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Transnational Legal Practice Developments

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Transnational Legal Practice Developments

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I. Issues

A common misconception among U.S. lawyers is that the regulation of their practice is based solely on the law of the jurisdiction(s) of their licensure. In the case of lawyers licensed in the United States, this would be the laws of the states of bar admission. Actually, the issue is more complex. First, there are rules applicable to the entitlement to “practice law;” second, there are separate rules regarding how that practice is conducted. The jurisdiction of initial licensure is the primary source of both sets of rules, but in addition, jurisdictions in which the lawyer actually “practices”—through the delivery of legal services to persons in a given geographic location or through physical presence in that location—are also applicable. While the regulation of the practice of law by U.S. lawyers is indeed predominantly governed by state law, such regulation operates today against a significant and evolving regulatory backdrop that includes the international trade in services. Cross-border practice, both as it affects lawyers crossing state boundaries or international frontiers, is generally referred to as “multijurisdictional practice” or “MJP” to reflect the fact that the rules of more than one jurisdiction may—and generally do—affect a lawyer’s right to practice law in a location other than the jurisdiction of licensure. Despite the “globalization” of the world’s economy, the rules applicable to lawyers working within it are generally defined by geographic boundaries. That fact has generated extensive efforts by key members among the more than 160 participants in the World Trade Organization to enhance cross-

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border trade in legal services through a process under the auspices of the WTO's General Agreement on Trade in Services (GATS).¹

This report describes briefly recent international and domestic regulatory law developments affecting lawyers engaged in multijurisdictional practice.

II. International Developments

A. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The GATS is one of the agreements annexed to the Agreement Establishing the World Trade Organization (WTO) adopted in 1994.² Article XIX of the GATS required WTO Members to begin, within five years, negotiations to liberalize trade in services beyond the first obligations accepted in 1994. The principal concept in such liberalization is ever wider "market access;" i.e., assurance to providers of services in one member "access" to offer and provide their services within the markets of other members. The two main pillars of such access are "national treatment" and "most-favored-nation" (MFN) principles that require foreigners to be treated equally with local providers regarding rights to offer services and require treatment of all foreigners on terms equal to those granted the most favored of them. Each of these principles is tempered by appropriate "prudential principles" that permit members to impose regulations to protect consumers or other public policies, so long as they are not applied in a discriminatory manner.

These ongoing negotiations are referred to here as "Track 1" of the GATS. "Track 2" of the GATS, which is based on article VI(4), requires WTO Members to develop "any necessary disciplines" to ensure that domestic regulatory measures do not create unnecessary barriers to trade.³

1. Track 1 Activities

In November 2001, WTO Member States met in Doha and reached agreement to engage in ongoing negotiations to further liberalize trade in services through the GATS, trade negotiations referred to as the "Doha Round,"⁴ in which developing countries are stressing

1. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS].

2. See Robert E. Lutz et. al., *Transnational Legal Practice: Cross-border Legal Services: 2002 Year-in-Review*, 37 INT'L LAW. 987 (2003). For additional information about the GATS' application to legal services, see International Bar Association, *Gats: A Handbook on Trade in Services* (2002), available at <http://www.ibanet.org/images/downloads/gats.pdf>; Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002) [hereinafter *GATS' Applicability*].

3. GATS, *supra* note 1, art. VI(4). The complete text of this subsection states:

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

4. World Trade Organization, Ministerial Conference of 14 November 2001, WT/MIN(01)/DEC/W/1, available at <http://www.wto.org>.

a “Doha Development Agenda.” Track 1 of the GATS does *not* require the United States (or any other Member State) simply to permit foreign lawyers to practice in the United States (and the other Member States). It is intended to encourage the United States and other members to liberalize prevailing rules to facilitate that practice. At this time Track 1 *does* require that the United States (and other WTO countries) act in a transparent fashion and indicate in its *Schedule of Specific Commitments* annexed to the GATS any market access or national treatment limitations applicable to foreign lawyers who want to practice in the United States.

The Doha Round negotiations originally were scheduled to end on January 1, 2005, with a “stocktaking” to occur in September 2003 during the WTO Fifth Ministerial Meeting in Cancun.⁵ This schedule was interrupted when the negotiations broke down during the Cancun Meeting. On August 2, 2004, however, WTO Members agreed to resume the negotiations⁶ and fixed a deadline of May 2005 for new offers. As of mid-2005 offers from most countries of interest to the United States were tabled but an assessment of their “quality” was incomplete.⁷

To assist the United States Trade Representative (USTR) in formulating the US offer submitted in 2005, he published a Federal Register Notice in 2004 seeking input on the contents of the U.S. “requests” to other countries.⁸ The U.S. legal services offer, submitted on May 31, 2005, does not include any new commitments beyond the contents of the U.S. 1994 *Schedule of Specific Commitments*⁹ and changes since 1994 in eight U.S. states applicable to foreign lawyers seeking to open offices in the U.S.; further additions are possible and likely to reflect adoption of such rules by additional States.¹⁰ At the same time, it seems clear that in few countries other than the United States do services sector desires for market access have a priority in the “Doha Development Agenda” of the current Round. Reform of market access for agricultural products, particularly through the elimination of subsidies for production and export in developed countries, is the principal and most difficult aspect of the Round that could directly and quickly impact the “development” needs of the many new and less developed countries now in the WTO.

Although the U.S. requests to other countries regarding legal service access are considered confidential government-to-government communications, the Office of the U.S. Trade Representative has made available to the American Bar Association (ABA) a summary of the requests.¹¹ Non-governmental sources have published the contents of the legal ser-

5. See Sergio Marchi & Dr. Supachai Panitchpakdi, *Statements by the Chairman of the General Council and the Director-General* (Oct. 14, 2003), available at http://www.wto.org/english/news_e/news03_e/stat_gc_dg_14oct03_e.htm.

6. World Trade Organization General Council, *Doha Work Programme*, WT/L/579 (Aug. 2, 2004), available at <http://www.wto.org>.

7. *Id.*

8. Trade Policy Staff Committee: Public Comments Regarding the WTO Doha Development Agenda (DDA) and the WTO Dispute Settlement Understanding (DSU) Negotiations, 69 Fed. Reg. 71,466 (Dec. 9, 2004).

9. United States of America, *Initial Offer*, available at http://www.abanet.org/cpr/gats/legal_svcs.pdf (last visited May 13, 2005).

10. For information comparing the 1994 U.S. Schedule to later U.S. state lawyer rules, see Letter from Carole Silver, Senior Lecturer, Northwestern University School of Law, to Gloria Blue, Executive Secretary, Trade Policy Staff Committee (Nov. 8, 2002), available at <http://www.abanet.org/cpr/gats/silver.pdf>.

11. See American Bar Association, *Summary of [U.S.] Proposed Reference Paper on Legal Services*, available at http://www.abanet.org/cpr/gats/us_request.doc (last visited May 13, 2005).

vices and other requests directed toward the United States.¹² The offers tabled in 2005 are now available from the WTO website.

