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Citation: 5 Minn. J. Global Trade 159 1996



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## Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA

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The continued expansion of world trade has created a growing need for international legal services.<sup>1</sup> Lawyers from all nations are increasingly traveling and settling in foreign countries to meet this need.<sup>2</sup> Lawyers' efforts to settle in foreign countries,<sup>3</sup> however, have met with strong resistance from both local bar associations and governments, resulting in the imposition of numerous restrictions on foreign lawyers.<sup>4</sup> These restrictions—some necessary and some not—have created an inefficient environment for the delivery of legal services by foreign lawyers.<sup>5</sup>

Although it is difficult to calculate the value of trade lost because of restrictions on the practice of foreign lawyers,<sup>6</sup> coun-

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\* The author would like to express his thanks to Steven C. Nelson for his insightful comments on the topic.

1. James Andrews, *NAFTA: Free Trade and the Rule of Law*, CHRISTIAN SCI. MONITOR, Sept. 13, 1993, at 13.

2. In New York, for example, there are lawyers from at least 45 different countries, "from Argentina to Uruguay." Hope B. Engel, *New York's Rules on Licensing of Foreign Legal Consultants*, 66 N.Y. ST. B.J. 36 (Mar./Apr. 1994).

3. Throughout this Note, "foreign country" refers to a country where a lawyer is not licensed to practice law. "Foreign lawyer" refers to a lawyer licensed to practice law in one country but seeking to practice elsewhere. For instance, a lawyer licensed in the United States and practicing in Britain is a "foreign lawyer," until he or she becomes licensed in Britain.

4. Pratap Chatterjee, *Bar Association Fails to Agree on Code for Working Abroad*, FIN. TIMES, Oct. 1, 1990, at 14 (noting that "most countries . . . have barriers that can make it quite difficult for the foreign lawyer to [even] advise on the laws of his or her own country"). See *infra* Part II (discussing the most prevalent regulations of foreign lawyers).

5. The situation of Tianlong Yu, a Chinese lawyer working for the Indianapolis law firm of Ice, Miller, Donadio & Ryan, illustrates such inefficiency. Bill Koenig, *Swearing-in Lets Chinese Attorney Represent New Area of Indiana Law*, INDIANAPOLIS STAR, Nov. 1, 1994, available in LEXIS, News library, US file. When Yu began working at the law firm, Indiana did not allow foreign lawyers to give advice on the law of any country unless they were members of the local bar. *Id.* Since Yu could not advise Indiana clients on Chinese law, he was forced to brief Ice Miller attorneys "who in turn would advise clients." *Id.* This process increases the cost of delivering legal services to the firm's clients.

6. *Foreword to U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 4 (1994) [hereinafter FOREIGN TRADE BARRIERS]*.

tries throughout the world recognize the need to liberalize the regulation of foreign lawyers. This Note describes the most significant efforts and explores the prospects for further liberalization. Part I explains the typical practice and activities of foreign lawyers. Part II describes many of the barriers that foreign lawyers face when they seek to provide legal services. Part III then examines the efforts to liberalize and standardize the regulation of foreign lawyers in the European Union and the United States, and concludes with an analysis of the provisions relating to legal services included in the General Agreement on Trade in Services<sup>7</sup> (GATS) and the North American Free Trade Agreement<sup>8</sup> (NAFTA). Part IV examines the prospects for continued liberalization in this area, based on the GATS and NAFTA models.

## I. THE ROLE OF FOREIGN LAWYERS

Foreign lawyers facilitate international transactions,<sup>9</sup> expand the flow of goods<sup>10</sup> and increase trade in other types of services, "particularly in such sectors as financial services which are especially law-intensive."<sup>11</sup> More concretely, foreign lawyers' practice usually consists of advising clients on international commercial matters. This includes advising on international finance, tax planning, corporate and securities law, franchising, licensing, distribution and commercial agency, joint ventures, competition law, arbitration and general international law.<sup>12</sup>

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7. Annex II of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, I.E.L. I-B-64 (1994) [hereinafter GATS].

8. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 605 (1993) [hereinafter NAFTA].

9. FOREIGN TRADE BARRIERS, *supra* note 6, at 167 (noting that "the Government of Japan recognized the important role that lawyers play in facilitating international transactions. . ."); see generally Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989) (discussing the role of lawyers in facilitating transactions between negotiators from different cultures).

10. See, e.g., *Countries Seen Continuing to Seek Liberalized Trade in Legal Services*, 11 Int'l Trade Rep. (BNA) 1247 (Aug. 10, 1994) [hereinafter *Trade in Legal Services*]; Andrews, *supra* note 1, at 13 (quoting Gary Horlick, lawyer in O'Melveny & Myers, Washington, D.C. office, as saying that "[l]awyers help facilitate international trade and investment by explaining the rules.").

11. American Bar Association, Section of International Law and Practice, *Report to the House of Delegates: Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207, 216 (1994) [hereinafter *Model Rule*].

12. See Goebel, *supra* note 9 at 509; see also DENNIS CAMPBELL and JACK J. COE JR., *TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES* 2-4 (D. Campbell ed., 1982).

Foreign lawyers usually provide their services in one of two contexts. First, law firms hire and "import" foreign lawyers to their home office to advise domestic clients on the law of the foreign lawyers' home country.<sup>13</sup> More commonly, law firms send their own lawyers abroad<sup>14</sup> to establish or staff a foreign branch office.<sup>15</sup> These branch offices enable law firms to meet the needs of a "new breed and range of clients—including domestic clients with business abroad and foreign clients doing business with domestic partners—[which are] placing new demands on the legal profession worldwide for the delivery of legal services across national boundaries."<sup>16</sup> Among these demands is the clients' strong preference to work with a single law firm in transnational transactions<sup>17</sup>—the "desire for one stop shopping."<sup>18</sup>

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13. See, e.g., Koenig, *supra* note 5, at E01. Such was the case when the Sexton & Stiphany law firm hired a Venezuelan lawyer, Juan Vicente Urdenetta, to work at the firm's headquarters in Miami, Florida. *First Foreign Lawyer Certified by Florida Bar; New Florida Bar Rule Allows Limited Practice by Foreign Lawyers*, Bus. Wire, Oct. 27, 1993, available in LEXIS, Market library, Bwire file. This move directly benefited the firm's clients because they could, "without leaving the state of Florida, . . . obtain counsel on legal matters in Venezuela." *Id.*

14. It is very difficult to estimate the number of foreign lawyers that staff law firms' foreign branch offices. Some jurisdictions keep poor track of foreign lawyers who practice in their jurisdiction. Cynthia Cooper, *Despite Loopholes, N.Y. Admission Rule is National Model*, N.Y. L.J., Apr. 8, 1993, at 5. In many cases foreign lawyers work in law firms' branches without authorization from the local authorities, so their numbers are not easily tabulated. *Id.* See also Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 760-61 (1994). Yet other foreign lawyers practice abroad under umbrella licenses granted to entire branch offices. See *China: 12 Law Firms Open Offices Under Interim Regulations*, 9 Int'l Trade Rep. (BNA) 1975 (Nov. 18, 1992). One author estimates that American law firms, which are the most internationalized, employ less than 2,000 lawyers in their foreign branch offices, although the figure includes foreign qualified lawyers practicing local law. Abel, *supra*, at 738.

15. Another way to establish foreign branches is to hire local lawyers. Baker & McKenzie, the largest multinational law firm in the world, has used this strategy to expand internationally. Abel, *supra* note 14, at 780. However, many law firms dislike this approach. Among the many issues that it raises are whether the local profession permits it, whether local firms will cut off referrals because they resent the foreign branch's local law capacity and whether local lawyers can become partners. *Id.* at 744-45. There are also cultural difficulties in managing lawyers from different nationalities which law firms may want to avoid. *Id.* at 745.

16. Engel, *supra* note 2, at 36. See also Abel, *supra* note 14, at 743 (noting that a law firm's decision to open a branch office is usually driven by corporate clients).

17. See Jonathan Barsade, *The Effect of EC Regulations Upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT'L LAW. 313, 315 (1994) (noting that businesses prefer to use only one lawyer or law firm in

A client's desire to work with one lawyer or law firm—usually one based domestically—to satisfy its international legal needs is only natural.<sup>19</sup> If a client's domestic law firm does not provide international legal services, the client must secure different lawyers, either directly or indirectly through their domestic law firm, in each foreign country where the client conducts business.<sup>20</sup> This new layer of lawyers can greatly increase a client's expenses.<sup>21</sup> Ensuring open and effective communication with the foreign counsel<sup>22</sup> further increases expenses.

To a law firm's foreign clients, the presence of a branch office staffed with lawyers from the law firm's home office is also important. Many foreign clients believe that such presence "indicates the commitment" of a law firm to the foreign clients' market.<sup>23</sup> As an American lawyer working in Toronto noted, "the ability to walk across the street to meet with clients is vital."<sup>24</sup> For this reason, many law firms maintain expensive branch offices in Tokyo, staffed with lawyers from the home office.<sup>25</sup>

Recognizing the growing importance of foreign lawyers' practice, countries sought to liberalize and harmonize their regulation both in GATS<sup>26</sup> and NAFTA.<sup>27</sup> In spite of these efforts, the regulation of foreign lawyers continues to be highly restrictive.<sup>28</sup>

## II. THE REGULATION OF FOREIGN LAWYERS

Foreign lawyers are generally subject to one of two regulatory regimes.<sup>29</sup> Some jurisdictions require foreign lawyers to be

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transactions that entail cross-border elements "to ensure reliable and efficient lines of communication, consistent service, and ease of quality control").

18. *Trade in Legal Services*, *supra* note 10, at 1247 (quoting Peter D. Ehrenhaft, partner at Bryan & Cave in Washington D.C.).

19. Sir Thomas Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154, 1155 (1973).

20. Barsade, *supra* note 17, at 315.

21. *Id.*

22. *Id.*

23. Michael Crawford, *Law Societies Will Have to Grapple with Foreign Consultants*, FIN. POST, Oct. 3, 1991, at 16.

24. *Id.*

25. Marcia Chambers, *Sua Sponte*, NAT. L. J., Mar. 1, 1993, at 17 (noting that most law firms with Tokyo branch offices stay because they believe that "client convenience requires it.").

