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Legal Services and the Trade and Tariff Act of 1984

Michael K. Grace*

The Trade and Tariff Act of 1984 (TTA),¹ passed in the last days of the 98th Congress, marks a major effort to deal with the difficult problems associated with liberalization of international trade in services.² While the TTA does not give the President additional negotiating authority to enter into agreements on international trade in services,³ it does articulate new negotiating objectives for such international agreements. The TTA is the first piece of trade legislation whose negotiating objectives focus primarily on the reduction of barriers to international trade in services.

Although Congressional concern for the legal services industry⁴ was not a primary motive in the enactment of the TTA,⁵ reduction of restrictions on foreign legal practice is an attractive goal as it would further the overseas expansion of

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1. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified in scattered sections of 19 U.S.C.A. and 22 U.S.C.A. (West Supp. 1985)) [hereinafter cited as TTA].

2. The TTA defines services as "economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism." *Id.* at § 306(a)(5), 19 U.S.C.A. § 2114b(5) (West Supp. 1985).

3. 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).

4. For the purpose of this note, "legal services" are defined as activities such as offering legal advice, making court appearances on behalf of clients, and holding oneself out as an attorney, that are performed for remuneration and by licensed members of state bar associations. *See Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

5. U.S. interests in international finance and data transmission were the chief proponents of the TTA provisions relating to services. For a list of 60 companies and industry associations that supported S. 144, 98th Cong., 1st Sess. (1983), which in amended form became Title III of the TTA, see 130 CONG. REC. S2228 (daily ed. Mar. 2, 1984) (statement of Sen. Danforth).

the U.S. economy.⁶ In 1984, however, the tenth amendment posed potential problems to the negotiation of such reductions. Legal services in the United States are regulated by the individual states and play a crucial role in the administration of justice by state governments.⁷ Consequently, prior to the Supreme Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,⁸ an international agreement affecting the ability of the states to regulate this area would likely have been subject to a tenth amendment, state sovereignty challenge. *Garcia* seems to have mooted this potential objection, apparently clearing the way for an agreement as comprehensive as Congress is willing and able to endorse.

Part I of this note outlines the major nontariff barriers (NTBs) to trade in services. Part II discusses the provisions of the Trade and Tariff Act that are aimed at the reduction of those barriers. Part III examines the applicability of the TTA to legal services and the potential limitations on the provisions of an international agreement for that particular service industry. It concludes that concerns over state sovereignty, while no longer posing a constitutional obstacle to an international agreement on trade in services, will remain an important political force in the shaping of such an agreement.

I. NONTARIFF BARRIERS TO TRADE IN SERVICES

Over the past decade, world trade in services grew at an annual rate of 17 percent⁹ and now represents nearly one-quarter of all international commerce.¹⁰ Despite overall trade deficits,¹¹ the United States has run large surpluses in trade in services since 1975.¹² From 1972 to 1980, however, the U.S. share of world trade in services declined from 20 to 15 percent.¹³ Members of Congress have

6. See Calder, *Opening Japan*, FOREIGN POL'Y, Summer 1982, at 82, 95.

7. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("[L]awyers are essential to the primary governmental function of administering justice. . .").

8. 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

9. 130 CONG. REC. H11022 (daily ed. Oct. 3, 1984) (statement of Rep. Florio) [hereinafter cited as Rep. Florio Statement].

10. See Kristof, *New Era in Service Exports: Trade Bill Gives Support*, N.Y. Times, Oct. 24, 1984, at D1.

11. In 1984, for example, the U.S. trade deficit was \$123 billion, a record high. Hershey, *Shultz Outlines Steps to Aid World Economy*, N.Y. Times, Apr. 12, 1985, at D1.

12. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 98TH CONG., 1ST SESS., RECIPROCAL TRADE AND INVESTMENT ACT, 1983: WRITTEN COMMENTS ON H.R. 1571, AND SERVICE INDUSTRIES COMMERCE DEVELOPMENT ACT, 1983: WRITTEN COMMENTS ON H.R. 2848, at 83 (Comm. Print 1984) [hereinafter cited as HOUSE COMMENTS ON SERVICE INDUSTRIES].