Since the last Year-in-Review report about the GATS, three developments should facilitate communication between the U.S. legal profession and the USTR regarding MJP of legal services. First, the ABA reconstituted the ABA Task Force on GATS Legal Services Negotiations (ABA GATS Task Force),¹³ discussed further in Section III(D)(2) below; second, a “Summit Meeting” was convened at the 2004 Annual Meeting of the ABA in Atlanta to bring together U.S. representatives from fourteen states, various U.S. legal organizations, the Law Society of England and Wales, and the Council of Bars and Law Societies of Europe (CCBE), which is the umbrella organization of the European Union’s (EU) bar associations and represents over 700,000 lawyers;¹⁴ and third, a meeting of USTR representatives and state representatives and others was held at the Office of the USTR in November 2004 in order to engage in a dialogue with the USTR about market access for the legal profession.¹⁵

A technical issue that attracted attention in 2003-04 focused on the proper “classification” of legal services negotiations using an internationally-accepted common vocabulary. During the negotiations leading to the 1994 GATS, the WTO issued Document W/120, based on a United Nations system of classification of goods and services that countries *could* but were not *required* to use when submitting their GATS commitments.¹⁶ In the current GATS Track 1 Doha negotiations, WTO Members agreed to continue to recommend, but not require, that WTO countries use the classification system in Document W/120 when making their commitments.¹⁷ At the time this Year-in-Review summary was prepared, several WTO Members had submitted proposals to revise W/120’s classification system for legal services to reflect better the importance of business advisory and counseling functions as distinguished from representation in courts or before agencies. To date, WTO Members have not agreed on any changes,¹⁸ although some WTO Member States who call themselves “Friends of Legal Services” have suggested using the September 2003 International Bar Association (IBA) Terminology Resolution as the basis for developing a legal services classification system.¹⁹ To date, the ABA has not taken a position on the classification issue.

12. Public Citizen, *GATS Requests by State*, available at http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf (last visited May 13, 2005) (requests regarding business services, which includes legal services, are listed on pp. 3-9).

13. The Mission Statement of the ABA GATS Task Force is reproduced in Laurel S. Terry, *The GATS and Legal Services: The Resumed GATS Negotiations Trigger Additional U.S. and Other Activity*, 75 B. EXAMINER 43 (Feb. 2005), available at <http://www.abanet.org/cpr/gats/articles.html>. The mission statement will appear on the forthcoming webpage of the ABA GATS Task Force, and appears *infra* at III(D)(2).

14. For additional information about the Atlanta Summit, see *id.*

15. For additional information about the November 2004 USTR meeting, see *id.*

16. World Trade Organization Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991), available at <http://www.wto.org> [hereinafter Classification List].

17. World Trade Organization Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services*, S/L/92 at ¶¶ 23-24 (Mar. 2001), available at <http://www.wto.org>.

18. For additional information on the Classification issue, including the proposals that have been submitted, see American Bar Association, *Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations*, available at http://www.abanet.org/cpr/gats/track_one_class.html (last visited May 13, 2005).

19. See International Bar Association, *Resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations*, available at http://www.ibanet.org/images/downloads/WTO_-

In summary, during 2004 the U.S. government considered what, if anything, the United States wants to “request” from other WTO Member States to assure market access for U.S. lawyers engaged in MJP and what can—and will—the U.S. “offer” to foreign lawyers wishing to engage in MJP in this country. Clearly, the USTR is committed to making “offers” based on recognition that the regulation of the legal profession is a state-by-state matter.

2. Track 2—The Disciplines Issue

In 1998, WTO Members agreed on Disciplines for Domestic Regulation in the Accountancy Sector.²⁰ Since then, WTO Members discussed extending these Disciplines to other sectors including legal services. Even while discussions about Track 1 were suspended, WTO Members continued their discussions about Track 2 issues.²¹ Annex C of an August 2004 WTO Decision states that WTO Members must intensify their efforts to conclude the negotiations regarding the Disciplines issue at the same time as the Track 1 negotiations come to completion.²²

If the Accountancy Disciplines were extended to legal services, foreign lawyers would use the qualification and licensing requirements and procedures that U.S. states apply to domestic lawyers seeking traditional qualification (rather than the unique “foreign legal consultant” qualification that exists in major U.S. jurisdictions). These WTO Disciplines might also require that, with respect to foreign lawyers, domestic licensing rules must be publicly available.²³ The ABA has not taken an official position on this issue. However, in September 2003, the IBA responded to the WTO’s consultation request by unanimously approving a resolution recommending certain changes in the Accountancy Disciplines if they were to be applied to lawyers,²⁴ and in March 2004, held a workshop on domestic regulation that addressed the Track 2 Accountancy Disciplines at which the IBA was the only legal services representative.

Resolution_in_Support_of_System_of_Terminolog_for_Legal_Services.pdf (last visited May 13, 2005) [hereinafter IBA “Terminology Resolution”]. For detailed additional information, including relevant resolutions and related source materials, about the IBA Terminology Resolution, see Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO’s Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN STATE INT’L L. REV. 695 (2004) [hereinafter *Lawyers, Gats, and the WTO*].

20. World Trade Organization Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/LJ/64 (Dec. 17, 1998), available at <http://www.wto.org>.

21. See generally, Penn State Dickinson School of Law, *Resources about the GATS and Legal Services: Minutes of the WTO Working Party on Domestic Regulation*, at <http://www.personal.psu.edu/faculty/l/s/lst3/wpdr%20minutes%20web.htm> (last visited May 13, 2005).

22. See *Doha Work Programme*, *supra* note 6.

23. For additional information about the application of Disciplines to the legal profession, see Laurel S. Terry, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 SYMPOSIUM ISSUE, THE PROFESSIONAL LAWYER 83 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=591964.

24. International Bar Association, *Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector* (Sept. 2003) available at http://www.ibanet.org/images/downloads/WTO_Resolution_on_Disciplines_for_the_Accountancy_Sector.pdf; see also the exhibits to this resolution available at http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess3_exhibit_a_terry_e.doc (last visited May 13, 2005) and http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess3_exhibit_b_terry_e.doc (last visited May 13, 2005). An unofficial annotated version of the Accountancy Disciplines shows the changes the IBA recommends. See *id.* For additional information about the WTO’s consultation and this resolution see also *Lawyers, GATS, and the WTO*, *supra* note 19.

In early 2005, Track 2 development was revived through the submission of papers regarding domestic regulation and Track 2 Disciplines.²⁵ The primary focus of the USTR has been on transparency in all regulatory regimes, a commitment that developing countries claim it is difficult to accept. Within the United States, although the federal Administrative Procedures Act provides a model for advance notice and opportunity for comment and review, not all states have adopted similar legislation and some sectors—such as legal services—have not generally been subject to APA-type requirements.

B. SUMMARY AND PROSPECTS

The GATS Doha Round did not conclude on January 1, 2005, as originally scheduled, but now aims for a final agreement by the end of 2006. In any event, a number of important developments in 2003-04 are relevant to GATS legal services negotiations and further developments throughout 2005 are likely.

Professional services, such as legal services, are clearly an important part of the world trade talks. As the GATS is intended to be a universally advantageous agreement, it is not clear that it is necessary that each market access concession sought by a signatory must be matched by an equivalent market access obligation in the same sector. The GATT clearly allowed countries to seek tariff reductions on specific exports (e.g., auto parts) in exchange for tariff reductions in products of interest to foreign suppliers to the United States (e.g., cheese). In the GATS, there is no presently pursued concept that might seek market opening commitments for lawyers (sought by the United States) in exchange for a U.S. market opening to computer engineers (sought by India), or for access for sugar imports (sought by many LDCs). Such cross-sector exchanges have not been offered for a variety of reasons. First, the sectors seeking foreign access lack the knowledge and ability to influence other sectors that might resist changes. Can lawyers ask sugar growers to allow more cane imports from the Caribbean so that lawyers may open more offices in that region? Second, services sectors are regulated by state governments that have no ability to engage in such “trades.” Can state bar regulators affect requirements applicable to grade school teachers or amounts to be granted to agricultural extension services viewed as “subsidies” abroad? As of the end of 2004, the USTR has continued to assume that each service sector requires reciprocal access. Therefore, unless the United States can offer access to foreign lawyers, the USTR feels constrained from requesting such rights for U.S. lawyers abroad.