26. GATS, *supra* note 7. See *infra* Part III.

27. NAFTA, *supra* note 8. See *infra* Part III.

28. See *supra* note 4 and accompanying text and *infra* Part III.

29. Abel, *supra* note 14, at 755.

admitted as local lawyers before they may give advice on any kind of law.<sup>30</sup> Once foreign lawyers are licensed locally, they are treated as any other local lawyer and are usually no longer subject to special restrictions. However, the full requalification requirement is a very significant barrier to the entry of foreign lawyers into the market.<sup>31</sup>

Many jurisdictions<sup>32</sup> reserve a special professional license for foreign lawyers called the foreign legal consultancy license.<sup>33</sup> To qualify for this license, foreign lawyers normally do not face restrictions such as examinations or adaptation periods.<sup>34</sup> Instead, they are licensed as foreign legal consultants<sup>35</sup> based on their own professional qualifications. To obtain the license they must also meet a number of requirements, many of which are discussed below, and are then limited in their scope of practice.<sup>36</sup>

Without question, some level of regulation of foreign lawyers is needed to protect the public from unqualified lawyers and to preserve the integrity of the local legal profession.<sup>37</sup> Certain

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30. *Id.*

31. *See infra* Part II.B.

32. In the United States, seventeen states license foreign legal consultants. Edward A. Adams, *U.S. Lawyers Lose Opportunities in GATT Agreement*, N.Y. L.J., Dec. 17, 1993, at 1. In Canada, provinces that license foreign legal consultants include Ontario, British Columbia and Saskatchewan. Jim Middlemiss, *Cross-Border Opportunities Opening Up*, FIN. POST, Jan. 25, 1994, at 14. Other countries that license foreign legal consultants include Belgium, Germany and Japan. *Foreign Lawyer Practice Rules*, N.Y. L.J., Dec. 17, 1993, at 8.

33. *See* Abel, *supra* note 14, at 755.

34. *See, e.g.*, CAL. CT. R. v.23, pt. 2, r. 988 (West Supp. 1992); N.Y. CT. R. § 521.1.

35. New York, the first American jurisdiction to create a special category for foreign lawyers, calls foreign lawyers that qualify under such category "foreign legal consultants." Gary Spencer, *Court of Appeals Suggests Rules Easing Way for Foreign Lawyers*, N.Y. L.J., Sept. 16, 1993, at 1.

36. Robert Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 74 (1992).

37. *See, e.g.*, Niels Fisch-Thomsen, *Lawyers and Legal Services* 17, OECD Doc. DAFFE/INV/PROF(94)18 (Sept. 8, 1994) (noting the consensus within the Council of the Bars and Law Societies of the European Community (CCBE) that regulation is needed to protect the consumer of legal services as well as the legal profession); *Japan Said to Eye Easing Rules on Foreign Lawyers Practicing in Japan*, Int'l Bus. & Fin. Daily, Mar. 23, 1994, available in LEXIS, BNA library, BNAIBF file (noting that Japan regulates foreign lawyers "to ensure that the profession of lawyers is for serving the public. . .") [hereinafter *Japan Said to Eye Easing Rules*]; Annie Eun-ah Lee, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT*, 13 B.C. INT'L & COMP. L. REV. 91, 115 (1990) ("A country or a state has an interest in preserving the integrity of its bar"); *Model Rule*, *supra* note 11, at 216 n.23 (noting that in the view of the

restrictions on foreign lawyers' practice, however, may not be justified by a genuine concern for the public, but rather by protectionism or by unfounded fears of foreign lawyers' lack of qualifications. Attempts to liberalize the regulation of foreign lawyers must address the concerns that led to these restrictions. Therefore, it is useful to review the most prevalent restrictions on foreign lawyers' practice and the primary arguments for and against their imposition.<sup>38</sup>

#### A. SCOPE OF PRACTICE RESTRICTIONS

Jurisdictions that allow foreign lawyers to practice without requalifying as local lawyers limit the scope of their practice. Areas of the law that require intimate familiarity with local laws and procedures are normally off-limits. For instance, foreign lawyers in Britain, a jurisdiction known for its hospitality to foreign lawyers,<sup>39</sup> "may not appear in a court proceeding, prepare courtroom documents, undertake probate work, or prepare documents for the transfer of real estate."<sup>40</sup> New York, also known for its openness to foreign lawyers, has similar practice restrictions.<sup>41</sup> These restrictions protect the public because they prevent foreign lawyers from advising in areas that require special training and in-depth knowledge of local law, which foreign lawyers generally do not possess.

Apart from these basic restrictions, many jurisdictions only allow foreign lawyers to advise on the law of their home jurisdiction because they fear that foreign lawyers may not be properly qualified.<sup>42</sup> These jurisdictions forbid foreign lawyers from ad-

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American Bar Association (ABA), the main reasons for regulation are "first, the protection of the public . . . and, second, the preservation of the integrity of, and public respect for, the legal profession").

38. The same concerns that led jurisdictions to impose the following restrictions on foreign lawyers also led some jurisdictions to require foreign lawyers to fully requalify and become licensed locally. Thus, attempts to liberalize the regulation of foreign lawyers should hopefully lead these jurisdictions to adopt a more flexible regulatory scheme.

39. See Robert Lever, *Bars to Practice; Will Only European Community Nationals be Able to Perform Legal Work in EC Countries?*, TEX. LAW., July 20, 1992, available in LEXIS, TEX library, TXLAWR file.

40. Goebel, *supra* note 9, at 479.

41. Foreign legal consultants licensed in New York are forbidden from appearing for another person in court, preparing trust or estate documents and preparing any document respecting marital or parental rights. Engel, *supra* note 2, at 36.

42. See, e.g., *Model Rule*, *supra* note 11, at 227 (indicating that Alaska, California, Connecticut, Florida, Georgia, Texas, Michigan and Illinois all have

vising their clients on third-country<sup>43</sup> and international law. These restrictions are significant obstacles to foreign lawyers because they usually need to advise their clients on the totality of the transaction, which may even include certain aspects of local law.<sup>44</sup>

The concern over foreign lawyers' qualifications is at least partially justified because jurisdictions do not control the educational and licensing requirements of foreign lawyers and have a limited capacity to evaluate their qualifications.<sup>45</sup> Jurisdictions may be especially concerned with the education of foreign lawyers licensed in jurisdictions with completely different legal systems. For example, this may be the case when foreign lawyers trained in a common law system seek to practice in a civil code jurisdiction. Concern over foreign lawyers' lack of qualifications is heightened when dealing with lawyers from jurisdictions that impose loose ethical obligations.

Perhaps the strongest reason for eliminating broad scope of practice limitations is the high level of sophistication of foreign lawyers' typical clients. For most foreign lawyers, typical clients are governments, multinational corporations and financial institutions.<sup>46</sup> Such clients "have house counsel fully capable of evaluating the quality of legal services and reviewing bills."<sup>47</sup> Moreover, because law firms' branch offices usually have a few large clients, bargaining power favors the client and not the lawyer.<sup>48</sup> One commentator therefore believes that the client ought to decide who is best qualified to meet its legal needs.<sup>49</sup> The same commentator opines that "it is disingenuous to argue that strict qualifications are needed to protect the likes of Mitsubishi Bank and IBM, as the consumers of legal services, from incompetent lawyers."<sup>50</sup>

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restrictions providing that a "legal consultant may render legal advice only on the law of the foreign country in which he or she is admitted to practice").

43. "Third-country" law is law of countries other than a foreign lawyer's home jurisdiction and the jurisdiction in which the foreign lawyer practices. For example, Canadian law is "third-country" law to a Mexican lawyer practicing in the United States.

44. Interview with Steven C. Nelson, Partner, Dorsey & Whitney, Minneapolis, Minnesota, and former Chair of the American Bar Association's Section of International Law and Practice, 1988-89 (Feb. 1, 1995).

45. See Lee, *supra* note 37, at 114.

46. Abel, *supra* note 14, at 751.

47. *Id.*

48. *Id.*

49. John Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape From Freedom*, 5 UCLA PAC. BASIN L.J. 1, 14 (1986).

50. *Id.*



The circumstances behind foreign lawyers' typical practice also help to ensure that they are well qualified. Most foreign lawyers work for small branches of multinational law firms<sup>51</sup> whose work depends largely on reputation in the local community.<sup>52</sup> These branch offices "need visibility and stand or fall on reputation, which is easily tarnished."<sup>53</sup> With such strong incentive to protect their image, law firms go to great lengths to ensure that lawyers in their foreign offices are well qualified.

It is also significant that jurisdictions with the most liberal regulatory regimes receive few complaints about foreign lawyers' competence. New York, for example, hosts the majority of foreign legal consultants in the United States,<sup>54</sup> but has only received six complaints about foreign lawyers in the past nineteen years.<sup>55</sup> European jurisdictions have had similar experiences with foreign lawyers.<sup>56</sup> This is evidence that, although foreign and local lawyers have different training, foreign lawyers are usually qualified to carry on an international legal practice.

Excluding third-country and international law from foreign lawyers' scope of practice seems especially unjustified. Supporters of such limitations argue that foreign lawyers usually do not have specialized training in those areas.<sup>57</sup> Yet local lawyers, allowed by virtually all jurisdictions to advise on third-country and international law, rarely receive specialized training or certification in those areas. Thus, in most cases, foreign lawyers have at least the same amount of specialized training as local lawyers. In fact, foreign lawyers are more likely to be qualified than local lawyers to advise clients on third-country<sup>58</sup> and inter-

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51. See *supra* Part I.

52. Abel, *supra* note 14, at 751.

53. *Id.*

54. See Spencer, *supra* note 35, at 1 (noting that it is estimated that "all but a handful of legal consultants are concentrated [in New York]").

55. Engel, *supra* note 2, at 36 n.4. In the same period, 178 foreign legal consultants were licensed in New York. *Id.* at 36.

56. See Abel, *supra* note 14, at 752 (noting that, after extensive travel and meetings with lawyers and professional associations in London, Paris, Brussels and Amsterdam, the author "found no one who could point to a single instance in which a serious complaint had been leveled at a foreign lawyer").

57. See Kelly C. Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1796 (1983) (suggesting that "[l]imiting the foreign lawyer to practice only in matters related to the law of his home jurisdiction, where he is already qualified, minimizes the risk of harm to the public caused by defects in the training or competency of the foreign lawyer").

