either as quotas or under national treatment concepts. Economic protectionism is anathema to the GATT; barriers affording such protection are contrary to the spirit of the Agreement. With a few narrow exceptions, GATT article XI forbids the use of quotas on the importation of goods.<sup>52</sup> GATT's ban on quotas could be regarded as a specific interpretation of the national treatment provision, since quantitative restrictions are laws or regulations which affect the availability of imported products and afford protection to domestic production.

The type II length-of-stay and frequency-of-practice regulations are, in effect, quotas, limiting the amount of foreign lawyering allowed in a country. The needs test is also a form of quota, fixing the number of lawyers according to the government's assessment of domestic demand. Restrictions on partnership between domestic and foreign lawyers afford protection to domestic lawyers by effectively limiting foreign lawyers' practice to certain types of law and clients, and thus can be addressed through the national treatment concept.

49. See GATT, *supra* note 2, at art. III, para. 2.

50. See GATT, *supra* note 2, at art. III, para. 4. The repatriation of legal fees may be an issue for the International Monetary Fund or for individual FCN treaties, rather than for the GATT, since currency movements are involved. GATT article XV requires the GATT parties to consult and cooperate with the IMF on monetary questions. Still, the issue may fall under GATT jurisdiction since paragraph 4 of article III was intended to have a broad reach. See J. JACKSON, *supra* note 11, at 288.

51. See GATT, *supra* note 2, at art. III, para. 1.

52. The exceptions relate mainly to agricultural products. See GATT, *id.* at art. XI, para. 2. Article XII also allows restrictions to safeguard a country's balance of payments. See GATT, *id.* at art. XII.

Of the four types of barriers, type III, intended to protect the public from incompetent practitioners, are the most rational.<sup>53</sup> Differences between the legal systems of any two countries often overwhelm similarities. Common and civil law lawyers practicing in each other's jurisdictions must grasp the intricacies of entirely different legal frameworks before they can even begin to grapple with the distinct substantive and procedural precepts of the other system.

Such differences could theoretically remove all barriers to transnational legal practice, including types I, II, and IV, from the purview of a GATT-style agreement. Paragraph four of GATT article III only requires that foreign products receive "treatment no less favourable than that accorded to *like* products of national origin" (emphasis added). Similarly, GATT article I mandates the extension of MFN treatment only to like products from different foreign countries. Proponents of protectionism might argue that foreign lawyers without comprehensive training in the host country are not functionally equivalent to domestic lawyers, and thus are deserving of neither national treatment nor MFN treatment. Those with a less protectionist viewpoint might limit application of the national treatment and MFN clauses to lawyers from jurisdictions similar to their own. For instance, a civil law country might opt to afford practitioners from other civil law jurisdictions more privileges than it would to common law practitioners.

A better solution to the "like products" problem would be to designate type III barriers as explicit exceptions to a multilateral agreement liberalizing transnational legal practice. Although such action would not solve the problems caused by differences between legal systems, it would prevent them from hopelessly impeding the progress of multilateral negotiations and delaying indefinitely the attainment of a comprehensive agreement.<sup>54</sup>

GATT article XX(b) allows measures "necessary to protect human . . . life or health." Incompetent lawyers might jeopardize clients' legal rights and economic security, just as faulty or dangerous goods might endanger citizens' lives and health. Legal rights might not be exercised to full advantage because of uninformed counsel, or poor commercial decisions might be made on the basis of faulty advice. Accordingly, an agreement on transnational legal practice could include an exception for measures necessary to protect citizens' legal rights and economic well-being. Under such an exception, educational requirements and

53. See *supra* text accompanying notes 42–45 for a discussion of why some barriers may be considered rational.

54. The European Community has struggled with the issues for years in attempting to implement articles 52 (right of establishment), 57 (mutual recognition of diplomas), and 59 (right to provide services) of the Treaty of Rome, and has yet to arrive at a satisfactory solution. A Council of Europe directive implementing the treaty language as applied to lawyering only addressed the freedom to provide legal services, avoiding for the moment the problems related to the mutual recognition of diplomas that a directive concerning the right of establishment would have raised. J.-P. CRAYENCOUR, *supra* note 31, at 96–100, 112–13. *But see infra* note 70 (questioning the function of the educational barrier).

type-of-advice restrictions would be exempt from the agreement's national treatment and MFN provisions.

An exception clause could also be used to reconcile conflicts in national codes of ethics or professional responsibility. The codes serve to protect clients and preserve the legal profession's reputation.<sup>55</sup> An International Bar Association study group has recommended that foreign lawyers be required to abide by local codes of ethics, with the local code prevailing when conflicts with lawyers' home codes arise.<sup>56</sup> Such an arrangement could be allowed under an exception clause permitting measures necessary to protect citizens' legal rights and professionals' reputations.