The ABA is on record that it: (1) supports the continued regulation of legal services in the United States by the individual fifty states—essentially through regulations adopted and administered through the courts or court-supervised bar organizations; (2) urges all

25. See International Centre for Trade and Sustainable Development (ICTSD), *Technical discussions in Domestic Regulation Working Party*, 9 BRIDGES WEEKLY TRADE NEWS DIGEST No. 4, at 8 (Feb. 9, 2005). The article states the following:

Discussions in the 8 February meeting of the Working Party on Domestic Regulation focused around a Swiss paper on technical standards and a document presented jointly by India, Thailand, Pakistan and Chile on qualifications, requirements and procedures. The latter triggered debate on disciplines on domestic regulation. The meeting was not concluded and will continue on 18 February. It is likely that the US will put forward a paper on transparency issues.

At the time this Year-in-Review summary was prepared, the U.S. Transparency paper had not been made publicly available.

states to adopt rules permitting foreign lawyers to open offices within the state to practice as "foreign legal consultants" (FLC) without taking a U.S. qualification examination; and (3) recommends that foreign lawyers be permitted to engage in fly-in fly-out temporary practice on terms similar to those that the ABA urged all states to adopt with respect to domestic lawyers.²⁶ At the beginning of 2005, twenty-four jurisdictions (twenty-three states and the District of Columbia) had FLC rules in place and Utah and Idaho have been added since then with prospects for adoption also advancing in other U.S. jurisdictions. In 2004, two states (Georgia and Pennsylvania) adopted a FIFO rule for foreign lawyers when such rights were accorded domestic lawyers from other U.S. jurisdictions. The District of Columbia claims it always has permitted FIFO by both domestic and foreign lawyers. The ABA believes that, although only about half of the states have adopted FLC rules (some flawed by unduly limiting the scope of practice of the FLCs), probably 80 percent of the U.S. "market for legal services" exists in those states, with a market estimated by the USTR to have generated \$186 billion in legal fees in 2003. Those states that have adopted legal consultant rules include most of the most populous and legally/commercially active states, including New York, California, Illinois, and Texas.

As the Doha Round negotiations continue in mid-2005, the USTR will seek commitments from the United States' trading partners to adopt rules allowing foreign lawyers to establish local offices and to practice law with local lawyers in forms similar to those provided by the ABA Model Rule for FLCs. The key elements include: (1) a scope of practice including all law in which the lawyer is competent other than selected aspects of local law (such as the preparation of instruments requiring local recordation in the local language or court appearance without special leave of the court); (2) the right to use home country firm names and titles; and (3) the right to employ, be employed by, and be partners with or shareholders of, local lawyers and law firms.

C. REGIONAL AND FOREIGN COUNTRY DEVELOPMENTS

1. *Europe*

a. Third Money Laundering Directive²⁷

Following the Second Money Laundering Directive of 2001, which imposed on lawyers an obligation to report suspicious actions under certain circumstances, the European Commission has proposed a Third Money Laundering Directive.²⁸ This Directive focuses on a number of issues ranging from areas left over from the 2001 Directive to those introduced by the recently approved Financial Action Task Force 40 Recommendations.

The CCBE has registered its belief that a proper evaluation of the implementation of the Second Directive in relation to lawyers' needs should be carried out pursuant to article 2 of that Directive.²⁹ Since that assessment has not occurred, in addition to the fact that

26. American Bar Association, *Interim Report of the Commission on Multijurisdictional Practice* (Nov. 2001), available at http://www.abanet.org/cpr/mjp-final_interim_report.doc [hereinafter *Interim Report*].

27. Proposal for a Directive of the European Parliament and of the council on the prevention of the use of the financial system for the purpose of money laundering including terrorist financing, COM(2004) 448 final, available at http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0448en01.pdf (last visited May 27, 2005).

28. HM Treasury, Informal Consultation on the Third EC Money Laundering Directive, May 2004, available at http://www.hmtreasury.gov.uk/media/13555/ECmoney_laundering_may04_291.pdf.

29. CCBE, Proposed Amendments to the Proposal for a Third Money Laundering Directive (June 1, 2005), available at http://www.ccbe.org/doc/En/ccbe_amendments_to_3mld_en.pdf.

the Directive has been implemented in many disparate ways across Europe, causing unworkable levels of severity in reporting and due diligence in cross-border matters, the CCBE has requested that the new proposed Directive be delayed.³⁰ At a recent conference of European Bar Presidents, the EBPs conveyed the widespread support from the European legal profession for a delay in implementation of the Third Directive.³¹

In addition, challenges to the Second Directive have taken place in Poland, Belgium, and France. The Polish Bar has mounted a challenge against certain provisions of the implementation of the Second Money Laundering Directive legislation in Poland.³² The Polish Bar submitted a motion to the Constitutional Tribunal to determine the consistency of certain regulations with the Polish Constitution. In that submission, the Polish Bar contends that the legislation threatens (1) the interests of lawyers, the bar, and persons soliciting legal assistance from lawyers; (2) the security of legal transactions, the concept of a democratic state ruled by law, and the structure of the state; and (3) rights and freedoms of citizens guaranteed by the Constitution.³³

The Belgian Bars—the French and German speaking bars on the one hand (the *Ordre des Barreaux Francophones et Germanophones* and the *Ordre français des Avocats du barreau de Bruxelles*) and the Flemish speaking bars on the other hand (*Vereniging van Vlaamse Balies* and the *Nederlandse orde van advocaten bij de balie te Brussel*)—brought a claim before the Court of Arbitration seeking the partial annulment of the Belgian law of January 12, 2004, implementing the Second Money Laundering Directive.³⁴ The CCBE has intervened in this case to support the Belgian Bars.

In addition, the petition submitted by the French Bars against the reporting obligations imposed on lawyers in the Second Directive was very recently discussed by the European Parliament Committee on Petitions.³⁵

Finally, the CCBE Secretariat has circulated a questionnaire with twelve questions on the practical implementation of the Second Directive. The questionnaire covers practical problems, for example,

whether there have been prosecutions against lawyers, the quantity of reports to the competent authority, what triggers a report, the local bar's [or law society's] involvement in controlling the files of lawyers, the inspection of files, guidelines from the bar or law societies, challenges/proceedings against the [Second Directive] in the different Member States, and whether additional financial costs have been imposed by the Directive.³⁶

b. Competition

(1) *EU Competition Developments.* Following the publication of the European Commission study undertaken by the Austrian Institute of Advanced Studies on the economic

30. *Id.*

31. *Id.*

32. CCBE-INFO, *Challenge Mounted by the Polish Bar Against Certain Provisions of the 2001 Money Laundering Legislations* (Mar. 2005), available at http://www.lawscot.org.uk/pdfs/CCBE/n_11_en.pdf.