13. Rep. Florio Statement, *supra* note 9, at H11022.

attributed much of this decline to intervention by foreign governments in service markets, both to protect their service industries from U.S. competition and to assist their firms in export expansion.¹⁴

Unlike the readily noticeable tariff barriers to international trade in goods, most barriers to international trade in services are subtle, technical, and service specific. Nontariff barriers such as licensing, technical standards, quotas, and exchange controls are difficult to evaluate and compare. This makes reciprocal concessions in international negotiations nearly impossible to achieve.¹⁵ In addition, the regulation of many services reflects deeply held and nationally shared political and ethical values. Regulations governing the licensing of lawyers, for example, are founded on cultural values and thus may be less susceptible to international control than regulations governing goods.¹⁶ The importance and diversity of the values underlying some NTBs and the difficulty of analyzing their impact on international trade suggest that this type of trade restriction will, for the foreseeable future, continue to be a serious problem.

Regulatory burdens to international trade in services appear in four varieties: (1) outright prohibition of establishment or access to markets; (2) government regulation discriminating against imports of services; (3) government subsidies for domestic service industries; and (4) discriminatory government procurement policies.¹⁷ In the first category are the outright prohibitions of the importation of ready-made television commercials by the governments of Argentina, Australia, and Canada. The second category includes government restrictions on the use of international telecommunications lines by firms in Brazil, and the Federal Republic of Germany.¹⁸ Governments regularly provide subsidies to domestic service industries, such as below-market rate loans, export financing, and discount sales by government-owned enterprises. Discriminatory government procure-

14. See *id.*; 130 CONG. REC. S11387-88 (daily ed. Sept. 18, 1984) (statement of Sen. Inouye). In 1983, the trade surplus in services narrowed to \$30 billion, nearly a 25 percent decline from 1979. *Id.*

15. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 119 (1985).

16. The number of lawyers in different societies varies greatly. In 1980, for example, there were 11,475 lawyers (*bengoshi*) licensed in Japan compared to an estimated 400,000 lawyers in the United States. Fukuda, *Japan*, in TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES 204 (D. Campbell ed. 1982). Moreover, their roles differ in important respects. Japanese *bengoshi* are primarily litigation lawyers, while U.S. lawyers engage in business planning and legal counseling as well as litigation. *Id.* Since there is no international consensus on the role lawyers should play in business and in society generally, constructing an international regime to regulate transnational legal services will be a difficult task.

17. See HOUSE COMMENTS ON SERVICE INDUSTRIES, *supra* note 12, at 128-30 (statement of the Int'l Chamber of Comm.); see also *Service Industries Development Act, Hearings on S. 3003 Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 23-25 (1980) (statement of Geza Feketekuty, Assistant U.S. Trade Rep. for Policy Development) [hereinafter cited as *Hearings, Service Industries*].

18. See HOUSE COMMENTS ON SERVICE INDUSTRIES, *supra* note 12, at 85.

ment policies also aid national firms to the detriment of potential U.S. exporters.¹⁹

II. THE TTA AND TRADE IN SERVICES

The TTA does not change the President's negotiating authority to reduce NTBs to international trade in services.²⁰ Rather, it adds focus and urgency to existing authority in two ways. First, the TTA indicates the U.S. desire to negotiate international agreements designed to reduce barriers to trade in services. Second, the TTA asserts the willingness of the U.S. to retaliate against service imports from countries discriminating against U.S. service exports.

The negotiating objectives set forth in the TTA demonstrate the U.S. interest in negotiating trade agreements on services.²¹ The negotiating goals represent the

19. The degree of government intervention in international trade is surprisingly large. Barriers to international trade in services include "national preferences for local products, industrial targeting policies, export credit subsidies, regional investment incentives, [and] closed national distribution systems." *Legislation Authorizing International Trade Negotiations: Hearings on H.R. 6773 and H.R. 5519 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 9* (1982) (statement of Raymond J. Waldmann, Asst. Secretary of Commerce for Int'l Economic Policy).

