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Lawyers Abroad: New Rules for Practice in a Global Economy

Kenneth S. Kilimnik

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Lawyers Abroad: New Rules for Practice in a Global Economy

Kenneth S. Kilimnik*

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I. Introduction

A. Historical Note

Practice by lawyers in foreign jurisdictions is not a new phenomenon. Long before national states arose and imposed borders and passport controls, empires ruled over people with diverse ethnic and religious backgrounds. To varying degrees, the Hellenic, Roman, and Ottoman empires applied law according to their subjects' ethnic, religious, or social status and not uniformly according to territorial standards. The coexistence of different legal systems within the same territory was the rule¹ and inevitably resulted in the legal profession — or its equivalent — being very diverse. In the Roman era and beyond, consuls were appointed to travel on board ships during long sea voyages in order to administer the laws of the country of flag.² Gradually, their jurisdiction extended not only to seamen on ship and in the port of call but also to all nationals of the country to which the consul was accredited.³

In the fourteenth century in England and the city states of the Hanseatic League, courts composed of guild members and foreign traders evolved a common "law merchant" for disputes involving traders.⁴ From the sixteenth century onwards, the Ottoman Empire granted "capitulations" to France that permitted French consular courts to operate within the Ottoman Empire.⁵ During the nineteenth century, China granted European countries and the United States extraterritorial rights allowing offenses involving their nationals to be tried in extraterritorial courts in China (such humiliation contributed to the Boxer rebellion of 1899).⁶ Extraterritorial concessions and courts came into discredit only with the downfall of colonial empires after World War I.

The "law merchant" thrives today in international commercial arbitration and in national commercial legislation, but fundamental differences exist between the exercise of traditional consular jurisdiction on the one hand and contemporary international legal practice on the

1. H.D. Hazeltine, *Roman and Canon Law in the Middle Ages*, in 5 CAMBRIDGE MEDIEVAL HISTORY 748-52 (1926) (Cambridge Series).

2. GEORGE B. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW* 211 (4th ed. 1915).

3. *Id.* at 219 n.1.

4. Uwe Blaurock, *Übernationales Recht des Internationalen Handels (The Supranational Law of International Trade)*, in 2 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 247, 251 (1993).

5. See LORD KINROSS, *THE OTTOMAN EMPIRE — THE RISE AND FALL OF THE TURKISH EMPIRE* 204 (1977).

6. WESTEL W. WILLOUGHBY, *FOREIGN RIGHTS AND INTERESTS IN CHINA* 21-22 (1920).

other. Extraterritorial courts are no longer in vogue, although extraterritorial legislation remains common. Specifically, national courts or legislatures may claim jurisdiction over persons or property situated abroad, but they lack authority to enforce their decisions. Courts of one country no longer sit in foreign enclaves. Foreign lawyers, now retained privately rather than serving as government consuls, represent nationals of the state in which they practice as well as their own nationals. Moreover, local lawyers regularly dispense advice on foreign law without being subject to licensing or review by the jurisdictions whose law they apply.⁷

B. Contemporary Note

Commercial links, family ties, travel, and telecommunication have made national borders more permeable than at any time since the start of World War I. It is thus not surprising that rules concerning the practice of law by foreign attorneys and law firms have come under challenge as outmoded and overly restrictive.

Numerous proposals are pending at regional, national, and local levels for regulating the practice of law by foreign lawyers. Many of these proposals will be revised as a result of commitments and obligations made under the new General Agreement on Tariffs and Trade signed by representatives of one hundred and twenty five states in Marrakesh, Morocco on April 15, 1994.⁸ Nevertheless, too many local bar associations still view the presence of foreign lawyers and law firms as unwanted competition rather than as a stimulant for the local handling of

7. Some have suggested that the giving of advice in a jurisdiction in which the lawyer is admitted on the law of a jurisdiction to which the lawyer is not admitted should subject the lawyer to sanctions or require licensing under the foreign jurisdiction whose law is applied. See Mary Finlay Geoghegan, *Ireland, England and Wales*, in *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* 12 (Maurice Sheridan & James Cameron eds., 1992). Such comments are as impractical as they are unwise. Such sanctions or licensing would make scope of practice limitations for foreign lawyers within a host jurisdiction appear irrational. If the practice of law in one's own jurisdiction can include giving advice on foreign law, why does admission in the home state not suffice for giving advice on a foreign law in the foreign jurisdiction as well? A response is that there is a greater expectation and need abroad for the advice on local law to be correct, and there are other locally trained lawyers who are undoubtedly in a better position to give such advice.