33. *Id.*

34. CCBE-INFO, *Belgium* (Mar. 2005), available at http://www.lawscot.org.uk/pdfs/CCBE/n_11_en.pdf.

35. CCBE-INFO, *Petition by the French Bars* (Mar. 2005), available at http://www.lawscot.org.uk/pdfs/CCBE/n_11_en.pdf.

36. CCBE-INFO, *CCBE Questionnaire* (Mar. 2005), available at http://www.lawscot.org.uk/pdfs/CCBE/n_11_en.pdf.

impact of regulation in the field of liberal professions in January 2003,³⁷ DG Competition launched in March of that year a stocktaking exercise for professional services. The purpose of the exercise was to consider the justification for and effects of restrictive rules and regulations in those professions. On February 9, 2004, the Commission published its report on competition in professional services which sets out the Commission's thinking from the perspective of competition policy to reform specific professional rules.³⁸ In 2005, DG Competition is to report on its progress in eliminating restrictive and unjustified rules.

(2) *National Competition Developments.* The Belgian Competition Authority has written to the Flemish speaking Bar to inquire about the rules applying to the legal profession. The Danish government recently established a committee to investigate the rules applying to the legal profession, such as those regarding monopolies on legal representation in court cases and ownership of law firms. Next, in Finland, contrary to its traditionally liberal approach, there seems to be a movement aimed at tightening professional regulation in the name of the proper functioning of the legal system, contrary to what is happening in the other countries.

In France, apart from the Commission's request to look into the French advertising rules of the legal profession, the French *Conseil d'Etat* has suspended, on a preliminary basis, the French rule that essentially prohibits multi-disciplinary practices (MDP). A final decision of the *Conseil d'Etat* is expected before the end of 2005. Furthermore, in Germany, the Federal Ministry of Justice has submitted a draft of a new law on legal services that will open the market for legal services to a range of other service providers, such as banks and insurers (provided that the legal service rendered by these other service providers are connected to their main activities as bankers, etc). The Monopoly Commission also initiated a review of the liberal professions including the legal profession in November 2004. There was a first meeting with representatives from liberal professions in December 2004 to discuss the regulatory framework of liberal professions. In Ireland, the Irish Competition authority is following up, in consultation with the legal profession, on the Indecon report of March 2003. The authority will issue a consultation paper, probably by the end of this year, and views will be sought on its contents before a final report is published. In Italy, the Italian competition authority is looking into the Italian professional rules on lawyer advertising. There is also a law pending before the Italian Parliament to modify the regime applying to the liberal professions, including the legal profession. In the Netherlands, there have also been recent moves at the Ministry of Justice level. The Dutch Minister of Justice plans to set up a committee to review the legal framework applying to lawyers. The issues, which would be looked into as a matter of priority, are: the board structure of the Dutch Bar, guarantees for the quality of legal services and the integrity of lawyers, and the

37. See Iain Paterson et al., *Economic Impact of Regulation in the Field of Liberal Professions in different Member States: Final Report—Part 1* (Jan. 2003), available at http://www.europa.eu.int/comm/competition/liberalization/conference/prof_services_ihs_part_1.pdf; see also Iain Paterson et al., *Economic Impact of Regulation in the Field of Liberal Professions in different Member States: Final Report—Part 2* (Jan. 2003), available at http://www.europa.eu.int/comm/competition/liberalization/conference/prof_services_ihs_part_2.pdf (last visited May 27, 2005); Iain Paterson et al., *Economic Impact of Regulation in the Field of Liberal Professions in different Member States: Final Report—Part 3* (Jan. 2003), available at http://www.europa.eu.int/comm/competition/liberalization/conference/prof_services_ihs_part_3.pdf (last visited May 27, 2005).

38. Communication from the Commission: Report on Competition in Professional Services, COM(2004) 83 final, available at http://www.europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf.

complaints-handling system and disciplinary proceedings. There are also discussions regarding the Dutch Bar test allowing “no cure no pay” in personal injury cases. The Minister of Justice has shown its disapproval of this experiment and may annul the decision. In Norway, the Ministry of Justice is continuing its work to follow up a 2002 government report on competition and legal services. The litigation monopoly is one of the questions dealt with in this review. In Poland, the Office for Competition and Consumer Protection most recently published its own-initiative report criticizing the rules of liberal professions including those of the legal profession. The report questions the rules on entry to the profession and advertising. In the United Kingdom, the Clementi Report, published in December 2004,³⁹ recommended a new system for regulation of the legal profession and new models for legal practice, including non-lawyer owned legal disciplinary practices. Apart from the Clementi Report, the Scottish Executive Justice Department set up a working group in 2004 for research into the legal services market.

c. Proposed Services Directive

On January 13, 2004, the European Commission presented a draft directive⁴⁰ designed to create an internal market in services. This piece of legislation would touch upon one of the fundamental growth engines of the EU—according to figures, 66 percent of the EU gross domestic product and 75 percent of EU jobs are linked to service activities.⁴¹ The Directive covers all services provided to consumers and businesses except free services provided by public authorities, including legal services. Some services that are already covered by specific EU law, such as financial services, telecommunications, and transport, are excluded from the directive. Overall, this means that a large array of services would be affected by the new legislation, including those offered by architects, management consultants, travel agents, car rental companies, employment agencies, healthcare service providers—and finally, lawyers.

The main elements of the Directive are

- (1) *Cutting red tape*: The new legislation would require member states to cut through administrative burdens preventing businesses from offering their services across EU borders or to set up shop in another member state.⁴²
- (2) *Country of origin principle*: Service providers would be subject to the laws of their country of origin rather than the country where the service is provided. This principle is one the most controversial parts of the Directive, but services provided by lawyers appear to be excluded from this provision on the basis that existing directives applying to lawyers already provide adequate solutions.⁴³

39. See Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales, Final Report* (Dec. 2004), available at <http://www.legal-services-review.org.uk/content/report/index.htm>.

40. Press Release, European Commission, *Services: Commission Proposes Directive to Cut Red Tape that Stifles Europe's Competitiveness* (Jan. 13, 2004), available at http://www.europa.eu.int/comm/internal_market/en/services/services/index.htm.

41. EU News, Policy Positions & EU Actors Online, *Services in the Internal Market*, available at <http://www.euractiv.com/Article?tcmmuri=tcm:29-132241-16&type=LinksDossier> (last updated June 15, 2005).

42. *Id.*

43. *Id.*

- (3) *Improved national co-operation*: National authorities are to exchange information and cooperate to replace the current duplication of national regulations and controls with a more coherent and business-friendly system.⁴⁴
- (4) *Basic common rules*: These are measures to increase trust and confidence in cross-border services, such as appropriate levels of professional indemnity insurance, lifting bans on advertising for certain professions (including lawyers), and the regulation of multi-disciplinary practices. There is also an article that calls for the drafting of EU-wide codes of practice for the professions, including lawyers.⁴⁵
- (5) *Rights of service users*: The right of consumers to use services across the EU prevents member states from imposing restrictions on such services. This includes specific authorizations to use a service (for example, architects or builders) or discriminatory tax rules.⁴⁶

The Directive has been controversial within the legal profession for a number of reasons: (1) it includes lawyers, with their special role and needs, together with a range of services not related to the administration of justice and the rule of law; (2) lawyers already have sectoral EU directives regulating their activities, in recognition of their special role; and (3) there is an increased regulation of lawyers' and bars' affairs through this directive, thus impacting the notion of self-regulation and also on the important European principle of subsidiarity (which means matters that can be best regulated at the national level should not be regulated at the European level).