20. The House staff summary of the conference report exaggerates the impact of the TTA when it states: "The conference agreement for the first time gives the President specific negotiating authority with respect to international trade in services." STAFF OF HOUSE COMM. ON WAYS AND MEANS, 98TH CONG., 2D SESS., SUMMARY OF PROVISIONS OF TRADE AND TARIFF ACT 19 (Comm. Print 1984) [hereinafter cited as STAFF SUMMARY]. The President has authority under section 102 of the Trade Act of 1974, 19 U.S.C. § 2112 (1982), to enter into trade agreements to reduce or remove nontariff barriers to trade in goods and services. Under this authority the President may submit the international agreement to Congress for expedited consideration without the possibility of amendment. For the procedural requirements that the President must meet in order to qualify a trade agreement for such "fast-track" consideration, see Trade Act of 1974, §§ 102, 151, 19 U.S.C. §§ 2112, 2191 (1982). While the TTA did not alter the President's negotiating authority to enter into international agreements governing NTBs, it does provide the President with limited authority to enter into agreements to reduce tariff barriers to goods and services. See TTA, *supra* note 1, at § 401, 19 U.S.C.A. § 2112 (West Supp. 1985).

21. Section 305 of the TTA provides:

Principal United States negotiating objectives under section 102 shall be—

(A) to reduce or to eliminate barriers to, or other distortions of, international trade in services (particularly United States service sector trade in foreign markets), including barriers that deny national treatment and restrictions on the establishment and operation in such markets; and

(B) to develop internationally agreed rules, including dispute settlement procedures, which—

(i) are consistent with the commercial policies of the United States, and

(ii) will reduce or eliminate such barriers or distortions and help ensure open international trade in services.

TTA, *supra* note 1, at § 305, 19 U.S.C.A. § 2114a(a)(1) (West Supp. 1985).

first explicit statement of congressional intent regarding international trade in services. They call for the reduction or elimination of barriers to such trade and the development of a set of international rules, including dispute settlement procedures, to govern it. "[O]pen international trade in services" is the avowed end of U.S. trade policy.²² This trade objective reflects increased awareness in Congress that the United States, with "the world's leading service-industry economy,"²³ has the most to lose in an international trade regime dominated by protectionist pressures.

In addition, by amending and adding to the President's retaliatory authority under section 301 of the Trade Act of 1974,²⁴ the TTA indicates the desire of Congress that his authority be used more aggressively in the services area. Section 301 permits the President to suspend trade agreements and to impose duties or other restrictions on U.S. imports of goods or services in retaliation against governments that engage in actions harmful to U.S. exports.²⁵

The TTA contains three provisions relating to the President's section 301 retaliatory authority. First, it clarifies the President's power to exercise his retaliatory authority against any service imports from an offending country,²⁶ as well as against the service or product affected by the action of the foreign government.²⁷ The Trade Act of 1974 provided the President with broad authority but did not specifically permit retaliation against foreign services unassociated with the foreign protectionist action.²⁸ The TTA unequivocally gives the President the power to respond to harmful foreign trade policies and practices in this manner.

Second, the TTA adds a subsection to section 301 that gives the President the authority to restrict "service sector access authorizations"²⁹ governed by federal law, notwithstanding the existing authority of independent federal regulatory

22. *Id.*

23. Cohen, *Economic Relations with Other Advanced Industrial States*, in *EAGLE DEFIANT* 122 (K. Oye ed. 1983).

24. 19 U.S.C. § 2411 (1982).

25. *Id.*

26. The President may retaliate when a foreign country acts in a manner that is inconsistent with its trade obligations to the United States or discriminates against and is burdensome to U.S. commerce. The President may impose restrictions that affect all countries equally or only the offending country. Whether the President imposes general or country-specific restrictions, he has the flexibility to restrict the services initially affected by the foreign measures, as well as all other service imports. TTA, *supra* note 1, at § 304(a), 19 U.S.C.A. § 2411(a) (West Supp. 1985).