58. Foreign lawyers usually have the means of obtaining reliable information on the laws of third countries, either through their employer or through lawyers in other countries contacted through referral networks.

national law because of their experience and international contacts. Foreign lawyers' multinational law expertise is the primary reason why clients seek their help. Also, foreign lawyers are subject to disciplinary action in their home jurisdictions, and their typical clients—governments and multinational corporations—are fully capable of protecting themselves by filing grievances against them.<sup>59</sup>

Apart from the fear of lack of qualifications, cultural concerns may prompt countries to limit foreign lawyers' scope of practice. For instance, Japan does not allow foreign lawyers to represent parties in international arbitration proceedings in Japan.<sup>60</sup> This restriction limits an important and very common function that lawyers perform for their international clients.<sup>61</sup> Japan argues, however, that preventing foreigners from participating in any type of litigation is necessary to "prevent Japan from becoming a litigious society."<sup>62</sup> Although it is difficult to determine whether this is a legitimate concern or an excuse for protectionism,<sup>63</sup> an agreement liberalizing the regulation of foreign lawyers should address cultural concerns of the parties to the agreement.

## B. EXAMINATION REQUIREMENT

Some jurisdictions impose examination requirements before allowing foreign lawyers to practice any kind of law.<sup>64</sup> In these jurisdictions, foreign lawyers must pass special exams that test their knowledge of local law and procedures. Alternatively, foreign lawyers must meet the same requirements and pass the same exams as local lawyers to obtain a license to practice law. Either way, once foreign lawyers pass an examination, they are licensed as local lawyers and can practice in all areas of the law.<sup>65</sup>

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59. Abel, *supra* note 14, at 763.

60. Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 54.

61. See *supra* note 12 and accompanying text.

62. *Japan Said to Eye Easing Rules*, *supra* note 37.

63. Both the United States and the European Union consider the Japanese regulatory regime unduly restrictive. See *Foreign Trade Barriers*, *supra* note 6, at 167; Fisch-Thomsen, *supra* note 37, at 18. Foreign lawyers in Japan believe that the restriction is based on the Japanese bar's fear of competition, especially from American lawyers who are known for their litigation skills. *Japan Said to Eye Easing Rules*, *supra* note 37.

64. France, for example, has this requirement. Joanne Naiman, *Bill to Curb U.S. Lawyers Passes 1st Test in France*, N.Y. L.J., Nov. 21, 1990, at 1.

65. See *supra* notes 29-30 and accompanying text.

In practice, requiring foreign lawyers to pass examinations constitutes an almost insurmountable barrier to foreign lawyers.<sup>66</sup> Passing these exams requires in-depth knowledge of the local language, which foreign lawyers often do not possess. Moreover, preparing for exams is extremely time consuming, which presents another hurdle to foreign lawyers who are already fully engaged in practicing law.

More importantly, the vast majority of foreign lawyers do not need or desire to be licensed as local lawyers. Few foreign lawyers seek, for example, to litigate in the courts of their host country or to advise in real estate transactions that require knowledge of the nuances of local law. Instead, foreign lawyers seek to carry on an international commercial practice,<sup>67</sup> which usually does not require an in-depth knowledge of subjects such as local civil procedure. Therefore, requiring foreign lawyers to pass examinations to obtain local licenses appears unnecessary. In some cases, examination requirements may be motivated by protectionism.<sup>68</sup>

### C. RESTRICTIONS ON THE RIGHT OF ASSOCIATION

Restrictions on foreign lawyers' ability to employ or associate in partnerships with local lawyers are common. In some jurisdictions local lawyers can hire foreign lawyers, but not vice-versa.<sup>69</sup> Law firms are subject to local equity restrictions in Ma-

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66. A growing exception to this is young law graduates, who prepare themselves in advance to pass foreign bar examinations. Abel, *supra* note 14, at 756.

67. See *supra* note 12 and accompanying text.

68. In France, there is evidence that the recently imposed examination requirement was at least partly inspired by protectionism, especially against American lawyers. See Richard Asthalter, *French Bar Reform May Hit the U.S. Legal Community in France*, COM. IN FR., Fall 1990, at 19. Commentators fear that the exam will be similar to the French bar exam (C.A.P.A.). *Id.*

[The C.A.P.A.], unlike the U.S. bar examination, covers general cultural topics as well as legal matters. The . . . floor manager [of the bill introducing the new examination requirement in the French Assembly] recalled that when he had taken the C.A.P.A. he had been asked to treat in four hours the following statement of the Bishop of Reims: "A l'origine des déprivations de notre époque, il y a toujours le snobisme ou l'idôlatrie de la sincérité." To the great amusement of the deputies, he then added that such a topic 'would be difficult to deal with for someone coming from Arizona!'

*Id.* Because the new exam requirement is tied to a tough reciprocity requirement, "[t]he only incoming [American] lawyers who would be exempted from taking the C.A.P.A. are those that come from states within the United States where French lawyers can become members of the bar without passing the exam." Naiman, *supra* note 64, at 1.

69. Abel, *supra* note 14, at 759.

laysia<sup>70</sup> and forced local partnerships in Brazil.<sup>71</sup> In Japan, one of the largest legal markets in the world, foreign and local lawyers face strict regulations. A proposed law would allow foreign lawyers to form limited partnerships, called "joint enterprises," but these would be highly regulated:<sup>72</sup> foreign lawyers would be "required to follow strict accounting guidelines in order to share offices, and the joint enterprise [could] give only limited advice on Japanese law."<sup>73</sup> As part of this proposed law, Japanese lawyers could form partnerships with individual foreign lawyers, but not with a foreign lawyer's law firm.<sup>74</sup> This would continue to restrict foreign lawyers' ability to form partnerships with Japanese lawyers, because the latter cannot share the world-wide profits generated by foreign law firms.<sup>75</sup>

Restrictions on foreign lawyers' ability to employ or form partnerships with local lawyers can severely handicap law firms' ability to serve their clients. These restrictions also inhibit the growth of international law firms because they force branch offices to "farm out" work locally, instead of doing it themselves through local lawyers employed by the branch office.<sup>76</sup> As an American lawyer in Mexico noted, "[b]y hiring local lawyers, you can do things like appear before a notary to incorporate a business, . . . [which] is bread-and-water work, because every company has to go through it."<sup>77</sup>

One reason jurisdictions impose restrictions on foreign lawyers' ability to employ or form partnerships with local lawyers is a fear that foreign lawyers may eventually dominate the local legal market. This concern may be especially powerful in jurisdictions where local law firms do not have the capacity to provide multinational legal services.<sup>78</sup> Any agreement seeking to liberalize the regulation of foreign lawyers should properly address this concern, recognizing that it is not only protectionist but also cultural.

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70. FOREIGN TRADE BARRIERS, *supra* note 6, at 199.

71. *Id.* at 24.

72. Dillon, *supra* note 60, at 52.

73. *Id.* at 55.

74. *Id.* at 52.

75. *Id.*

76. Bob Rossi, *NAFTA Won't Open Doors for Lawyers; Despite Negotiations, Limits on Foreign Law Practices Will Remain*, LEGAL TIMES, Oct. 25, 1993, at 8.

77. *Id.*

78. Such may be the case in countries where domestic law firms do not have foreign offices or multinational capacity. This may include some Latin American, Asian and south European countries.

#### D. EXPERIENCE REQUIREMENTS

Most jurisdictions impose experience requirements before allowing foreign lawyers to practice law.<sup>79</sup> For example, many American states that license foreign legal consultants require foreign lawyers to have practiced the law of their home jurisdiction for at least five years while living in that jurisdiction.<sup>80</sup> This requirement is very restrictive because it automatically prevents junior associates from staffing law firms' foreign branch offices.<sup>81</sup> Moreover, foreign lawyers often gain experience practicing the law of their home jurisdiction while living in a foreign country, yet some states will not count this work experience toward the requirement.

The experience requirement arguably serves as a "substitute for the evidence of legal expertise otherwise afforded by the bar examination."<sup>82</sup> Another justification for the requirement is that it ensures that foreign lawyers' credentials are current and that only experienced lawyers are allowed to practice in the host jurisdiction.<sup>83</sup> However, some commentators doubt the effectiveness of the requirement because, "[g]iven the differences in lawyers and requirements for admission from country to country, there is no guarantee that a lawyer with more years of experience is better qualified than one with less experience."<sup>84</sup> In addition, as noted earlier, most clients of foreign lawyers are sophisticated enough to determine the competence of their lawyers.

#### E. REGULATIONS AND PRACTICES WITH UNINTENDED HARMFUL EFFECTS

Some regulations have the unintended effect of interfering with foreign lawyers' ability to efficiently serve their clients.<sup>85</sup> For example, the United Kingdom enacted a law in 1990 allowing foreign and local lawyers to form multinational partner-

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79. See, e.g., *Model Rule*, *supra* note 11, at 221 (discussing experience requirements in American jurisdictions).

80. See *id.* at 221 n.36 (noting that Alaska, Connecticut, Washington D.C., Hawaii, Texas, Michigan, New Jersey, Oregon and Washington all have this requirement).

81. Cooper, *supra* note 14, at 5.

82. *Model Rule*, *supra* note 11, at 221.

83. See *id.* at 222; Crabb, *supra* note 57, at 1797.

84. Lee, *supra* note 37, at 115.

85. *Model Rule*, *supra* note 11, at 215.

ships.<sup>86</sup> However, such partnerships remained subject to the same regulations as any other British law firm which meant that all lawyers in the multinational partnership—whether based in the United Kingdom or abroad—must pay large insurance fees.<sup>87</sup> Consequently, partnerships between local and foreign lawyers remained very expensive<sup>88</sup> because foreign lawyers usually work for foreign law firms. Thus, under the 1990 law it was still very difficult for foreign lawyers to associate with local lawyers, which in turn hinders foreign lawyers' ability to serve their clients.

Foreign lawyers also face difficulties when jurisdictions do not accord them the same professional privileges accorded to the local lawyers. For instance, lawyers not licensed in countries belonging to the European Union<sup>89</sup> do not enjoy the attorney-client privilege in Europe.<sup>90</sup> Therefore, correspondence between non-European lawyers and their clients "is not considered confidential."<sup>91</sup> The deprivation of the attorney-client privilege, whether or not motivated by protectionism, effectively disadvantages non-European lawyers. New York lawyers considered this to be such a serious problem that the state changed its rule to make it explicitly clear that foreign lawyers in the state do have the attorney-client privilege, hoping that the European Union reciprocates.<sup>92</sup>

The general lack of uniformity in the regulation of foreign lawyers further impedes multinational law firms. Since each country regulates foreign lawyers differently, law firms must comply with different regulations wherever they seek to establish a presence—an expensive and time consuming task. This problem is compounded in countries like the United States and Canada, which regulate the legal profession at the sub-national level.<sup>93</sup> This system has been aptly described as a "patchwork

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86. See Roger Goebel, *Lawyers in the European Community: Progress Towards Community Wide Rights of Practice*, 15 *FORDHAM INT'L L.J.* 556, 562 (1992) [hereinafter *Lawyers in the European Community*].