The Directive has run into a great deal of political opposition from governments such as France and Germany, in the European Parliament, and from a wide range of groups representing service interests. As a result, the Commission has recently agreed to review the Directive. Some bars would prefer legal services to be excluded altogether from the Directive, and the CCBE is currently considering this question.

2. Japan

a. Foreign Lawyers System in Japan

There have been several amendments to the Foreign Lawyers Act,⁴⁷ which allows a foreign lawyer to qualify to practice in Japan as a foreign lawyer licensed by the Ministry of Justice. Under the current procedure, a foreign lawyer can qualify if he or she has three years of practice experience (one year of practice experience in Japan can be counted), is in good standing in the country of original licensure, and meets various financial/insurance requirements. Registration with the Japanese Federation of Bar Associations (JFBA) and a local bar association enables the foreign lawyer to practice as a licensed foreign lawyer. Currently, there are approximately 210 foreign lawyers registered with the JFBA.⁴⁸

44. *Id.*

45. *Id.*

46. *Id.*

47. See *Gaikoku Bengoshi ni Yoru Horitsu Jimu no Toriatsukai ni Kansuru Tokubetsu Sochi Ho* [Foreign Lawyers Law], Law No. 66 of 1986. This statute made it possible for foreign lawyers, if registered at the Japan Federation of Bar Associations (JFBA), to engage in the limited scope of legal affairs, such as those related to the laws of the jurisdictions where the foreign lawyers are qualified to practice. Otherwise, handling of legal affairs by persons other than practicing attorneys in Japan is prohibited in the Practicing Attorney Law.

48. POLA 2004 Country Report (Japan Federation of Bar Associations), *Practicing Attorney System in Japan*, available at <http://www.nichibenren.or.jp/en/activities/statements/data/POLA2004.pdf>.

b. Amendment to Foreign Lawyers Act and Measures taken by JFBA

The Foreign Lawyers Act was amended on July 18, 2003, so as to permit a joint enterprise between a Japanese practicing attorney and/or a Japanese legal profession corporation and a licensed foreign lawyer. In addition, the Act also allows employment of a Japanese practicing attorney by a licensed foreign lawyer.⁴⁹ This amendment of the Foreign Lawyers Act is expected to come into effect on April 1, 2005.

This amendment to the Foreign Lawyers Act resulted from the work of the Consultation Group of Experts on the Internationalization of the Legal Profession of the Judicial System Reform Promotion Headquarters and the Recommendations by the Judicial System Reform Council submitted to the Cabinet in June 2001. It is noteworthy that licensed foreign attorneys under these amendments are still prohibited from practicing "law outside their authority" in excess of the duty scope as prescribed in the Act.⁵⁰ Furthermore, according to the amendment of the Foreign Lawyers Act, foreign attorneys are restricted from being involved inappropriately in foreign joint legal enterprises and employment of Japanese practicing attorneys and from ordering employed practicing attorneys under the employment relationship in connection with legal affairs outside their authority.

In November 2004, the JFBA adopted new rules concerning (1) foreign joint legal enterprises; (2) the employment of Japanese practicing and/or licensed foreign attorneys by licensed foreign attorneys; and (3) the application of practicing attorney ethics, *mutatis mutandis*, to licensed foreign attorneys.⁵¹

III. U.S. Developments

A. STATE IMPLEMENTATION OF MULTIJURISDICTIONAL PRACTICE RULES

Recent developments in the United States relate to three key areas of activity in the regulation of transnational practice: (1) regulation of foreign lawyers who wish to reside and practice in the United States as legal consultants; (2) regulation of foreign lawyers "practicing" in the United States only on a temporary basis; and (3) the rights of foreign lawyers to work as in-house counsel in the United States. Both of the first two areas of regulation are covered by recommendations of the August 2002 Report of the ABA Commission on Multi-jurisdictional Practice (MJP Commission).⁵² Developments during 2004 in each of the three key areas are discussed below.

1. *Legal Consultants*

The MJP Commission recommended that all U.S. jurisdictions adopt a rule licensing foreign lawyers to work as legal consultants, the form and content of which should follow the Model Rule for the Licensing of Legal Consultants (the Model Rule) adopted by the

49. Australian Government, Department of Foreign Affairs and Trade, *Joint Study into the Costs and Benefits of Trade and Investment Liberalisation between Australia and Japan*, available at <http://www.dfat.gov.au/geo/japan/tef-study/chapter4-2-2.pdf> (last visited May 13, 2005).

50. POLA 2004 Country Report, *supra* note 48.

51. *Id.*

52. American Bar Association Center for Professional Responsibility, *Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice* (Aug. 12, 2002), available at <http://www.abanet.org/cpr/mip/final-mjp-rept-6-17.doc>.

ABA in 1993.⁵³ At the end of 2004, 24 U.S. jurisdictions had adopted rules for licensing foreign legal consultants. However, none of these jurisdictions adopted the Model Rule in full, without change. The differences from the Model Rule are minor in certain cases and significant in others. One example of a minor deviation from the Model Rule is found in Missouri's requirement that applicants have practiced a minimum of five of the last ten years prior to applying for the legal consultant license,⁵⁴ compared to the Model Rule practice requirement of five of the last seven years.⁵⁵ A significant deviation from the Model Rule relates to the scope of practice allowed to legal consultants licensed under the rules; Florida and many of the other states with legal consultant rules restrict licensed legal consultants to advising on the laws of the country in which the legal consultant is admitted to practice.⁵⁶ The Model Rule approach to scope of practice is more liberal: licensed legal consultants are authorized to advise on any law on which they are competent and permitted to advise in their home country, subject to the condition that with respect to advice on U.S. and state law, their advice must be based upon the advice of a locally-licensed lawyer.⁵⁷ Most state rules are more restrictive than the Model Rule. Added limits exist in Florida, for example, which requires foreign legal consultants to use a written retainer agreement that provides information on liability insurance, among other matters,⁵⁸ while the Model Rule imposes no comparable restrictions. Some state rules, however, are more liberal than the Model Rule. For example, New York requires only three of the last five years of practice experience for applicants, which practice need not be in the jurisdiction of licensure.⁵⁹

The FLC Rules are not widely used in the United States because full admission to the bar is much less of a problem in certain U.S. jurisdictions than in most foreign countries. First, no citizenship requirement can be imposed for admission. Second, many U.S. jurisdictions impose no residency requirements. Third, education prerequisites in certain U.S. jurisdictions are not extensive or onerous and may be completed in just one year of education in a U.S. law school. But probably most important, the bar examination in the English language can be taken and passed by many foreigners. On the other hand, many foreign countries maintain citizenship or residency requirements for bar admission, and, above all, require a local language examination that is often beyond the language capability of U.S. lawyers and irrelevant to the type of practice (e.g., drafting of international contracts) in which they are engaged.

The legal consultant licensing regime is the basis for most of the negotiation of legal services rights under the GATS.⁶⁰ Consequently, uniformity would greatly enhance the United States' negotiating position by allowing the USTR to offer a complete and transparent package to foreign jurisdictions on the legal services issue. To this end, in 2004 the Transnational Legal Practice Committee worked with U.S. jurisdictions to encourage them

53. Louis B. Sohn, *American Bar Association Section of International Law and Practice Report to the House of Delegates*, 28 INT'L LAW 207 (1994).