Years-of-experience requirements are the only type III barriers that ought to be eliminated using national treatment concepts. Like educational requirements, these rules are designed to protect the public. Given the widespread use of other type III barriers, however, experience requirements are not necessary to afford adequate protection. The requirements are also quite possibly ineffective or even counterproductive.<sup>57</sup> Lengthy experience is not a sure indication of a high quality domestic practice, much less the ability to master a foreign legal system. Exclusion of young, yet highly-qualified foreign lawyers serves no state's interests.

The GATT conceptual framework is inadequate to structure an agreement reducing nationality-based type IV barriers. The issues raised by these barriers "touch and concern national sovereignty far more than free trade."<sup>58</sup> Control over the entry of foreigners into the country and their direct participation in the economy is a widely recognized concomitant of sovereignty.<sup>59</sup> While trade in legal services may require foreign lawyers to establish themselves in the country of their clients, trade in goods does not require the presence of foreign producers in the importing country.<sup>60</sup> The GATT, therefore, does not address nationality issues, and thus there are no true GATT analogies to type IV barriers. Still, an

55. See Note, *Making Room*, *supra* note 1, at 1803.

56. See Lund, *supra* note 34, at 1155.

57. See Note, *Making Room*, *supra* note 1, at 1797 n.162.

58. Note, *Legal Problems*, *supra* note 10, at 302.

59. "A state is under no duty, in the absence of treaty obligations, to admit aliens to its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests. . . . These are incidents of sovereignty." 3 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 717 (1942).

60. Trade in services can be separated into two basic categories. "Establishment trade" generally requires the physical presence of the supplier in the importing country. Examples include medical services, accounting, advertising, and retail trade. Tourism and education are examples of establishment trade requiring the presence of the consumer in the supplying country. "Across-the-border trade" allows both suppliers and consumers to remain in their respective countries. Examples include insurance, port services, telecommunications, brokering, passenger transport, film services, and information services. Note, *Threshold Problems*, *supra* note 10, at 382-83. Trade in legal services may take place on either level; this note is specifically concerned with establishment trade. See *supra* note 39.

agreement on transnational legal practice based on GATT concepts could require MFN treatment with regard to all type IV restrictions. Although such a policy would not ensure any specific degree of liberalization—all foreigners could be harshly yet equally discriminated against—it would bring the barriers under the umbrella of the agreement.<sup>61</sup>

### B. GATT Procedures

As shown above, the central GATT substantive concepts of national treatment, MFN, quota, and exception are applicable and adaptable to an agreement reducing barriers to transnational legal services. Such an agreement might incorporate GATT procedural concepts as well.<sup>62</sup> Three aspects of the agreement's procedural framework are relevant: the method of negotiating; the underlying goal of reciprocity; and the dispute settlement mechanisms.

A legal services agreement might be achieved by adapting the negotiating procedure utilized during the Tokyo Round of multilateral trade negotiations. Each party would first make a list of the barriers to trade in legal services that it faces abroad, and a list of the barriers that it presently imposes that it would be willing to eliminate. Negotiators would then use these lists as springboards for agreement on the reduction or elimination of specific barriers.<sup>63</sup>

The "linear technique," introduced at the Kennedy Round of negotiations, is another possible method which might be adopted. Talks would start with an across-the-board proposal. Parties would then table exceptions and proceed to negotiate counter-exceptions.<sup>64</sup> For instance, all countries might initially agree to eradicate all type I financial barriers, after which some might try to negotiate exceptions for certain discriminatory taxes. Both the Tokyo and Kennedy Round negotiating techniques have the advantage of familiarity; trade negotiators are

61. U.S. negotiators want establishment trade dealt with under the GATT. See Note, *Legal Problems*, *supra* note 10, at 302.

Citizenship requirements have been eliminated in a number of countries. In *In re Griffiths*, 413 U.S. 717 (1973), the U.S. Supreme Court held that U.S. citizenship as a prerequisite to bar admission is unconstitutional. The European Court of Justice found citizenship requirements contrary to the Treaty of Rome in *Reyners v. Belgian State*, 1974 E. Comm. Ct. J. Rep. 631; 2 Common Mkt. L.R. 305. The Supreme Court of Mexico held unconstitutional a law requiring citizenship for practice in federal matters. S. CONE, *supra* note 1, at 92. The United Kingdom and Japan have also recently removed citizenship requirements with regard to solicitors and lawyers, respectively. Campbell & Coe, *supra* note 32, at 7. In spite of these developments, however, citizenship requirements are still common. See *supra* note 35.