87. Lever, *supra* note 39, at 17.

88. *Id.*

89. The European Union has promulgated regulations that affect the European legal profession. See *infra* Part III.B.

90. Chatterjee, *supra* note 4, at 14.

91. *Id.*

92. See Engel, *supra* note 2, at 36-37.

93. See SIDNEY CONE, *THE REGULATION OF FOREIGN LAWYERS* 1 & 53 (3rd ed. 1984). Lawyers in the United States are regulated by the individual states. *Id.* at 1; see *supra* note 32. Canadian lawyers are regulated by the provinces. CONE, *supra* at 53.

of regulation' ”<sup>94</sup> that hinders multinational law firms' ability to effectively serve their clients.<sup>95</sup>

#### F. OTHER RESTRICTIONS OR REQUIREMENTS

Foreign lawyers are subject to many other restrictions. For instance, a number of small European jurisdictions, such as Luxembourg, Liechtenstein and some Swiss cantons seek to exclude foreigners altogether through citizenship, apprenticeship and language competence requirements.<sup>96</sup> In the United States, some jurisdictions that license foreign legal consultants impose such complex licensing procedures that foreign lawyers consider them practically “impenetrable.”<sup>97</sup> Some jurisdictions impose restrictions on foreign law firms, directly affecting foreign lawyers. China, for example, forbids foreign law firms from establishing branches in more than one city;<sup>98</sup> Hong Kong limits the total number of law firms allowed in the country;<sup>99</sup> and Malaysia,<sup>100</sup> Russia, Indonesia<sup>101</sup> and, until recently, Japan,<sup>102</sup> forbid foreign lawyers from using their firm names.<sup>103</sup>

As with the right of association restrictions, many of these restrictions arise because of local lawyers' fear that foreign lawyers will “invade” the local market.<sup>104</sup> For example, when the Japanese opened their door to foreign lawyers, they feared that the United States would “ship its surplus lawyers” to Ja-

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94. Briefly, NAT'L L.J., Aug. 30, 1993, at 2. (Quoting Steven C. Nelson, Partner, Dorsey & Whitney, Minneapolis, Minnesota, and former Chair of the American Bar Association's Section of International Law and Practice, 1988-89).

95. See Robert Rice, *Dissatisfied Clients at Europe's Bars—A Barrier-Free Market is a Long Way Off*, FIN. TIMES, Jan. 11, 1994, at 14 (quoting Mr. John Toulmin QC, former President of the CCBE, who stated that “[i]f lawyers are going to meet the new and increased demands from clients they must move towards a unified position on legal practice and regulation”).

96. Abel, *supra* note 14, at 753.

97. Dillon, *supra* note 60, at 54.

98. FOREIGN TRADE BARRIERS, *supra* note 6, at 53.

99. Chaterjee, *supra* note 4, at 14. *But see* Abel, *supra* note 14, at 753 (noting that Hong Kong has been relatively open, “confident that its local lawyers would be successful in the competition for clients”).

100. FOREIGN TRADE BARRIERS, *supra* note 6, at 200.

101. Abel, *supra* note 14, at 759.

102. *Foreign Lawyer Practice Rules*, *supra* note 32, at 8.

103. This restriction may actually work against the protection of the public, because it makes it more difficult for clients to choose between foreign law firms based on their reputation.

104. See Abel, *supra* note 14, at 739 (discussing the reaction of “local governments, legal associations and lawyers to the foreign ‘invasion’”); Chambers, *supra* note 25, at 17.

pan.<sup>105</sup> This prediction proved to be wrong. As one American lawyer in Japan noted, “[i]t’s too expensive to put a lawyer in Tokyo, let alone surplus lawyers.”<sup>106</sup> Similarly, the New York regulatory regime, one of the most liberal in the world, “has not resulted in any flood of foreign attorneys in that state.”<sup>107</sup>

The actual number of foreign lawyers practicing abroad, while growing, also indicates that they are not flooding local legal markets, even in jurisdictions hospitable to them.<sup>108</sup> One expert estimates that there are only about 500 American lawyers practicing in the European Union.<sup>109</sup> In the United States, only 200 foreign lawyers are actually registered as foreign legal consultants,<sup>110</sup> although the number of unlicensed lawyers is probably much higher. In late 1993, seventy-six foreign lawyers were estimated to be practicing in Japan.<sup>111</sup>

Moreover, foreign lawyers usually do not compete with local lawyers. In Japan, Japanese lawyers practice local law<sup>112</sup> while foreign lawyers practice international law.<sup>113</sup> Similarly, American lawyers in Canada usually do not compete with Canadian firms.<sup>114</sup> In fact, American lawyers in Canada “may actually boost prospects of Canadian lawyers,” because they provide a ready resource to assist Canadian lawyers in American law.<sup>115</sup>

Even where foreign lawyers compete strongly with local lawyers, competition benefits both the legal profession and its clients. In France, for example, heated competition between for-

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105. Chambers, *supra* note 25, at 17 (quoting Isaac (Ike) Shapiro, Partner, Skaden, Arps, Slate, Meagher & Flom, New York).

106. *Id.* (discussing his law firm’s experience with their Tokyo office).

107. *Foreign Attorneys’ Practice in Japan, Other Services Issues Focus of Chicago Conference*, 3 Int’l Trade Rep. (BNA) 221 (Feb. 12, 1986) (quoting Sydney Cone III, Partner, Cleary, Gottlieb, Steen & Hamilton, New York).

108. Fisch-Thomsen, *supra* note 37, at 7. If the number of law firms’ foreign branches is any indication, the number of lawyers practicing outside their home jurisdictions is rapidly increasing. Between 1985 and 1990, American law firms increased their number of foreign branches from 88 to 220. Abel, *supra* note 14, at 764. English law firms increased their number of foreign branches from 57 in 1985 to over 140 in 1992. *Id.*

109. Interview with Steven C. Nelson, *supra* note 44.

110. Abel, *supra* note 14, at 758.

111. *Japan Said to Make Concessions on Practice by Foreign Lawyers*, 10 Int’l Trade Rep. (BNA) 2060 (Dec. 8, 1993).

112. Chambers, *supra* note 25, at 17.

113. *See supra* note 12 and accompanying text.

114. *See Crawford, supra* note 23, at 16.

115. *Id.* (quoting John Barber, resident partner in the Canadian office of Hodgson, Russ, Andrews, Woods & Goodyear).



ign and local lawyers<sup>116</sup> has "encouraged excellence at the French bar"<sup>117</sup> and has made Paris "one of the leading centers of transnational law practice in the world today."<sup>118</sup> One expert believes competition and interaction with foreign lawyers "raises legal standards in developing countries."<sup>119</sup> Finally, protection from competition is "entirely out of step" with the stated goals of trade agreements such as GATS.<sup>120</sup>

### III. EFFORTS TO LIBERALIZE THE REGULATION OF FOREIGN LAWYERS

Both the United States and the European Union have already taken measures to liberalize and standardize the regulation of foreign lawyers. These measures may serve as a foundation for further liberalization in broader contexts. The American and European experiences should also help identify some of the difficulties for further liberalization.

#### A. EFFORTS IN THE UNITED STATES

In the United States, where the legal profession is regulated at the sub-national level, only sixteen states and the District of Columbia license foreign legal consultants.<sup>121</sup> Each state's regulatory scheme is different. The rest of the American states do not license foreign legal consultants, requiring foreign lawyers to pass the local bar exam before practicing law.<sup>122</sup>

The American Bar Association (ABA), recognizing that "uniformity of approach among the states is of critical importance," initiated an effort to standardize and liberalize the regulation of foreign lawyers in the United States.<sup>123</sup> In 1993, the ABA

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116. See Victoria Lee, *Hard Times For French Lawyers*, INT'L FIN. L. REV., Feb. 1994, at 16.

117. John M. Grimes, "Une et Indivisible"—*The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U. J. INT'L L. & POL. 1757, 1784 (1992).

118. Goebel, *supra* note 9, at 467.

119. Andrews, *supra* note 1, at 13.

120. Asthalter, *supra* note 68, at 20.

121. These states are: Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon and Washington. Adams, *supra* note 32, at 8. These states represent over 75% of the American legal market. See Abel, *supra* note 14, at 766-67.

122. Chatterjee, *supra* note 4, at 14.

123. *Model Rule*, *supra* note 11, at 236. The ABA decided "to take the lead in establishing a coherent and forward-looking model for the regulation of foreign lawyers in [the United States]." *Id.*

promulgated a Model Rule for the Licensing of Legal Consultants. The Model Rule is largely based on the New York foreign legal consultancy rules,<sup>124</sup> which, as noted earlier, are known for their openness to foreign lawyers.

The primary requirement to qualify as a foreign legal consultant under the ABA Model Rule is that the applicant be "a member in good standing of a recognized legal profession in a foreign country, the members of which are . . . subject to effective regulation and discipline."<sup>125</sup> In addition, foreign legal consultants must submit to state rules of professional conduct, are subject to the same disciplinary provisions as local lawyers, and cannot hold themselves out as members of the bar.<sup>126</sup> The Model Rule does not restrict foreign legal consultants' ability to associate with local lawyers.<sup>127</sup> Finally, the years-of-experience requirement discussed earlier is optional to the states adopting the Model Rule.<sup>128</sup>

Importantly, the Model Rule does not contain an examination requirement for the foreign legal consultancy license. Since there is no examination requirement, the Model Rule, like the British rules,<sup>129</sup> does not allow licensed foreign legal consultants to perform a specific list of activities which require in-depth knowledge of local laws and procedures. These activities include representing a client as an attorney in court, rendering legal advice on any state or federal law (except on the basis of advice from a person duly qualified and entitled) and preparing documents such as real estate titles and wills and trusts.<sup>130</sup>

Both the U.S. federal government<sup>131</sup> and the ABA<sup>132</sup> have promised to use their "best efforts" to encourage the American states to adopt the Model Rule or a regulation substantially similar to it.<sup>133</sup> However, for constitutional and political reasons,<sup>134</sup>

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124. See Spencer, *supra* note 35, at 1.

125. Model Rule, *supra* note 11, at 208 (Model Rule § 1(a)).

126. See *id.* at 209-10 (Model Rule §§ 4(g), 5(a), 6).

127. See *id.* at 210 (Model Rule § 5(b)(i)).

128. *Id.* at 208 (Model Rule § 1(b)).