54. Mo. Sup. Ct. R. 9.05(a) (2005).

55. Model Rule for the Licensing of Legal Consultants § 1(b) (1993), available at <http://www.abanet.org/cpr/mjp/201h.doc> (last visited May 13, 2005).

56. Rules Regulating the Florida Bar, Rule 16-1.3(a)(1) (2005).

57. Model Rule, *supra* note 55, § 4(e).

58. Rules Regulating, *supra* note 56, at R. 16-1.3(b).

59. N.Y. Ct. Rules, § 521.1(a)(2) (2004).

60. See Lutz, *supra* note 2.

to adopt legal consultant rules if they had none, and to conform those already in place to the Model Rule.

In 2004, three jurisdictions that have never had legal consultant rules began the process of considering adoption. First, the Virginia State Bar Task Force on Multi-jurisdictional Practice proposed a legal consultant rule following the Model Rule. Pennsylvania's Disciplinary Board and the Pennsylvania Board of Law Examiners jointly proposed a legal consultant rule that was adopted in 2005, with a more restrictive approach to the scope of practice than under the Model Rule. Finally, South Carolina initiated a process to consider regulation of foreign lawyers working as legal consultants as well.⁶¹

Those jurisdictions that had adopted rules regulating legal consultants have been urged to revise their rules to conform to the Model Rule. Bar committees in several jurisdictions, including Illinois and California, initiated review of their rules in 2004. The Texas Board of Law Examiners proposed a revision of the Texas rule that would substantially conform to the Model Rule. Finally, the Supreme Court of Georgia adopted a revised legal consultant rule in 2004 that follows the Model Rule approach.⁶²

2. *Temporary Practice by Foreign Lawyers*

Temporary practice by foreign lawyers is central to multi-jurisdictional practice.⁶³ While legal consultant rules govern the rights of foreign lawyers who reside and practice on a more-or-less permanent basis in the licensing jurisdiction, these rules do not regulate the right of foreign lawyers to provide services in 'host' jurisdictions on a less-than-permanent basis. Foreign lawyers who offer or provide services outside of their home jurisdictions risk being charged with the unauthorized practice of law.⁶⁴ The Model Rule on Temporary Practice by Foreign Lawyers, recommended by the MJP Commission, clarifies the services a foreign lawyer may provide on a "temporary" basis in a "host" jurisdiction without running afoul of its unauthorized practice restrictions.⁶⁵

The States have taken several approaches to the regulation of temporary practice by foreign lawyers. One approach follows the Model Rule on Temporary Practice. Louisiana has recommended adoption of a rule based upon the Model Rule. Florida adopted Rule 4-5.5(d), authorizing foreign lawyers to provide temporary services only if the foreign lawyer associates with local counsel or anticipates being admitted *pro hac vice*, or if the services relate to proceedings involving alternative dispute resolution or transactional advice.⁶⁶ A

61. American Bar Association, *State Implementation of ABA MJP Recommendations* (Mar. 23, 2005), available at http://www.abanet.org/cpr/jclr/mjp_alpha_chart.pdf.

62. Supreme Court of Georgia Order, *Licensure of Foreign Law Consultants, Part E* (Sept. 3, 2004), available at http://www.abanet.org/cpr/jclr/flc_georgia.pdf.

63. While this article does not attempt to provide a complete review of *pro hac vice* rules as they apply to foreign lawyers, it should be noted that certain jurisdictions have revised or are considering revising their *pro hac vice* rules to authorize *pro hac vice* admission of foreign lawyers to the same extent as lawyers from other US jurisdictions. An example is Pa. B.A.R. Rule 301 (2005).

64. *Interim Report*, *supra* note 26.

65. American Bar Association Commission on Multijurisdictional Practice, *Report to the House of Delegates* (Aug. 2002), available at <http://www.abanet.org/cpr/mjp/201j.doc>.

66. The Florida proposal, which is pending before the Florida Supreme Court, is included in the Report of the Special Commission on the Multijurisdictional Practice of Law 2002, dated 10/24/03. See also, *The Florida Bar Re: Petition to Amend Rules Regulating the Florida Bar and The Florida Rules of Judicial Administration*, Case No. SC04-135 (2004), available at http://www.floridasupremecourt.org/clerk/comments/2004/04-135_ReplyToComments.pdf.

second approach was taken by Pennsylvania and Georgia, which have addressed the issue of temporary practice through revision of Disciplinary Rule 5.5 that governs multi-jurisdictional practice for domestic lawyers.⁶⁷ Model Rule 5.5 provides a safe harbor for lawyers admitted in another U.S. jurisdiction if their services in the host jurisdiction are limited to representation (1) in association with a locally-admitted lawyer; (2) relating to a proceeding in a tribunal before which the non-host state lawyer is authorized to practice; (3) in or related to an arbitration or other proceeding that is related to the lawyer's authorized practice in his or her home jurisdiction; or (4) arising out of or relating to the lawyer's practice in his or her home jurisdiction.⁶⁸ Pennsylvania modified Rule 5.5 to provide that foreign lawyers also become authorized to engage in the same temporary practices as domestic lawyers, pursuant to the Rule.⁶⁹ Georgia also used the revision of Rule 5.5 as an opportunity to define the rights of foreign lawyers to practice on a temporary basis in the United States. Rather than adopt identical provisions for foreign and domestic lawyers, however, Georgia's rule limits the temporary practice rights of foreign lawyers in two respects. First, the rule permits foreign lawyers to offer advice relating to a tribunal proceeding only if that proceeding will be held outside of the United States. Second, the rule limits foreign lawyers' advice in transactional matters to those that are offered to clients who reside or have offices in the lawyer's home country, where the matter is substantially related to the lawyer's home jurisdiction, or where international law or the law of a non-U.S. jurisdiction governs the transaction.⁷⁰

The District of Columbia and North Carolina have taken a third approach. In D.C. the Committee on Unauthorized Practices of Law of the D.C. Court of Appeals interpreted the exceptions in D.C.'s unauthorized practice Rule 49 for "incidental presence" to apply to foreign lawyers as well as domestic lawyers. A similar view was expressed by the relevant North Carolina committee.

3. *In-House Counsel*

Finally, the issue of regulation of foreign lawyers serving as in-house counsel is an important concern for foreign lawyers and businesses alike. In the United States, jurisdictions take one of three approaches to foreign in-house counsel. Certain U.S. jurisdictions have defined the services of an in-house lawyer for an employer as not constituting the practice of law and therefore not requiring admission in the particular host jurisdiction. Others consider in-house lawyers to be practicing law, but provide a limited license for them that does not require the in-house lawyer to sit for the bar examination in the host jurisdiction. A third category considers in-house lawyer services to constitute the practice of law, and requires either admission based upon passage of the bar examination or admission on motion.

67. Oregon rejected a similar expansion of Rule 5.5 to cover foreign lawyers, Email from George Reimer, Oregon State Bar Counsel (Jan. 30, 2005) (on file with author).

68. See *In re Amendments to the Pennsylvania Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement*, Per Curiam Order (2004), available at <http://www.aopc.org/OpPosting/Supreme/out/28drd-1.pdf>; Pa. R. Prof'l Conduct 5.5 (2004), available at <http://www.aopc.org/OpPosting/Supreme/out/28drd-1attach.pdf>; Ga. R. Prof'l Conduct 5.5, available at http://www2.state.ga.us/Courts/Supreme/amended-rules/6_8_2004_order.htm (last visited May 27, 2005).