62. Former U.S. Trade Representative William Brock has argued that GATT procedures would be adaptable to a general multilateral agreement on trade in services. Brock, *supra* note 23, at 238-39.

63. Cf. J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 477 (1977); Cohen & Morante, *supra* note 15, at 516; Note, *Threshold Problems*, *supra* note 10, at 387 (describing Tokyo Round negotiating techniques).

64. Cf. J. JACKSON, *supra* note 63, at 477 (describing Kennedy Round negotiating techniques).

accustomed to the idiosyncracies of each system. They may, therefore, be more likely to reach agreement than they would if a different system were employed.

Reciprocity, an underlying concept in all GATT tariff negotiations, will undoubtedly play a role in the negotiation of a legal services agreement. GATT contracting parties agreed to conduct all negotiations on "a reciprocal and mutually advantageous basis."<sup>65</sup> The concept is not specifically invoked in negotiations; rather, all parties are aware that concessions require counter-concessions. However, due to the difficulty of ascertaining the true value of concessions, criteria for measuring reciprocity in goods negotiations have not been well-developed.<sup>66</sup>

In contrast, reciprocity has obtained a clearer meaning in the context of transnational legal practice. France enacted a provision in 1971 that allows certain types of legal practice in France by citizens of a country that grants, without restriction, the right to engage in the same type of practice to French lawyers.<sup>67</sup> New York responded to the new French provision by enacting court rules allowing foreign lawyers to practice as "legal consultants" without a U.S. law school diploma or admission to the New York bar.<sup>68</sup> A number of other countries have formal reciprocity provisions.<sup>69</sup> The widespread usage which the concept of reciprocity already enjoys in the regulation of legal services trade should facilitate the application of the GATT conceptual framework to the outstanding problems of transnational legal practice.<sup>70</sup>

65. GATT, *supra* note 2, at art. XXVIII (bis), para. 1.

66. See J. JACKSON, *supra* note 11, at 241-45. Non-tariff barriers (such as the ones described in this note) are especially difficult to quantify, as no specific dollar amount is attached to them. Note, *Threshold Problems*, *supra* note 10, at 395 n.164.

67. Loi no. 71-1130, art. 55, Journal Officiel, 5 janvier 1972 (Fr.) (Law pertaining to the reform of certain legal professions).

68. See N.Y. R. Cr. § 521 (McKinney 1984). California, Illinois, and Pennsylvania have all rejected similar proposals. See Note, *Making Room*, *supra* note 1, at 1787. The District of Columbia Court of Appeals is presently considering a proposal, made initially in 1977 by the D.C. Bar and renewed in 1984, to allow foreign lawyers to serve as special legal consultants in the District of Columbia. The Assistant Executive Director of the D.C. Bar expects the proposal to be adopted. Telephone conversation with David Dorsey, Assistant Executive Director, District of Columbia Bar (July 8, 1985) (notes on file, Michigan Yearbook of International Legal Studies). The D.C. proposal is based on the New York foreign legal consultant provision. District of Columbia Bar, Draft Memorandum for the District of Columbia Court of Appeals 4 (Dec. 3, 1984) (Proposed Amendment to Rule 46 to Provide for Licensing of Legal Consultants) [hereinafter cited as D.C. Bar Memorandum].

69. See, e.g., S. CONE, *supra* note 1, at 48 (Belgium); *id.* at 49 (Brazil); *id.* at 70 (France); Echegoyen, *Spain*, in TRANSNATIONAL PRACTICE, *supra* note 1, at 332. The D.C. Bar proposal, see *supra* note 68, contains an unusual informal reciprocity provision. It recommends that the opportunities for practice by D.C. lawyers in a particular foreign country be taken into account when an application by an attorney from that country is considered. D.C. Bar Memorandum, *id.* at 2, 3. No rigid standards are proposed, however. *Id.* at 2.