129. See *supra* note 40 and accompanying text.

130. See Model Rule, *supra* note 11, at 209 (Model Rule §§ 4(a), (b), (c), (e)).

131. Adams, *supra* note 32, at 8 (explaining that the United States obligated itself to promote the states' adaptation of the ABA model rules in GATS).

132. See Agreement Between the American Bar Association and the Order of the Brussels Bar (August, 1994) (on file with the *Minnesota Journal of Global Trade*).

133. See Dillon, *supra* note 60, at 56 (noting that "each of the . . . states without rules allowing foreign legal consultants will feel pressure to adopt the ABA's model rules for opening their state").

neither the ABA nor the federal government can force the American states to adopt the Model Rule, and even if the states do so, they may adopt a more restrictive version of the Model Rule. Any effort to liberalize the regulation of foreign lawyers in an international context will have to contend with this difficulty, not only in the United States but also in any country where the legal profession is regulated at the sub-national level.

## B. EFFORTS IN THE EUROPEAN UNION

Because of increasing economic integration, European lawyers have recognized the need to harmonize the legal profession throughout the European Union.<sup>135</sup> The European Union enacted a series of Articles and Directives to achieve this harmonization.<sup>136</sup> Unlike the ABA Model Rule, these measures are mandatory to all member countries. Also, these measures do not affect the way that European Union countries regulate non-European lawyers—they only apply to the way that European countries deal with lawyers licensed in other European countries. In fact, the most important Directive in this area, discussed below, applies only to citizens of the European Union's countries.<sup>137</sup> Nevertheless, the European Union's measures are an indication of what countries may be willing to agree upon in broader international agreements.

The most significant European Union effort to liberalize the regulation of European lawyers is the Directive on the Mutual Recognition of Diplomas.<sup>138</sup> The purpose of this Directive is to facilitate the ability of professionals from the European Union's member states, including lawyers, to acquire the right to fully practice their profession in other member states.<sup>139</sup> Under the Directive:

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134. See Henry P. de Vries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW. 845, 847 (1987) (noting that the American legal system "is a complex balance of national supremacy and state sovereignty within the framework of a common law inheritance"). In fact, some feel that "[a]ny move toward federal preemption of the licensing function [of the states] is . . . ill advised, and perhaps, unconstitutional." Adams, *supra* note 32, at 8 (quoting John E. Holt-Harris, Jr., Chairman of the New York Board of Law Examiners).

135. Rice, *supra* note 95, at 14.

136. For an extensive discussion of these Articles and Directives, see *Lawyers in the European Community*, *supra* note 86. See also, Barsade, *supra* note 17, at 317-22; Goebel, *supra* note 9; Rice, *supra* note 95.

137. Barsade, *supra* note 17, at 319.

138. Council Directive 89/48, 1989 O.J. (L 19) 16.

139. See Barsade, *supra* note 17, at 318.

Lawyers who have completed degree and other requirements for admission to practice in one member state can be admitted to full membership in the legal profession of another member state upon satisfaction of a requirement of "adaptation" which may be met either through an abbreviated period of practical training or through the satisfactory completion of limited examination designed to cover those areas in which the laws of the two countries differ so materially that the lawyer's original training can be said to be "deficient" in those areas.<sup>140</sup>

Because of the Directive's ambitious "full membership" goal, most member states will use an aptitude test to compensate for the applicants' "deficiencies" with respect to local law.<sup>141</sup>

The European Union's approach is fundamentally different from that of the ABA Model Rule because its goal is to get full membership into the local bar for non-local European lawyers.<sup>142</sup> As noted earlier, the Model Rule does not require foreign lawyers to fulfill adaptation requirements such as examinations to become foreign legal consultants.<sup>143</sup> Since the Model Rule does not contain an examination requirement, which can be very difficult for foreign lawyers to meet, it is a more liberal and open approach than the European model.<sup>144</sup> On the other hand, the Model Rule may not go far enough to satisfy local lawyers' concerns that certain foreign lawyers may be unqualified. The European Union's approach, by requiring non-local European lawyers to meet an adaptation requirement, provides more assurance that lawyers that have met this requirement are prepared to practice law. In other words, the European approach is an easier pill to swallow for regulators of the legal profession in jurisdictions throughout the world. Since the Directive applies only to European Union nationals, however, non-European law firms and lawyers will continue to face different and potentially restrictive regulations in each European member state.

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140. *Model Rule*, *supra* note 11, at 218 n.30.

141. *Lawyers in the European Community*, *supra* note 86, at 598.

142. The European Union is contemplating adopting a separate measure that would create a "registered lawyer" category. Barsade, *supra* note 17, at 321. The registered lawyer category would be somewhat similar to the Model Rule's foreign legal consultancy title. This new measure, embodied in the Draft Directive on Right of Establishment for Lawyers, has been under consideration for at least five years. *Id.* at 321 n.27.

143. *See supra* Part II.A.

144. *See supra* note 66 and accompanying text (noting that examination requirements pose a significant barrier to foreign lawyers' entry into legal markets).

### C. GATS PROVISIONS DEALING WITH THE REGULATION OF FOREIGN LAWYERS

The Uruguay Round on trade produced the General Agreement on Trade in Services (GATS).<sup>145</sup> GATS "provides for the first time a set of multilateral rules for the conduct of services trade and simultaneously creates a framework for a continuing process of liberalization."<sup>146</sup> Despite opposition from certain GATS Members,<sup>147</sup> the agreement covers legal services.<sup>148</sup> GATS affects the regulation of foreign lawyers in two ways, discussed separately in the following two sections.

#### 1. Liberalizing the Regulation of Foreign Lawyers Through GATS Members' Concessions

Countries that included legal services in their schedule of GATS commitments subject themselves to GATS provisions such as the national treatment and the most-favored-nation (MFN) clauses. The national treatment clause obliges each Member, subject to its schedule of commitments, to accord to foreign lawyers "treatment no less favorable than that it accords to its own like services and service suppliers."<sup>149</sup> This provision is aimed at eliminating discriminatory regulations or procedures, such as requirements of "nationality, residence, waiting periods, or temporary stay requirements."<sup>150</sup> A Member's inclusion of legal services in its schedule of commitments generally amounts "to a standstill preventing them from introducing new [discriminatory] restrictions."<sup>151</sup> Apart from this benefit, however, the national treatment clause is of limited value in liberalizing regu-

145. GATS, *supra* note 7.

146. Mario A. Kakabadsé, *The General Agreement on Trade in Services: Implications for Professional and Business Services 2*, OECD Doc. DAFFE/INV/PROF(94)3 (Sept. 6, 1994).

147. France, for example, opposed the inclusion of legal services in GATS. The ABA strongly supported the inclusion of legal services, but later tried to withdraw the American concessions because of its dissatisfaction with the Japanese concessions. See *infra* notes 166-69 and accompanying text.

148. See GATS, *supra* note 7, art. I.

149. *Id.* art. XVII:1.

150. Fisch-Thomsen, *supra* note 37, at 12.

151. Issues Paper (Note by the Secretariat) 12, OECD Doc. DAFFE/INV/PROF(94)1 (Sept. 21, 1994). Australia, Canada, the European Union, Japan and the United States all included legal services in their schedule of commitments. Julian Arkell, *OECD Members' GATS Commitments in Accounting, Architectural, Engineering, Legal and Surveying Services 3-5, 8, 12*, OECD Doc. DAFFE/INV/PROF(94)15 (Sept. 8, 1994). Mexico did not offer legal services in its schedule of commitments. *Id.* at 9.

latory regimes because lawyers' training is country specific,<sup>152</sup> and therefore foreign lawyers are not exactly "like" local lawyers.<sup>153</sup>

The application of the GATS MFN clause will probably have a bigger impact than the national treatment clause in the regulation of foreign lawyers. The MFN clause states that "[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favorable than that it accords to like services and service suppliers of any other country."<sup>154</sup> Simply put, MFN requires a GATS Member to treat similar service suppliers from other GATS Members similarly.

The MFN clause is also "unconditional." This means that GATS Members' legal services concessions must be available on an equal basis to all GATS Members, regardless of whether those Members made similar concessions.<sup>155</sup> Although Members that included legal services in their schedule of commitments were allowed to exempt themselves from the MFN clause, none of them did so for legal services.<sup>156</sup> This means that those GATS Members must eliminate reciprocity requirements<sup>157</sup> in their treatment of foreign lawyers.<sup>158</sup> This change will eliminate the confusion caused by such requirements.<sup>159</sup>

On the other hand, eliminating reciprocity requirements may discourage the liberalization of regulatory regimes.<sup>160</sup> For

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152. See Fisch-Thomsen, *supra* note 37, at 11.

153. See Lee, *supra* note 37, at 120.

154. GATS, *supra* note 7, art. II.1.

155. Harry Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT'L LAW. 623, 633 (1993). All market access and national treatment commitments in a country's schedule of commitments must also be made on an unconditional MFN basis. *Id.* at 634.

156. Arkell, *supra* note 151, at 13-14.

157. Many jurisdictions require foreign jurisdictions to accord reciprocity if lawyers licensed in those foreign jurisdictions wish to practice locally. For example, the District of Columbia and at least six other American states that license foreign legal consultants have a reciprocity requirement. See *Model Rule*, *supra* note 11, at 224.

158. *Trade in Legal Services*, *supra* note 10, at 1247.

159. The confusion was caused by the wide differences in rules regulating foreign lawyers. It was always difficult to know whether one jurisdiction's rules met the reciprocity requirements of other jurisdictions. See *Model Rule*, *supra* note 11, at 216-17 (noting the "inherent difficulty in applying absolute reciprocity requirements to dissimilar situations").

160. One author has specifically criticized GATS' unconditional MFN approach for this reason. Tycho Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 416 (1994).

example, New York has continually liberalized its foreign legal consultancy rules "to encourage other countries to allow them to practice there on the basis of reciprocity."<sup>161</sup> The ABA Model Rule itself was promulgated as a response to foreign jurisdictions' reciprocity requirements.<sup>162</sup> Thus, removing the reciprocity requirement may have eliminated an important incentive for liberalization.

The GATS method of trade liberalization through the exchange of countries' concessions poses a more pronounced problem in countries where the legal profession is self-regulated. In those countries, concessions in one's legal profession may be literally "traded away" by negotiators in exchange for concessions in unrelated areas. As a result, legal professions that voluntarily liberalize their regulation of foreign lawyers may not gain any advantages for their own lawyers. Therefore, self-regulating legal professions may have little incentive to open themselves to foreign lawyers.