69. See *In re Amendments*, *supra* note 68; Pa. R. Prof'l Conduct 5.5, *supra* note 68.

70. See Ga. R. Prof'l Conduct 5.5, *supra* note 68.

Certain jurisdictions taking the second approach, which involves adopting a rule providing for a limited license for in-house lawyers, have proposed that these rules include foreign lawyers in their scope. At least three jurisdictions—Virginia, Washington and Louisiana—have proposed rules allowing foreign lawyers to work as in-house counsel under either a limited license or similar capacity.⁷¹

Finally, the District of Columbia provides an exception to its general prohibition on unauthorized practice for certain limited activities, including serving as in-house counsel.⁷² Foreign lawyers who advise only their regular employer, even though not admitted locally, are engaged in the “authorized practice of law.”⁷³ The District of Columbia has included foreign lawyers within the class of persons entitled to claim “incidental presence,” thus they are exempt from the prohibition on the unauthorized practice of law.⁷⁴ It is likely that the same approach would extend to foreign in-house counsel, although no formal opinion of that effect has been issued.

B. FREE TRADE AGREEMENTS AND LEGAL PROFESSIONAL REGULATION

U.S. Bilateral Investment Treaties (BIT) and Free Trade Agreements (FTA) impact transnational legal practice. Important developments in these agreements have focused attention on the mobility of lawyers. The United States is a party to more than 40 BITs and a half dozen FTAs (with more awaiting conclusion and ratification). Their proliferation is partially attributable to concerns that broad multilateral agreement in the GATS may prove elusive or even impossible, at least within a reasonably short time.

The GATS contemplates four “Modes” by which services may be delivered by service suppliers in one country to users of the services in another. Mode 1 involves the delivery of the service through the mail or electronically without the presence of the provider in the receiving country (e.g., a lawyer’s e-mail to a foreign client is such a delivery).⁷⁵ Mode 2 involves the receipt of the service by the “foreigner” in the location of the service provider (e.g., the foreign client’s receipt of services in a U.S. lawyer’s U.S. or third country office is such a delivery).⁷⁶ Mode 3 involves the “permanent establishment” of the service provider in a foreign country for the delivery of the service (e.g., a U.S. lawyer opens an office in the foreign country and arranges for the delivery of services through that office, although

71. Virginia’s proposal would allow foreign lawyers to register with the Virginia State Bar under Part II of its Rule 1A.5. See generally, Virginia State Bar, *Virginia Supreme Court to Review Proposed Foreign Legal Consultant Rule*, available at http://www.vsb.org/profguides/proposed/rule_1A7.html (last visited May 13, 2005); Interview with James M. McCauley, Ethics Counsel Virginia State Bar [telephone] (Feb. 1, 2005) (on file with author). Washington’s proposal would allow foreign lawyers to serve as in-house counsel under a “special admissions” license. Washington Courts, *Suggested Amendment Admission to Practice Rules*, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rules_display&folderid=2004Dec&fileid=APR8 (last visited May 13, 2005). Louisiana State Bar Association Multijurisdictional Practice Committee recommended adoption of an in-house counsel rule applicable to foreign lawyers. See Louisiana State Bar Association, *Multijurisdictional Practice Committee Recommendations*, available at http://www.lsb.org/Bar_Information/multijurisdictional_practice_c1.html (last visited May 13, 2005).

72. D.C. Cir. R. 49(c)(6) (2005).

73. *Id.*

74. District of Columbia Bar, *Report and Recommendations of the District of Columbia Bar Special Committee on Multijurisdictional Practice*, available at <http://www.dcb.org> (last visited May 27, 2005).

75. *GATS’ Applicability*, *supra* note 2.

76. *Id.*

the work required to deliver the service may have been performed elsewhere).⁷⁷ Mode 4 involves the “temporary presence” of the service provider in the foreign country for the purposes of delivering the service (e.g., the not unusual practice of U.S. lawyers to fly-in-fly-out to provide their advice).⁷⁸ Because many GATS members believe that Mode 4 covers *any* entry of persons into a foreign country in a non-immigrant status, including those who would staff the “permanent establishment[s]” contemplated by Mode 3, this issue has become intertwined with the difficult issues of cross-border movement of semi-skilled workers and “immigration policy.”⁷⁹

The U.S. BITs and FTAs do not follow the GATS terminology. The concepts of the GATS, however, are embraced by those agreements. As a general rule, BITs and FTAs do not address the rights of nationals of one Party to provide services to nationals of the other Party under Modes 1 and 2. The core objectives of the BITs are to assure to nationals of the signatories non-discriminatory access for direct foreign investment in each others’ territories and to protect the rights of those investors under internationally recognized rules of law that protect foreign investors. FTA’s are BITs plus commitments to provide duty-free access to imported goods and liberal access to service markets beyond the benefits available under the broad multilateral agreements such as the GATT or GATS. Of greatest relevance to lawyers and the rights these agreements grant to service providers to establish in the treaty partner’s territory offices under the concepts of Mode 3. U.S. BITs and FTAs concluded prior to 2004 included specific rights of senior managers to manage and direct their employers’ foreign establishments.⁸⁰ These provisions, among others, enabled U.S. attorneys to travel to and work in the territory of a BIT or FTA signatory.⁸¹ Moreover, these provisions also guaranteed access on the same terms to the United States for attorneys from BIT or FTA signatory countries.⁸² Naturally, there were numerous other limitations (not addressed by the BIT or FTA provisions) on the ability of attorneys to engage in legal practice if they were licensed only to practice in another jurisdiction. Mode 4 temporary entries were not usually addressed in the agreements.⁸³

Potentially far-reaching changes were made in 2004 in the provisions governing the temporary entry of professionals in the BIT and FTA context. The new U.S. Model BIT released in 2004 contains fewer rights of investors to dispatch personnel to provide services through their investments in the territory of a BIT signatory.⁸⁴ The only commitment required by the text is the avoidance of nationality rules applied to senior managers or directors of investments.⁸⁵ The FTAs with Chile and Singapore did include extensive provisions regarding “temporary entry,” including assurances of the visas necessary to enable

77. *Id.*

78. *Id.*

79. *Id.*

80. See, e.g., Honduras Bilateral Investment Treaty, July 11, 2001, U.S.-Hond., art. VII, available at <http://www.state.gov/e/eb/afd/43264.htm>; See also, North American Free Trade Agreement, Jan. 1, 1995, ch.16, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=166.

81. Bilaterals, U.S. Draft Model BIT (Feb. 14, 2004), available at http://www.bilaterals.org/article.php3?id_article=137.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

foreigners to enter the United States.⁸⁶ The visas were capped at multiples of the actual use of such entry documents in recent years and were indefinitely renewable.⁸⁷ These provisions were publicly criticized by the House Judiciary Committee as inappropriate modifications of immigration law and policy that were outside the competence of the USTR to negotiate under “fast track” procedures preventing Congressional modification of the agreed treaty text. The outcome was an agreement of the USTR to avoid any commitments on the entry of persons into the United States under BITs or FTAs still to be negotiated. The extent to which the same approach will apply to the GATS negotiations, in which Mode 4 entries are specifically contemplated (and congressionally approved), remains to be seen.