27. *Id.*

28. See STAFF SUMMARY, *supra* note 20, at 19.

29. A service sector access authorization is "any license, permit, order, or other authorization, issued under the authority of Federal law, that permits a foreign supplier of services access to the United States market in a service sector concerned." TTA, *supra* note 1, at § 304(f)(2), 19 U.S.C.A. § 2411(e)(6) (West Supp. 1985).

agencies.³⁰ This authority applies only to retaliation against foreign restrictions on services.³¹ Under this subsection, the President can retaliate against foreign protectionism against U.S. service exports by refusing to grant or renew licenses to foreign firms desiring to provide services that require federal licenses.³²

Third, the TTA clarifies the President's authority under section 301(b) to impose retaliatory duties or other restrictions on imported services regardless of "any other [conflicting] provisions of law."³³ This provision applies only to retaliation against importation of services and ensures that the President's authority overrides other federal and state regulatory authority.

While these three provisions do not add significantly to the President's retaliatory authority, they suggest that Congress increasingly views the threat of retaliation as an important means of reducing barriers to trade in services. These provisions permit quicker and more flexible action against foreign protectionist policies and bolster the President's negotiating status vis-à-vis foreign governments. Congress also intended the President to exercise his authority more frequently.³⁴ By authorizing the United States Trade Representative (USTR) to initiate his own investigations to determine whether to advise the President to use section 301,³⁵ the Congress is encouraging the Executive Branch to defend more vigorously U.S. trade interests.

30. The added subsection to section 301 reads:

(1) In general.— Notwithstanding any other provision of law governing any service sector access authorization . . . the President may—

(A) restrict, in the manner and to the extent the President deems appropriate, the terms and conditions of any such authorization, or

(B) deny the issuance of any such authorization.

(2) Affected authorizations.— Actions under paragraph (1) shall apply only with respect to service sector access authorizations granted, or applications therefor pending, on or after the date on which—

(A) a petition is filed [with the USTR], or

(B) a determination to initiate an investigation is made by the [USTR]. . . .

Id. at § 304(c), 19 U.S.C.A. § 2411(c) (West Supp. 1985).

31. COMMITTEE OF CONFERENCE, TRADE AND TARIFF ACT OF 1984, JOINT EXPLANATORY STATEMENT, H.R. REP. NO. 1156, 98th Cong., 2d Sess. 146 (1984) [hereinafter cited as TTA EXPLANATORY STATEMENT].

32. However, only foreign persons not having a pending application for or currently holding a federal license at the time of the request for presidential intervention could be so restricted. *See* TTA, *supra* note 1, at § 304(c), 19 U.S.C.A. § 2411(c)(2) (West Supp. 1985).

33. *Id.* at § 304(b)(2), 19 U.S.C.A. § 2411(b)(2) (West Supp. 1985).

34. Congress appears to have been persuaded by the arguments made by some groups that the United States is losing the battle in international trade because of the President's reluctance to retaliate decisively against foreign trade barriers. *See, e.g.,* HOUSE COMMENTS ON SERVICE INDUSTRIES, *supra* note 12, at 55 (statement of the AFL-CIO) ("In our view, U.S. problems in international trade result in large measure from a lack of political will, not inadequacy of law. . . . [E]xisting authority to take action [under Section 301] has for the most part been ignored by the executive branch.").

35. *See* TTA, *supra* note 1, at § 304(d)(1), 19 U.S.C.A. § 2412(c)(1) (West Supp. 1985).

Other provisions of the TTA mandate the collection and analysis of trade data, providing Congress with the information necessary to more effectively pressure the President to exercise his retaliatory authority. The TTA instructs the Secretary of Commerce to collect information on U.S. exports of services and to establish a service industries program to promote U.S. service exports.³⁶ Furthermore, the USTR is to identify and analyze barriers to international trade in services and make annual reports to Congress on the "trade-distorting impact" of the barriers discovered and on the action taken to remove them.³⁷ These new programs and reporting requirements equip Congress to oversee the President's implementation of the trade legislation and furnish the President with the trade data necessary to support retaliation against foreign NTBs and negotiations with foreign governments for their removal.