An example will help illustrate this problem. During the GATS negotiations, the American legal profession, through the ABA, offered to include in the United States' schedule of commitments the foreign legal consultant rules then effective in seventeen American jurisdictions.<sup>163</sup> At the end of the GATS

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As a solution, he proposes replacing GATS' unconditional MFN arrangement with a trade agreement with multiple tiers of memberships. Under this agreement, each membership tier would be characterized by objective regulatory-reciprocal trade liberalization obligations. *Id.* at 441.

The case of aviation services may illustrate this structure. The Chicago Convention defined six "freedoms" of the air. . . In a multiple-tier, sectoral treaty on aviation services . . . the first tier could include those states willing to relax restrictions only on the first four freedoms of the air. The next tier could include those willing to grant the first five freedoms, while the third could include those willing to grant all six. *Id.* at 442.

This agreement would use conditional, rather than unconditional, MFN. *Id.* at 443. Each country willing to obtain membership in a certain "tier," which would guarantee it certain "freedoms" granted by countries that belong to that tier, would have to reciprocate by granting those countries the same "freedoms." This would encourage liberalization because countries in lower tiers would have the incentive of gaining new "freedoms" abroad if they allow them at home. *Id.* at 442. Moreover, there would be a clear objective goal in the process of liberalization, which would promote homogeneous rules regulating, for example, the licensing of foreign legal consultants.

Apart from the merits of this proposal, it is unlikely to be adopted since GATS chose the unconditional MFN method.

161. *Issues Affecting Lawyers in U.S.*, BUS. L. BRIEF, Dec. 1993, available in LEXIS, News library, BLB file.

162. *Briefly*, *supra* note 94, at 2.

163. *See* Dillon, *supra* note 60, at 54.

negotiations, however, the ABA lobbied vigorously to withdraw the American concessions because it considered the Japanese legal services concessions unacceptable.<sup>164</sup> In spite of the ABA's opposition, the American concessions in legal services remained in GATS as part of a "package deal"<sup>165</sup> in which "Japan conceded points on trade issues unrelated to legal services."<sup>166</sup>

As a result of this "package deal," GATS now requires the application of unconditional MFN to the foreign lawyers' regulatory regimes of seventeen American jurisdictions.<sup>167</sup> Therefore, these jurisdictions can no longer impose reciprocity requirements. This eliminates an important incentive to induce the Japanese bar to remove what are widely believed to be protectionist restrictions on foreign lawyers' practice in Japan.<sup>168</sup> Because of this result, the ABA and the Association of the Bar of the City of New York believe that "no agreement at all . . . would be preferable to accepting' the deal that ultimately was struck."<sup>169</sup> In the future, the American legal profession may have little incentive to liberalize its foreign lawyer regulatory regime because its GATS concessions were not reciprocated.

The GATS method of liberalization through individual countries' concessions also will not help to harmonize regulatory regimes because each country will continue to have different regulations and restrictions. In addition, the GATS liberalization method does not provide a "goal"—a certain level of liberalization in the regulatory regimes—toward which the legal profession in different jurisdictions could strive.<sup>170</sup> Unless a different method for liberalization is used, the GATS Members' concessions will remain inconsistent, perpetuating the inefficient environment in which international legal services are provided.

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164. *Id.* at 56.

165. *Id.* John Schmidt, the United States Trade Representative responsible for the GATT negotiations "decided that he could use legal services as part of a larger deal to help wrap up the GATT talks." *Id.* According to Schmidt, "[i]t was 'If you do D, we'll do A and B, and we'll split the difference on C.'" *Id.*

166. Adams, *supra* note 32, at 1.

167. Kakabadsé, *supra* note 146, at 7-8; Adams, *supra* note 32, at 8 (noting that GATS prohibits the seventeen jurisdictions, which allow foreign lawyers to practice without a bar exam, from making any additional restrictions on foreign attorneys).

168. *See supra* note 63.

169. Adams, *supra* note 32, at 1 (quoting John D. Feerick, president of the Association of the Bar of the City of New York).

170. Interview with Steven C. Nelson, Partner, Dorsey & Whitney, Minneapolis, Minnesota, and former Chair of the American Bar Association's Section of International Law and Practice, 1988-89 (Oct. 11, 1994).



## 2. Article VII and Recognition

Article VII of GATS, titled "Recognition," establishes a new framework for future liberalization based on a different approach from the traditional exchange of trade concessions.<sup>171</sup> Article VII allows Members to "recognize the education or expe-

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171. Article VII of GATS provides as follows:

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

GATS, *supra* note 7.

rience obtained, requirements met, or licenses or certifications granted in a particular country"<sup>172</sup> on a unilateral or bilateral basis.<sup>173</sup> Recognition "aims at providing better than national treatment to foreign service providers where this is needed to ensure that they can compete on an equal basis."<sup>174</sup> It allows foreign professionals to compete with local lawyers without having to retrain and requalify in aspects of the profession in which the foreigner may already possess expertise, by recognizing the foreigners' "qualifications, experience, licensing, registration, etc."<sup>175</sup> An example of this type of agreement is the European Directive on the Mutual Recognition of Diplomas, which operates within the European Union.<sup>176</sup>

Under Article VII, Parties to recognition agreements are obliged to "afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it,"<sup>177</sup> and are prohibited from according recognition as "a disguised restriction on trade in services."<sup>178</sup> However, in the opinion of a GATT Counsellor, "[m]utual recognition agreements will . . . remain a matter for bilateral negotiation between interested parties and the GATS will not force such agreements to be multi-lateralised nor insist that all foreign qualifications be treated in the same way."<sup>179</sup> Nevertheless, Article VII specifies that recognition agreements should, when appropriate, "be based on multilaterally agreed criteria."<sup>180</sup> In developing and adopting such criteria for recognition, Article VII encourages its Members to "work in cooperation with relevant intergovernmental and non-governmental organizations."<sup>181</sup> In addition, GATS establishes a Working Party on professional services to develop guidelines for the recognition of qualifications,<sup>182</sup> which "should give impetus

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172. *Id.* art. VII:1.

173. *Id.*

174. Issues Paper, *supra* note 151, at 13.

175. *Id.* at 17-18.

176. *See supra* notes 135-41 and accompanying text.

177. GATS, *supra* note 7, art. VII:2.

178. *Id.* art. VII:3. Article VII also provides that "[a] Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers." *Id.*

179. Kakabadsé, *supra* note 146, at 7.

180. GATS, *supra* note 7, art. VII:5.

181. *Id.*

182. Issues Paper, *supra* note 151, at 14.

to the process of mutual recognition of professional qualifications."<sup>183</sup>

Article VII in GATS may be the best avenue for the future liberalization and standardization of regulatory regimes, allowing Members to negotiate bilateral and multilateral recognition agreements. As long as such agreements are legitimately based on the mutual recognition of professional qualifications,<sup>184</sup> the benefits of these agreements need not be extended to non-participating parties. This would induce other Members to either join the agreement or "to negotiate comparable ones,"<sup>185</sup> and thus would help to make up for the loss of the reciprocity requirement caused by the application of unconditional MFN.<sup>186</sup>

#### D. NAFTA PROVISIONS DEALING WITH THE REGULATION OF FOREIGN LAWYERS

The North American Free Trade Agreement (NAFTA) affects how each NAFTA Party—Mexico, the United States and Canada—regulates lawyers licensed in the territories of the other NAFTA Parties.<sup>187</sup> Some of the applicable NAFTA articles, such as the national treatment and the MFN clauses,<sup>188</sup> have the same effect as the GATS national treatment and MFN clauses discussed above.<sup>189</sup> NAFTA also contains provisions dealing with recognition of foreign service providers' qualifications.<sup>190</sup> However, NAFTA goes further than GATS in providing specific provisions dealing with development of mutually recog-

183. Kakabadsé, *supra* note 146, at 7.

184. *See supra* note 178 and accompanying text.

185. *See supra* note 177 and accompanying text.

186. *See supra* notes 154-69 and accompanying text.

187. All services sectors are covered under NAFTA unless Parties take reservations from the application of specific NAFTA provisions. *See Broadman, supra* note 155, at 644 (describing NAFTA's "negative list" approach to the coverage of services). With respect to legal services, Parties reserved the application of numerous NAFTA provisions. *See NAFTA, supra* note 8, Annex I, II, VI. Each Party must then decide which non-conforming measures it wants to list in the agreement two years from NAFTA's entry into force. *Id.* arts. 1108, 1206. Once a Party eliminates its non-conforming measures, the measure cannot thereafter be made more restrictive. *Id.* arts. 1108:1(b)-(c), 1206:1(b)-(c); Broadman, *supra* note 155, at 639.

188. NAFTA requires Parties to accord lawyers and law firms from other NAFTA Parties the better of national or MFN treatment. NAFTA, *supra* note 8, arts. 1104, 1204.

189. *See supra* Part III.C.1.

190. NAFTA, *supra* note 8, art. 1210:2.

nizable professional standards<sup>191</sup> and with licensing of foreign legal consultants.<sup>192</sup> The NAFTA articles dealing with each of these subjects are discussed below.

Article 1210 of NAFTA, titled "Licensing and Certification," allows a Party, unilaterally or by agreement, to recognize the education, experience, licenses and certifications obtained in the territory of another Party or of a non-Party.<sup>193</sup> The same article states that "nothing in [NAFTA's MFN clause] shall be construed to require the Party to accord such recognition to education, experience, licenses or certifications obtained in the territory of another Party."<sup>194</sup> However, Parties that grant recognition to professional qualifications obtained in other countries must afford another Party "an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in that other Party's territory should also be recognized or to conclude an agreement or arrangement of comparable effect."<sup>195</sup>

Article 1210 was difficult to negotiate because of the differences in professional standards within the NAFTA Parties.<sup>196</sup> This is a problem in the NAFTA context because in Canada and the United States the legal profession is self-regulated, while in Mexico it is state-regulated.<sup>197</sup> To overcome this problem "the Parties agreed that the benefits of mutual recognition need not be automatically extended to other Parties, provided that the latter are given an opportunity to demonstrate their eligibility for similar treatment."<sup>198</sup> Importantly, the current NAFTA arrangement is flexible enough so that "an agreement can be reached between lawyers from Ontario, Illinois and/or the Federal District of Mexico, the benefits of which need not be extended automatically to practitioners from other U.S., Canadian or Mexican jurisdictions if [they] are unable or unwilling to abide by its rules."<sup>199</sup> The key, according to a Canadian negotia-

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191. *Id.* Annex 1210.5, sec. A. Annex 1210.5 applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers. *Id.* art. 1210:5.