70. In addition to facilitating the liberalization of all four types of barriers through GATT concepts, the existence of the reciprocity standards enunciated by various countries raises a question as to the

Dispute resolution within the GATT is a twofold process. Countries are first obligated under article XXII to consult one another on any matter affecting GATT obligations. Problems that defy solution in this manner are then dealt with through the dispute settlement procedures of article XXIII, which authorize the suspension of GATT obligations in response to unfair conduct. This two-step process seems well-suited to the resolution of conflicts arising under trade liberalization agreements. Although GATT dispute settlement procedures have been severely hampered by the vague wording of article XXIII,<sup>71</sup> the problems might be avoided by judicious drafting of an agreement on trade in legal services. Indeed, many of the MTN agreements contain redrafted or totally restructured dispute settlement procedures instead of the extant GATT procedures.<sup>72</sup>

#### IV. CONCLUSION

The substantive concepts and procedural mechanisms of the GATT framework could be employed in the negotiation of a multilateral agreement regulating trade in legal services. Of course, such an agreement could be reached completely outside the GATT system. However, the likelihood of negotiations on trade in legal services occurring outside of the GATT forum appears slim. GATT has proved the forum of choice for global trade negotiations, and transnational legal practice is not so pressing an issue as to cause precedent to be shattered. Although the Organization for Economic Cooperation and Development (OECD),

seriousness of the educational problems which type III barriers are meant to deal with. The French Law of 1971, *see supra* note 67 and accompanying text, allows any foreigner to give advice regarding non-French law and international law by registering as a *conseil juridique*. A registered foreigner from a country granting reciprocity can dispense advice on French law as well. Debost, *supra* note 41, at 122. Parliamentary debates show that the French Government hoped that the extended range of practice would serve as an incentive for other countries to grant reciprocity. The opposition called it an "unjustified privilege" and warned of American "imperialism." Comment, *The Reform of the French Legal Profession: A Comment on the Changed Status of Foreign Lawyers*, 11 COLUM. J. TRANSNAT'L L. 435, 445 (1972).

The tenor of the debate seems to imply that economic protectionism is the cause of all important barriers to legal trade between the two countries. Neither side expressed any concern over the competence of foreign lawyers in domestic law. France is not the only country which sets no educational barriers before lawyers from reciprocity-granting countries. *See, e.g.,* Echegoyen, *Spain*, in TRANSNATIONAL PRACTICE, *supra* note 1, at 327, 332. Perhaps the problems presented by type III barriers are not as intractable as they seem at first blush.

71. The article is ambiguous as to exactly what procedures are required or allowable. In addition, the tripwire phrase "nullification or impairment," which sets in motion the article XXIII machinery, is itself highly ambiguous. Jackson, *GATT Machinery and the Tokyo Round Agreements*, in TRADE POLICY IN THE 1980s, at 180-82 (W. Cline ed. 1983); Note, *Threshold Problems*, *supra* note 10, at 406. For a contrary opinion on the "so-called weakness of the system," *see* R. KROMMENACKER, *supra* note 12, at 125, 139 n.45.

72. Seven of the eleven major MTN agreements, including the important Antidumping and Subsidies-Countervailing Duty Agreements, contain explicit dispute settlement provisions. Jackson, *supra* note 71, at 185.

whose members represent a majority of the world's legal practitioners,<sup>73</sup> might provide a useful forum for research and consensus-building, it has proved an ineffective forum for negotiations.<sup>74</sup>

Recent actions of GATT signatories suggest that the GATT framework will, in the future, likely be used to regulate trade in services. That regulation could take a number of forms.<sup>75</sup> Individual sectoral agreements could be reached for each type of service: an insurance code, a legal services code, an advertising code, and so on. Alternatively, a general services code could be drawn up, with or without auxiliary agreements for specific sectors. Sectoral agreements would be most effective, being better able to address the idiosyncratic barriers each service faces (educational requirements, for instance, pose little problem for providers of most services); a general code, however, would be most efficient.

A general code coupled with auxiliary agreements would strike a balance between effectiveness and efficiency. Legal services might be covered in a separate auxiliary agreement, or in the context of a larger agreement on professional services (including law, medicine, and accounting). Whatever the form of the accord, and whatever the forum, it is clear that a multilateral agreement regulating trade in legal services can be achieved using the GATT conceptual and procedural framework.

73. 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.

74. See R. SHELPS, *supra* note 10, at 174. The OECD has discussed services since its inception, with little result. See *id.* at 127–36, 160. Recently, however, the organization has launched new initiatives in its study of services issues. See *id.* at 174–77. Ronald Shelp suggests using the OECD's work as "a tool to build a foundation for future negotiations" within the GATT framework. *Id.* at 176, 189–92.

75. For comprehensive comparisons of the possible negotiation approaches, see R. KROMMENACKER, *supra* note 12, at 162–80 and R. SHELPS, *supra* note 10, at 184–204. See also Cohen & Morante, *supra* note 15, at 515–17; Note, *Threshold Problems*, *supra* note 10, at 402; Note, *Legal Problems*, *supra* note 10, at 291–94.