III. APPLICATION OF THE TTA TO LEGAL SERVICES

A. Statutory and Constitutional Issues

Legal services are almost certainly within the scope of the negotiating objectives of the TTA. Services are generally defined as "economic activities whose outputs are other than tangible goods. Such term includes . . . professional services."³⁸ While this definition appears in the section of the TTA prescribing measures to promote trade in services, Congress intended that the definition also be used in connection with the President's retaliatory authority under section 301.³⁹ In the absence of a definition of services in the Trade Act of 1974, the definition in the TTA may be extended to the President's negotiating authority as well.⁴⁰

Professional services are not defined by the TTA, but Congress received testimony from the Office of the USTR that referred to legal services as part of professional services.⁴¹ In addition, Congress passed the TTA knowing that the

36. *Id.* at § 306(a), 19 U.S.C.A. § 2114b (West Supp. 1985).

37. *Id.* at § 303, 19 U.S.C.A. § 2241 (West Supp. 1985).

38. *See supra* note 2.

39. The definition of services is contained in section 306, which instructs the Secretary of Commerce to gather data on international trade in services. *See TTA, supra* note 1, at § 306, 19 U.S.C.A. § 2114b (West Supp. 1985). But the Conference Committee offered the following additional comment:

The Conferees do not intend that the definition of services which appears in section 306 of the Conference Agreement to be exhaustive. Instead, it should be referred to and used as guidance in determining what services means for purposes of section 301 of the Trade Act of 1974 as amended by the Conference Agreement.

TTA EXPLANATORY STATEMENT, *supra* note 31, at 149.

40. *See* 19 U.S.C. § 2112(g)(3) (1982).

41. *See Hearings, Service Industries, supra* note 17, at 23 (statement by Geza Feketekuty, Assistant U.S. Trade Rep. for Policy Development); *see also id.* at 108 (Congressional Research Service report).

United States and Israel had engaged in discussions aimed at liberalizing bilateral trade in services, including legal services.⁴² Thus, it is likely that Congress intended to include legal services within the scope of the President's negotiating authority.

Although unlikely, an agreement on trade in legal services negotiated under the TTA might face a tenth amendment challenge.⁴³ There are two reasons, however, why such a challenge will probably fail. First, the case of *Missouri v. Holland*⁴⁴ suggests that the power of the Chief Executive to enter into an international agreement is not restricted by the tenth amendment. Second, the Supreme Court's recent decision in *Garcia v. San Antonio Metropolitan Transit Authority*,⁴⁵ overruling *National League of Cities v. Usery*,⁴⁶ eliminates substantive tenth amendment challenges to the exercise of federal power. The TTA itself contains a provision that illustrates the reasoning of the *Garcia* decision in a particularly pointed way.

In *Missouri v. Holland*, the Supreme Court rejected a tenth amendment challenge to a federal statute implementing a treaty protecting migratory birds. The Court first noted that, since the power to make treaties is expressly delegated to the federal government in article II of the Constitution,⁴⁷ the literal proscriptions of the tenth amendment were inapplicable.⁴⁸ In addition, the Court held that the validity of an implementing statute is determined by the validity of the treaty, not by whether the statute would be constitutional in the absence of the treaty. The treaty at issue violated no specific constitutional provisions, nor was it "forbidden by some invisible radiation from the general terms of the tenth amendment."⁴⁹ The Court emphasized the strong national interest in protecting migratory birds and the tenuous nature of the claim of title to the birds on which

42. See Pine, *U.S.-Israel Accord on Trade in Services Could Be Model in Future GATT Talks*, Wall St. J., Oct. 12, 1984, at 33. The U.S.-Israel Trade Agreement, which eliminates all tariffs on trade between the two countries over ten years, was signed in Washington, D.C., on April 22, 1985. See Tolchin, *U.S. Signs Trade Pact with Israel*, N.Y. Times, Apr. 23, 1985, at 34.

43. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

44. 252 U.S. 416 (1920).

45. 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

46. 426 U.S. 833 (1976).

47. See U.S. CONST. art. II, § 2, cl. 2.

48. 252 U.S. at 432. In *Reid v. Covert*, the Court explained this analysis:

[*Holland*] carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

354 U.S. 1, 18 (1956) (footnote omitted).

49. 252 U.S. at 434.

the state based its assertion of regulatory power. In short, the Court viewed the tenth amendment as a limitation on the exercise of federal power in federal-state relations, not in international relations.⁵⁰

After *Missouri v. Holland*, the Court generally did not view the tenth amendment as an important limitation on federal power, even in the context of domestic legislation.⁵¹ In *National League of Cities v. Usery*,⁵² however, the Court breathed new life into the amendment, holding that it constituted an affirmative limit to the exercise of Congressional powers under the commerce clause. The Court held that state employees were not protected by the wage and hour regulations of the federal Fair Labor Standards Act. According to the Court, federal regulation of state employment policies and other traditional state activities and functions would “impair the States’ ‘ability to function effectively in a federal system.’”⁵³

National League of Cities may have indicated a willingness on the part of at least some members of the Court to reinvigorate tenth amendment limitations on international agreements as well as domestic legislation.⁵⁴ If so, an international

50. See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 147 (1972). Henkin notes:

Missouri v. Holland . . . did not say that there were no limitations on the Treaty Power in favor of the States, only that there were none in any ‘invisible radiation’ from the Tenth Amendment. The Constitution probably protects some few States’ rights, activities, and properties against any federal invasion, even by treaty.

Id.

51. See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941) (stating that the tenth amendment is not an affirmative limit on federal power, but merely states a “truism” that the states retain all powers not given to the federal government or reserved to the people).

52. 426 U.S. 833 (1976).

53. *Id.* at 852 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)). *Fry* upheld the President’s power under federal legislation to impose national wage and price controls in a national economic emergency. Modifying *National League of Cities*, *Hodel v. Virginia Surface Mining & Real. Ass’n.*, 452 U.S. 264 (1981), provides a four-part test for state immunity from federal regulation: states must be regulated as states; the matters regulated must be “indisputably ‘attribute[s] of state sovereignty’”; the states must show that compliance with federal law would “directly impair their ability ‘to structure integral operations in areas of traditional governmental functions’”; and the federal interest must not “be such that it justifies state submission.” 452 U.S. at 287, 288 & n.29 (quoting *National League of Cities*, 426 U.S. at 845, 852).

54. While *National League of Cities* held that the tenth amendment limits Congressional power under the commerce clause, Justice Rehnquist voiced broad concerns about state sovereignty that also imply a general limitation on federal power, including, perhaps, the treaty power: “[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.” *National League of Cities*, 426 U.S. 845. Rehnquist’s lone dissent in *Supreme Court of New Hampshire v. Piper*, 53 U.S.L.W. 4238 (U.S. Mar. 4, 1985) (N.H. residency requirement for bar admission violates privileges and immunities clause, U.S. Const. art. IV, sec. 2), is indicative of his special emphasis on state autonomy:

[T]he practice of law is—almost by definition—fundamentally different from those occupations that are practiced across state lines without significant deviation from State to State. The

agreement to reduce barriers to transnational legal practice may well have posed constitutional problems. Applying the *National League of Cities* test to such an agreement, a court might have reasoned that the states have a long-standing and fundamental interest in regulating the practice of law within their borders. This interest stems from the central role lawyers play in the administration of justice, a primary function of government.⁵⁵ To protect their citizens and the integrity of their judicial system, states must be concerned with and have the ability to monitor the ethical character and professional skills of lawyers.⁵⁶