192. *Id.* Annex 1210.5, sec. B.

193. *Id.* art. 1210:2.

194. *Id.* art. 1210:2(a).

195. *Id.* art. 1210:2(b).

196. See Pierre Sauvé, *The Long and Winding Road: Canadian Perspectives on NAFTA and the Professions* 10, OECD Doc. DAFFE/INV/PROF(94)12 (Sept. 7, 1994).

197. *Id.* at 10 n.10.

198. *Id.* at 10-11.

199. *Id.* at 11.

tor of NAFTA, was "to get the professions to embark on the road to mutual recognition."<sup>200</sup>

On this note, a NAFTA Annex contains special provisions dealing with the Parties' development of "mutually acceptable standards and criteria for licensing and certification of professional service providers."<sup>201</sup> The NAFTA Parties agreed in this Annex to "encourage the relevant bodies in their respective territories" to develop mutual recognition criteria with regard to the following matters: (a) education, (b) examinations for licensing, (c) experience required for licensing, (d) standard of conduct and ethics, (e) professional development and re-certification, (f) scope of licensed activities, (g) requirement of local knowledge and (h) consumer protection.<sup>202</sup> The Annex provisions also contain a review mechanism to ensure progress in the development of recognition standards and criteria.<sup>203</sup>

The NAFTA Parties also negotiated an Annex titled Foreign Legal Consultants<sup>204</sup> which attempts to harmonize and liberalize the rules regulating foreign legal consultants both within and among the NAFTA Parties. The Foreign Legal Consultants

200. *Id.* One of Canada's goals in the NAFTA negotiations was to develop a "generic blueprint of rules, principles and procedural mechanisms . . . aimed at encouraging all of North America's accredited professions to conclude agreements on the mutual recognition of licensing and certification requirements." *Id.* at 9.

201. NAFTA, *supra* note 8, Annex 1210.5 sec. A:2.

202. *Id.* Annex 1210.5 secs. A:2, A:3.

203. *Id.* Annex 1210.5 sec. A:4.

204. *Id.* Annex 1210.5 sec. B. The text of the Annex provides as follows:

1. Each Party shall, in implementing its obligations and commitments regarding foreign legal consultants as set out in its relevant Schedules and subject to any reservations therein, ensure that a national of another Party is permitted to practice or advise on the law of any country in which that national is authorized to practice as a lawyer.

*Consultations with Professional Bodies*

2. Each Party shall consult with its relevant professional bodies to obtain their recommendations on:

- (a) the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants;
- (b) the development of standards and criteria for the authorization of foreign legal consultants in conformity with Article 1210; and
- (c) other matters relating to the provision of foreign legal consultancy services.

3. Prior to initiation of consultations under paragraph 7, each Party shall encourage its relevant professional bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations on the matters referred to in paragraph 2.

Annex requires each Party to consult with its relevant professional bodies for their recommendations on (a) the forms of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants, (b) the development of standards and criteria for the authorization of foreign legal consultants in conformity with the NAFTA provisions dealing with the licensing and certification of professionals, and (c) other matters relating to the provision of foreign legal consultancy services.<sup>205</sup> In addition, the NAFTA Parties agreed to encourage their "relevant professional bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations" on these matters.<sup>206</sup> Finally, the NAFTA foreign legal consultancy provisions require each Party to "establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants."<sup>207</sup> This will be difficult for the United States and Canada because both countries regulate the legal profession at the sub-national level.<sup>208</sup>

NAFTA's provisions dealing with the regulation of foreign lawyers—Article 1210 on recognition, the professional standards and the foreign legal consultancy provisions—are all subject to an important restriction. Because of their location in the NAFTA document, these provisions apply to the provision of

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*Future Liberalization*

4. Each Party shall establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants.

5. Each Party shall promptly review any recommendation referred to in paragraphs 2 and 3 to ensure its consistency with this Agreement. If the recommendation is consistent with this Agreement, each Party shall encourage its competent authorities to implement the recommendation within one year.

6. Each Party shall report to the Commission within one year of the date of entry into force of this Agreement, and each year thereafter, on its progress in implementing the work program referred to in paragraph 4.

7. The Parties shall meet within one year of the date of entry into force of this Agreement with a view to:

- (a) assessing the implementation of paragraphs 2 through 5;
- (b) amending or removing, where appropriate, reservations on foreign legal consultancy services; and
- (c) assessing further work that may be appropriate regarding foreign legal consultancy services.

*Id.*

205. *Id.* Annex 1210.5 sec. B:2.

206. *Id.* Annex 1210.5 sec. B:3.

207. *Id.* Annex 1210.5 sec. B:4.

208. *See supra* note 93 and accompanying text.

legal services by individual lawyers not employed by foreign law firms.<sup>209</sup> Therefore, even if an agreement is reached under the NAFTA provisions discussed above, a NAFTA Party can require that applicants for licenses under such agreements not be employed by foreign law firms. This could be an important barrier to foreign lawyers, because, as discussed earlier, most foreign lawyers are employed by law firms.<sup>210</sup>

NAFTA's most important accomplishments are twofold. First, Mexico agreed to develop foreign legal consultancy rules throughout its territory.<sup>211</sup> Second, and perhaps more importantly, NAFTA successfully "set the stage for future talks, while lawyers in each country lay the groundwork for integrating their profession down the line."<sup>212</sup> Thus, the legal profession in each country will play a crucial role in deciding when and how to liberalize the regulation of their foreign peers.

#### IV. PROSPECTS FOR FURTHER LIBERALIZATION UNDER NAFTA AND GATS

Overall, NAFTA and GATS did not achieve an immediate liberalization of foreign lawyers' regulatory regimes. Instead, both agreements lay out a structure for future negotiations between countries, their national subdivisions and the legal profession. This Part discusses a few of the most likely agreements that may be reached under the structures that NAFTA and GATS provide. Consistent with NAFTA and GATS, the goal of these agreements should be to protect the public and the integrity of the profession while achieving a maximum level of liberalization.<sup>213</sup> Undoubtedly, negotiating parties of these

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209. The recognition, professional standards and foreign legal consultancy provisions are contained in Chapter 12 of NAFTA. Chapter 12 covers the "cross-border" provision of services. NAFTA, *supra* note 8, Chapter 12. The "cross-border" mode is the provision of legal services in one Party by lawyers licensed in another Party, not including the provision of a service through the investment mode. *Id.* art. 1213:2. The "investment" mode, covered in Chapter 11 of NAFTA, includes the provision of legal services by the branch office of a Party's law firm in the territory of another Party. *Id.* art. 1101.

210. *See supra* Part I.

211. NAFTA, *supra* note 8, Annex VI, at VI-M-2. Until now, foreign lawyers seeking to practice law in Mexico have had to go through a complex procedure to avoid being subject to a citizenship requirement. *See* CONE, *supra* note 93, at 92. Foreign lawyers also had to meet Mexico's educational requirement, usually through supplemental studies in Mexico. *Id.*

212. Rossi, *supra* note 76, at 8 (quoting D. Holly Hammonds, Associate General Counsel with the Office of the United States Trade Representative during the NAFTA negotiations).

213. *See supra* note 37 and accompanying text; Sauv , *supra* note 196, at 6.

agreements will look to past experiences such as the American and European liberalization efforts for guidance.

#### A. NAFTA-BASED FOREIGN LEGAL CONSULTANCY AGREEMENT

The NAFTA Parties may reach an agreement based on the NAFTA Annex, discussed above, titled "Foreign Legal Consultants."<sup>214</sup> This Foreign Legal Consultancy Agreement (FLCA) would be negotiated and work as follows. The "relevant professional bodies" of each NAFTA Party would develop joint recommendations on the licensing of foreign legal consultants.<sup>215</sup> The relevant professional bodies would presumably include bar associations and especially the licensing authorities of each country.<sup>216</sup> The joint recommendations would delineate the licensing requirements, rights and responsibilities of foreign legal consultants.

While speculating about the details of the joint recommendation is beyond this Note's scope, it should be based on "objective and transparent criteria, such as competence and the ability to provide a service," as NAFTA requires.<sup>217</sup> At a minimum, the joint recommendation should allow foreign legal consultants to practice the law of the country in which they are licensed,<sup>218</sup> and perhaps third-country and international law.<sup>219</sup> The joint recommendation should also contain provisions dealing with foreign lawyers' right to associate with local lawyers.<sup>220</sup> Although negotiators of the joint recommendation are not required to do so, they should strive to allow foreign legal consultants to be employed by foreign law firms. Finally, examination or educational requalification requirements should be avoided.<sup>221</sup> This makes

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214. See *supra* notes 204-08 and accompanying text. Negotiations on liberalizing foreign lawyers' regulatory regimes are already underway between the NAFTA Parties. Interview with Steven C. Nelson, *supra* note 44 (noting that the NAFTA Parties met in Mexico in 1994 and were scheduled to meet in March of 1995 to discuss the subject).

215. NAFTA, *supra* note 8, Annex 1210.5 sec. B:3.

216. Interview with Steven C. Nelson, *supra* note 44. In the United States and Canada, this would mean, respectively, the licensing authorities in the states and provinces.

217. NAFTA, *supra* note 8, art. 1210:1(a).

218. This is a NAFTA requirement. See NAFTA, *supra* note 8, Annex 1210.5 sec. B:1.

219. See *supra* notes 57-59 and accompanying text.

220. This is a NAFTA requirement. See NAFTA, *supra* note 8, Annex 1210.5 sec. B:2(a).

221. See *supra* Part II.B.



sense because, similar to the ABA Model Rule, foreign legal consultants' scope of practice under the FLCA would be limited.

If the joint recommendation is consistent with NAFTA and acceptable to the NAFTA Parties, the governments of the three NAFTA Parties would encourage their respective local authorities to implement the FLCA.<sup>222</sup> The FLCA would then be incorporated into NAFTA and would become a commitment at the national level. However, the FLCA would not bind the Parties' sub-national jurisdictions (i.e. the Parties' states or provinces). Instead, the sub-national jurisdictions would have the option to participate in the FLCA. Although this complicates the agreement, this arrangement is necessary because the legal profession is regulated at the sub-national level in both the United States and Canada, and their national governments are unlikely to invade this area of regulation.<sup>223</sup>

Once the FLCA is part of NAFTA, the Parties' jurisdictions could opt into the agreement. When a jurisdiction opts into the agreement, it would commit to license foreign lawyers from other participating jurisdictions as foreign legal consultants as provided in the FLCA. Eligible foreign lawyers would then gain all the rights and responsibilities outlined in the FLCA.