1. *Bilateral Investment Treaties*

As noted, the 2004 Model BIT contained significant changes in preexisting personnel mobility provisions. The 1994 Model BIT had contained provisions that prohibited the Parties from imposing numerical restrictions on personnel flows, the nationality of top management, or applying labor certification requirements for “professionals.” In addition, they maintain limited special investor visa status to those who could demonstrate having made an investment involving a “substantial” capital commitment.

The model BIT must be viewed against the background of increasing U.S. government scrutiny of visa applicants for security reasons, and Congressional concerns about the propriety of including immigration-related provisions in investment protection agreements.

2. *Free trade agreements*

During 2004 and early 2005, FTAs between the United States and Chile, Singapore, and Australia went into effect. Each FTA adopts a different approach to personnel mobility issues. In the case of FTA partners, which already have transparent, predictable, and relatively liberal visa regimes for temporary entry of business persons, the FTA provisions are less important than in the case of FTA partners that have less favorable immigration policies.

Therefore, the U.S.-Singapore FTA contains an entire chapter dedicated to the “Temporary Entry of Business Persons,”⁸⁸ as well as a side-letter under which Singapore agrees to recognize U.S. legal credentials, subject to certain (extremely stringent) conditions.⁸⁹ In contrast, the U.S.-Australia FTA does not contain analogous provisions, and instead has a side-letter that specifies that, “no provision of this Agreement shall be construed as imposing any obligation on a Party regarding its immigration measures.”⁹⁰ Furthermore, in the *Cross-border Trade in Services* Chapter of the U.S.-Australia FTA, article 10.1(5) provides that

86. Citizens Trade Campaign, U.S.-Chile Free Trade Agreement, available at <http://www.citizenstrade.org/chile.php> (last visited May 27, 2005).

87. Citizens Trade Campaign, U.S.-Singapore Free Trade Agreement, available at <http://www.citizenstrade.org/singapore.php> (last visited May 27, 2005).

88. See Free Trade Agreement, Jan. 1, 2004, U.S.-Sing., ch.11, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

89. See Letter from Amb. Robert E. Zoellick and George Yeo on Legal Services (May 6, 2003) (on file with author). The side-letter contains quite stringent criteria on Singapore’s recognition of the U.S. legal credentials, including a provision that only persons who are citizens or permanent residents of Singapore at the time of their receipt of a juris doctorate degree may qualify for this recognition, limiting such recognition to graduates of four U.S. law schools.

90. *Id.*

[t]his Chapter does not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment.⁹¹

At the same time, article 10.9 and annex 10-A encourage the development of standards of mutual recognition of the qualifications necessary to provide professional services.⁹²

C. STATE REGULATORY CONCERNS

During 2004, various state bar regulatory organizations expressed serious concerns about the implications of international trade agreements on the power of states to regulate the practice of law, and the states' role with respect to the negotiation of specific commitments on legal services under the GATS.⁹³ The USTR has assured states officials that the rights and responsibilities of the States to regulate the practice of law within their borders are not impaired, but that the United States will "bind" in the GATS the rules they do adopt to provide "market access" to foreign lawyers.

While the USTR's "offers" of state regulations are based on existing regulatory regimes a state is free to alter its regulation by making it less liberal or more burdensome, even after the U.S. is "committed," Particularly if the new rule is non-discriminatory and is adopted pursuant to "precautionary principles." But if a foreign country correctly claims breach of its privileges under the commitment, the United States may be subject to the affected party's suspension of its commitments to the United States.

The USTR is required to consult with its Intergovernmental Policy Advisory Committee on Trade (IGPAC) a statutory advisory committee comprised of state and local government officials,⁹⁴ and hopes to establish an ongoing constructive dialogue with state courts and the National Center for State Courts.

D. THE ROLE OF THE AMERICAN BAR ASSOCIATION⁹⁵

1. *Increasing Dialogue*

During 2004, the Transnational Legal Practice Committee (TLPC) of the Section of International Law worked to foster dialogue among the many stakeholders—both in the United States and abroad—with respect to the multijurisdictional practice of law. At the Annual Meeting in August 2004, the TLPC convened a trade in "Summit" of state bar and ABA leaders and leaders of the CCBE and the Law Society of England and Wales. At the Section's Fall 2004 Meeting in Houston, Texas, TLPC organized an "Americas Roundtable," of bar representatives from major U.S. states (California, New York, Texas, Florida) and from Canada, Mexico, Venezuela, Argentina, Peru, and Brazil, to discuss various bar-

91. Free Trade Agreement, May 18, 2004, U.S.-Austl., Art. 10.1(5), available at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.

92. *Id.*

93. *E.g.*, the National Center for State Courts and the Conference of State Chief Justices; See Leonard Post, *States Pressured to Admit Foreign Lawyers* (Feb. 8, 2005), available at <http://www.law.com/jsp/article.jsp?id=1107783316649>.

94. Bilaterals, *About the US Government's Trade Policy Advisory Committee System* (Nov. 5, 2004), available at http://www.bilaterals.org/article.php3?id_article=79.

95. See also *supra* text accompanying notes 14-16.

riers in these jurisdictions to foreign lawyer practice and ways by which such restraints might be lessened. Finally in November, with the reconstituted ABA GATS Task Force, it organized a meeting in Washington, D.C. with USTR personnel responsible for legal services negotiations in the GATS, bar leaders from interested U.S. states, ABA representatives from the Center for Professional Responsibility and related ABA entities, and leaders of the National Center for State Courts, National Organization of Bar Counsel, the Industry Trade Advisory Committee in Services, and the Coalition of Service Industries. The goal of the meeting was to create communication channels between the U.S. legal profession and the U.S. government in order to assist the government in advancing the interests of U.S. lawyers in its trade negotiations.

2. *Re-formation of ABA GATS Task Force*

The year 2004 also witnessed the re-formation of the ABA GATS Task Force. Originally established in 2003, the Task Force was re-activated to address the issues involving the impact that the ongoing GATS negotiations may have on the provision of legal services by U.S. lawyers and those from other countries. As an ABA-wide entity, it draws its membership from a variety of ABA sections and groups. One of its first acts was the issuance of a mission statement, which effectively outlines the tasks it plans to undertake in the. The Task Force will:

- (1) monitor the GATS negotiations and the negotiations of other international trade agreements that involve the United States and the provision of legal services;
- (2) coordinate the ABA's positions on issues relating to the provision of legal services by U.S. lawyers and threes from other countries in foreign jurisdictions;
- (3) advise the USTR of existing ABA policies relating to these issues and of the ABA's position on relevant aspects of the negotiations;
- (4) develop policy recommendations for the ABA and take other actions as may be necessary to carry out its mission;
- (5) assist other ABA entities in the implementation of ABA policies relating to the multi-jurisdictional practice of law in an international context; and
- (6) educate and engage in outreach to interested entities and individuals relating to the status of the GATS and other international trade agreement negotiations while providing those individuals and entities with a mechanism to transfer their input to the ABA for consideration and study.⁹⁶

96. The current roster of the Task Force includes: Don DeAmicis (Chair); Andrew Markus (Vice-Chair); Dennis Lehr (Business Law); Lindsay Meyer (Administrative Law); Philip T. von Mehren (International Law); Hon. Elizabeth Lacy (Legal Education); A. Stepherns Clay (Antitrust); Alice Richmond (NCBE); Carolyn Lamm (Board of Governors); Laurel S. Terry (Center for Professional Responsibility); Seth Rosner (CPR); Peter Ehrenhaft (ITAC Advisory Committee); Robert E. Lutz (International Law); and David Rivkin (Litigation).