The decision of the Court in *Garcia* makes this argument irrelevant for purposes of a tenth amendment challenge. The Court concluded, over strong dissent,⁵⁷ that the substantive standards outlined in *National League of Cities* and subsequent cases were unworkable, inflexible, and inconsistent with the founders' view of federalism.⁵⁸ According to the majority, states are protected from improper regulation by the procedural safeguards inherent in the structure of the federal system, not the tenth amendment as interpreted by the judiciary:⁵⁹ "The political process ensures that laws that unduly burden the States will not be promulgated."⁶⁰

B. The TTA and the Garcia Decision

The intense political bargaining that is likely to take place when a proposed agreement on legal services is put before Congress illustrates the *Garcia* concep-

fact that each State is free, in a large number of areas, to establish independently of the other States its own laws for the governance of its citizens, is a fundamental precept of our Constitution that, I submit, is of equal stature with the need for the States to form a cohesive union.

Id. at 4242.

55. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

56. A court persuaded by these arguments might distinguish *Holland* by noting the significantly greater state interest in regulating lawyers as opposed to protecting wildlife. On the other hand, the need for liberalization of international trade in services might be the kind of strong federal interest justifying state submission under the *National League of Cities* standard. Even under *National League of Cities*, an exception to the tenth amendment protection of states from federal authority is possible if "collective action by the National Government" is required, as during a national emergency. *National League of Cities*, 426 U.S. at 853.

57. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissented. Justices Rehnquist and O'Connor openly predicted the eventual return of the Court to the *National League of Cities* standard. See 53 U.S.L.W. at 4149 (Rehnquist, J., dissenting); 53 U.S.L.W. at 4151 (O'Connor, J., dissenting).

58. *Id.* at 4136.

59. *Id.* at 4141.

60. *Id.* at 4142. Justice Powell, in dissent, states that the substantive interpretation of the tenth amendment in *National League of Cities* involved a balancing test between "the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach." *Id.* at 4144 n.5. He asserts that the political pressure of the states is insufficient protection against the

tion of how state interests are reflected in national legislation.⁶¹ In the case of agreements negotiated under the TTA, the statute itself explicitly requires the consideration of state concerns that the *Garcia* opinion indicates is an inherent part of congressional debate prior to legislative action.

An international agreement on trade in legal services could take many forms, some less intrusive into state regulation of legal services than others. For example, state participation in an agreement to liberalize restrictions on the practice of law by foreigners might, by the terms of the agreement, be optional.⁶² Alternatively, if national uniformity was necessary to conclude an agreement with another government, an accord might involve the extension of national treatment⁶³ to foreigners.⁶⁴ A more comprehensive scheme might create either a federal licensing regime for foreign lawyers or a federal bar with its own rules on the admission of domestic and foreign lawyers.⁶⁵ The particular provisions of each type of agreement would call into play different state interests and varying levels of state resistance.

State bar associations will doubtless have strongly held views on any agreement that limits their regulatory authority.⁶⁶ The *Garcia* view assumes, probably correctly, that these views will be forcefully expressed before Congress and will influence Congressional consideration of proposed agreements.

In drafting the TTA, Congress recognized the states' traditional regulatory authority over many service industries and the importance of state participation in and approval of international agreements that might affect that authority. The TTA instructs the President to consult with state governments in developing negotiating proposals, sharing information on trade in services, implementing trade agreements, and exercising retaliatory authority against foreign imports of

encroachment of federal power in areas central to state concerns, *id.* at 4145 n.9 and that "[t]he States' role in our system of government is a matter of constitutional law, not of legislative grace." *Id.* at 4145.

61. For the *Garcia* Court's view of the influence of the states in the national political process, see 53 U.S.L.W. at 4141-42.

62. Friendship, commerce and navigation treaties, for example, frequently have been ratified subject to a reservation applying provisions of the treaty only to the extent that they are not inconsistent with existing state regulation of certain professions. See L. HENKIN, *supra* note 50, at 392 n.66.