To illustrate how the FLCA may work, suppose that three NAFTA jurisdictions, e.g., Illinois, Ontario and the Federal District of Mexico participate in the FLCA.<sup>224</sup> Because of Illinois' participation in the FLCA, a lawyer licensed there would operate under favorable foreign legal consultancy rules in the Federal District of Mexico and Ontario. This arrangement would leave lawyers from non-participating jurisdictions, say Michigan, at a disadvantage because they could not take advantage of the favorable FLCA provisions in Ontario and the Federal District of Mexico. However, this would give Michigan lawyers an incentive to persuade Michigan to join the FLCA. In fact, most jurisdictions that currently license foreign legal consultants began licensing them in response to local lawyers' requests.<sup>225</sup>

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222. NAFTA, *supra* note 8, Annex 1210.5 sec. B:2(a).

223. *See supra* note 134 and accompanying text.

224. *See supra* text accompanying note 199.

225. *See, e.g.,* Koenig, *supra* note 5, at E01 (noting that the Indiana foreign legal consultancy rules were instituted at the request of an Indiana lawyer); Interview with Steven C. Nelson, *supra* note 44. *See also* Cooper, *supra* note 14, at 5 (noting that New York began licensing foreign legal consultants because "New York lawyers wanted to eliminate the resistance of other countries to opening offices abroad").

The incentive to join the FLCA is similar to the incentives created by reciprocity requirements.<sup>226</sup> However, the FLCA would have the advantage of creating a standard for foreign lawyers' regulation, at least among the participatory NAFTA jurisdictions. This would avoid the confusion created by typical reciprocity requirements.<sup>227</sup> Moreover, because the licensing requirements and rights and responsibilities of foreign legal consultants would be clearly delineated in the FLCA, the new regulatory system would be transparent.

As described here, joining the FLCA would be optional. For the FLCA to succeed, it will have to satisfy the professions' concerns in licensing foreign lawyers, such as their possible lack of qualifications and the fear that foreign lawyers will invade the local market. To ensure that these concerns are properly addressed, participants in the FLCA negotiation (i.e. the joint recommendation) should include representatives of the larger Mexican bar associations, representatives of the American states that currently host most foreign lawyers (e.g. New York) and representatives of the Canadian provinces that have foreign legal consultant regulatory regimes in place. The FLCA's acceptance among the NAFTA jurisdictions will most likely be determined at the negotiation stage.

## B. GATS OR NAFTA-BASED RECOGNITION AGREEMENTS

GATS and NAFTA allow jurisdictions to unilaterally, bilaterally or multilaterally grant recognition to the education, experience, licenses or certifications obtained by lawyers in other jurisdictions.<sup>228</sup> To secure greater rights for their own lawyers abroad, jurisdictions will undoubtedly seek to enter into mutual recognition agreements with specific foreign jurisdictions.<sup>229</sup> If

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226. This requirement, as noted earlier, was eliminated by the application of unconditional MFN. See *supra* notes 155-70 and accompanying text. The FLCA, however, would not have to comply with GATS' unconditional MFN because the FLCA would operate within a free trade area. Free Trade Agreements are excepted from the MFN clause under Article V of GATS, titled "Economic Integration." GATS, *supra* note 7, art. V. The exception is subject to certain requirements, but there is little doubt that NAFTA, as a whole, qualifies as a free trade area. See NAFTA, *supra* note 8, art. 101.

227. See *supra* note 159.

228. GATS, *supra* note 7, art. VII:1; NAFTA, *supra* note 8, art. 1210:2.

229. This approach to liberalizing the regulation of foreign professionals has already been used by the accountancy profession. In 1991, the American and Canadian accountants developed mutual recognition criteria with respect to education, examination and experience qualifications of accountants licensed in their subnational jurisdictions. See *Principles for Reciprocity* (Am. Inst. of Cer-

possible, such recognition agreements should be based on multilaterally agreed-upon criteria developed by the legal profession, sub-national jurisdictions and national governments.<sup>230</sup> Thus, similar to the NAFTA-based FLCA, recognition agreements will probably be negotiated jointly by representatives of national governments, sub-national jurisdictions and the legal profession.<sup>231</sup> Also, for the reasons discussed earlier, countries where the legal profession is regulated at the sub-national level would most likely have to make recognition agreements optional to their sub-national units.<sup>232</sup>

Jurisdictions may use recognition agreements to allow foreign lawyers to practice locally without requiring them to pass examinations or fulfill adaptation periods, which, as discussed earlier, can be very restrictive barriers to foreign lawyers.<sup>233</sup> Under these agreements, jurisdictions may mutually recognize all of the professional qualifications acquired by lawyers in each other's jurisdictions. Since foreign lawyers are not trained to practice local law, the scope of practice of foreign lawyers licensed under such agreements would be limited to the foreign lawyers' areas of recognized expertise. This type of recognition agreement would be very similar to the ABA Model Rule, which recommends that foreign lawyers be licensed as foreign legal consultants without examinations but with a limited scope of practice.<sup>234</sup> These agreements would probably also contain provisions for the public's protection, such as requiring them to

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tified Pub. Acct., Canadian Inst. of Chartered Acct., and Nat'l Ass'n of State Bds. of Acct.), Sept. 16, 1991, at 3. This recognition effort for the accountancy profession continued under NAFTA and GATS. See NAFTA, *supra* note 8, art. 1410, Annex 1210.5 sec. C; GATS, *supra* note 7, art. VII. In fact, the GATS Working Party has given the accountancy profession priority over the legal profession in developing multilateral recognition criteria. Kakabadsé, *supra* note 146, at 7. Although comparing the legal and accountancy profession has limitations because of the differences between the two professions, the recognition criteria to be established by the GATS Working Party may help future recognition efforts in the legal field. Additionally, the recognition method to liberalize the regulation of foreign accountants may help cautious regulators of the legal profession feel at ease in using a similar method to liberalize the regulation of foreign lawyers.

230. See GATS, *supra* note 7, art. VII:5; NAFTA, *supra* note 8, Annex 1210.5 sec. A.

231. See *supra* text accompanying notes 215-216.

232. See *supra* notes 134, 223 and accompanying text.

233. See *supra* Part II.B.

234. See *supra* notes 129-130 and accompanying text.

abide by local rules of conduct<sup>235</sup> and contribute to some form of agreed-upon liability insurance.<sup>236</sup>

Ultimately, whether jurisdictions are able to reach such liberal recognition agreements will depend on the local professions' level of assurance that lawyers licensed in certain foreign jurisdictions are properly trained and subjected to meaningful ethical obligations and disciplinary procedures.<sup>237</sup> Thus, countries that have similar legal systems, provide similar legal education and have similar professional qualifications are more likely to reach recognition agreements. Candidates for this type of recognition agreements may be, for example, jurisdictions within the United States, Canada and England. Certain civil-code countries may also feel sufficiently comfortable with each other's professional qualifications to conclude similar recognition agreements.

More limited recognition agreements are also conceivable. For example, education and examination qualifications acquired in one jurisdiction may be recognized in another. Foreign lawyers with the recognized qualifications may then be required to take an exam to qualify as a full local lawyer in the other jurisdiction. Used this way, recognition agreements may draw heavily from the European Directive on the Mutual Recognition of Diplomas, which requires foreign lawyers to undergo an adaptation period to compensate for their deficiencies with respect to local law.<sup>238</sup> This type of limited recognition agreement may be useful to liberalize regulatory regimes in countries where foreign lawyers are currently required to completely requalify before allowing them to practice any kind of law. This type of recognition agreement may also be useful between jurisdictions that have very different examination or certification requirements.

Whatever the form of recognition agreements, jurisdictions that take part in them must not use them as a means of discrimination, or as a disguised restriction on trade in services.<sup>239</sup> In addition, parties to recognition agreements must afford non-par-

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235. The ABA Model Rule contains this requirement. See *supra* note 126 and accompanying text.

236. There is always the remote danger that a foreign legal consultant may leave the country in case of malpractice. See Lee, *supra* note 37, at 115.

237. Regulators seem primarily concerned with foreign lawyers' potential lack of qualifications. See *supra* Part II.

238. See *supra* Part III.B.

239. See *supra* note 178 and accompanying text; NAFTA, *supra* note 8, art. 1210:1(c).

ties an opportunity to demonstrate that the professional qualifications obtained in their territories are also deserving of recognition.<sup>240</sup> Alternatively, parties must allow non-parties an opportunity to negotiate comparable recognition agreements.<sup>241</sup> However, as a GATT Counsellor noted, GATS is unlikely to force bilateral agreements to be multilateralized.<sup>242</sup>

## V. CONCLUSION

Clients increasingly demand that their lawyers be able to service all their legal needs—both at home and abroad. Foreign lawyers enable the legal profession to provide the services that modern clients demand. Foreign lawyers' efforts to provide efficient and cost-effective legal services are hindered, however, by an array of restrictions that create an inefficient environment for the delivery of international legal services. The lack of uniform rules regulating foreign lawyers only magnifies these inefficiencies.

Both the United States and the European Union have taken some steps to address this problem. Overall, their efforts have had limited effect. Negotiators of NAFTA and GATS also set out to liberalize the regulation of foreign lawyers' regulatory regimes. However, as the GATS negotiations seem to indicate, the traditional method of liberalization through trade concessions may not succeed in liberalizing the regulation of foreign lawyers.

While neither GATS nor NAFTA achieved significant immediate liberalization, both agreements established a structure for future dialogue and negotiations between governments, sub-national jurisdictions, and representatives of the legal profession. This structure allows jurisdictions to reach flexible agreements to liberalize the regulation of foreign lawyers. Under NAFTA, a Foreign Legal Consultancy Agreement may be reached between interested jurisdictions throughout North America. Under either NAFTA or GATS, jurisdictions may reach recognition-based agreements that could liberalize foreign lawyers' regulatory regimes to various degrees. It is largely up to the legal profession throughout the world to take advantage of these opportunities and improve the environment for the delivery of international legal services.

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240. See *supra* notes 177, 195 and accompanying text.

241. *Id.*

242. See *supra* note 179 and accompanying text.