63. The principle of national treatment provides that contracting parties to a treaty accord to nationals of other contracting parties treatment no less favorable than that accorded to their own nationals. See 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 art. 3.

64. This was the approach in the recent U.S.-Israel agreement. See Pine, *supra* note 42.

65. No specific proposal has yet been advanced for a federal licensing regime exclusively for foreign lawyers. For a proposal for a federal bar for U.S. attorneys, see Comisky & Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L. Q. 945 (1982).

66. See, e.g., Young, *A National Bar? No!* 54 FLA. B. J. 109, 110 (1980) (argues that "the growth of interstate law practice must be balanced with the needs of the states to regulate the practice of law and to help control local economic conditions").

services.⁶⁷ The President is to establish one or more intergovernmental policy advisory committees to coordinate federal-state consultations.⁶⁸

Thus, the legitimate state interest in regulating the legal profession will probably be recognized in the process of negotiating and approving an international agreement on trade in legal services, not only through the normal functioning of the federal system, as described in *Garcia*, but also through the application of the TTA's intergovernmental consultation provision. Such intergovernmental consultation will allow the states to raise with the President and his negotiators the arguments that might have been raised in court before the *Garcia* decision rejected the substantive interpretation of the tenth amendment. In this new, statutorily mandated forum, the states will be able to emphasize the uninterrupted history of court-approved state regulation of the legal profession,⁶⁹ as well as the central role of attorneys in the administration of justice within state legal systems.⁷⁰

67. Section § 306(c)(2)(A) provides:

The President shall, as he deems appropriate—

(i) consult with State governments on issues of trade policy, including negotiating objectives and implementation of trade agreements, affecting the regulatory authority of non-Federal governments, or their procurement of goods and services;

(ii) establish one or more intergovernmental policy advisory committees on trade which shall serve as a principal forum in which State and local governments may consult with the Federal Government with respect to the matters described in clause (i); and

(iii) provide to State and local governments and to United States service industries, upon their request, advice, assistance, and (except as may be otherwise prohibited by law) data, analyses, and information concerning United States policies on international trade in services.

TTA, *supra* note 1, at § 306(c)(2)(A), 19 U.S.C.A. 2114c(2)(A) (West Supp. 1985); *see also id.* at § 304(c), 19 U.S.C.A. § 2411(c)(3) (West Supp. 1985) (requiring that the USTR consult with state governments before the President takes action restricting services which are subject to state regulation).

68. TTA, *supra* note 1, at §§ 306(c)(2)(A)(ii), 306(c)(2)(B)(ii), 19 U.S.C.A. §§ 2114c(2)(A)(ii), 2155(c)(3) (West Supp. 1985).

69. *See, e.g.,* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring) (“Admission to practice in a State and before its courts necessarily belongs to that State.”). Another argument for limiting or at least closely scrutinizing an agreement on trade in legal services is that the control over the admission to the bar and discipline and disbarment of lawyers has traditionally been the responsibility of the judiciary: “[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.” *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856). No separation of powers argument, however, has ever been used successfully to limit the treaty power. L. HENKIN, *supra* note 50, at 152.

These arguments were eroded by the recent Supreme Court decision in *Supreme Court of New Hampshire v. Piper*, 53 U.S.L.W. 4238 (U.S. Mar. 4, 1985), in which a 8–1 majority declared that New Hampshire's residency requirement for membership in the state bar violates the privileges and immunities clause, U.S. Const. art. IV, § 2.

70. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

IV. CONCLUSION

The TTA, Congress' most recent attempt to deal with the growing problems of nontariff barriers to international trade in services, also provides impetus toward the negotiation of agreements to liberalize restrictions on transnational legal practice. Because of the recent *Garcia* decision, the tenth amendment no longer poses a possible restriction on the provisions of such an agreement. The agreement will be limited only by the ability of the states and their bar associations to convince Congress and the President to respect the traditional role of the states in regulating legal services. States may express their concern about national and international regulation of legal services in the intergovernmental policy advisory committees mandated by the TTA and in Congress itself.