8. In addition to the protocol on tariff rate reductions, there are eighteen decisions, sixteen agreements, and ten understandings comprising the General Agreement on Tariffs and Trade 1994 (GATT). See General Agreement on Tariffs and Trade Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1 (1994) [hereinafter GATT 1994]. The General Agreement on Trade in Services (GATS) defines services to include "any service in any sector" with an exception for "services supplied in the exercise of government authority." General Agreement on Trade in Services, art. I(3)(b), 33 I.L.M. 44 (1994) [hereinafter GATS].

foreign transactions. Pressure to limit liberalization measures in the legal profession to regional blocs is also strong in some countries.

This Article examines the practice of law by foreign lawyers and law firms in three regions, the European Union (EU), the United States, and Japan, critically reviewing the international and regional dimensions involved in providing legal services abroad. With or without regulation, market demands are leading to closer ties among lawyers and law firms from different countries, and this phenomenon is likely to accelerate in the future.

The thesis of this Article is that trade, travel, and migration create opportunities for lawyers and law firms to provide legal advice abroad. The complicated issues involved in practice by foreign lawyers notwithstanding, local and foreign lawyers share a common interest in preserving or creating a strong legal profession. Hasty rulemaking in this area, at whatever level of government, may do more harm than good.

C. Criteria for Evaluating Foreign Lawyer Practice

Before discussing the rules applicable to foreign lawyer practice, several criteria are subjectively offered as goals to guide such practice and its regulation. First, the presence of foreign lawyers and law firms should not create an oligopoly for the largest law firms. The demand for foreign legal advice is not limited to claims or clients of a certain size or to citizens of big countries. Small countries are more likely to be takers than givers of foreign legal advice. Accordingly, their lawyers may prefer full admission to the host state's bar, while lawyers from larger countries may be content with more limited recognition. The definition and role of the legal profession varies around the world. Legal systems have completely different requirements for what lawyers should do and be. International transactions require lawyers who are familiar with several legal systems and who can communicate the differences to their clients. Thus, the entire legal profession in a global economy has a vested interest in cooperating with similarly trained colleagues around the world in order to attract and hold clients.

Second, foreign lawyers, like local lawyers, are hired to serve clients' needs. Regulation of foreign lawyers needs to be flexible enough to allow clients' judgment to control where and from whom legal advice is sought, yet firm enough to assure some certification of initial competence and redress of client grievances. Clients' needs, both commercial and noncommercial, are more and more international, thereby creating pressure for less protectionist rules in the legal profession than in other fields of enterprise. The structure of local law firms and their relations to foreign lawyers and law firms should, wherever possible, be

a matter left for the market to determine, not for bureaucracy, whether parochial or international.

Third, principles that national and local jurisdictions can adopt should be developed so that common international standards emerge for regulating foreign lawyers and law firms. While international agreements and standards should not preempt national or local rules governing the legal profession, national or local authorities should not use such agreements and standards as an excuse for postponing or avoiding the creation of an appropriate legal framework regulating the foreign practice of law. Often bilateral negotiations are more effective in addressing legal practice issues than multilateral talks. Moreover, international principles should be developed through an open process that allows concerned parties in both the legal profession and the public to participate. Maintaining secrecy in framing or implementing standards for foreign lawyer and law firm practice, as with other technical rules, multiplies the risks of abuse and disuse of such standards.

On a *de facto* level, many law firms already cooperate across national and regional borders and even share profits and losses. However, this does not justify the failure to form international standards or regional, national and local rules. Such norms, evenly applied, tend to bring predictability and efficiency to cooperative arrangements and will encourage more lawyers and law firms to invest resources in providing advice on foreign laws.

Fourth, external barriers to foreign lawyers and their practice and for the legal profession in general should be minimized. This goal, applied to foreign lawyers, entails not only reducing entry barriers such as citizenship requirements, the nonrecognition of education and professional experience, and registration formalities, but also considering ways to eliminate overlapping regulation.

Mutual recognition has become a popular slogan within the European Union to achieve the guaranteed free movement of goods and persons among the member states. It is also now being applied in assessing the conformity of goods and services to standards, both inside and outside of the European Union. Lawyers' conformity to professional conduct standards — ethics, discipline, forms of association — can also be addressed as a matter of mutual recognition to reduce multiple, often conflicting regulatory regimes.

The development of common standards at international and regional levels will make liberalizing national and local rules on foreign lawyer practice easier. Foreign lawyer practice should be done in a manner that avoids offending local customs and desired levels of sovereignty. Rumors that legal services will be the next great wave of U.S. exports are

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greatly exaggerated. Legal services, like other services, are as likely to be a U.S. import as an export.

In developing countries, a stable legal and political structure sets the groundwork for economic growth. The same is true for the legal profession. The rules now being formulated will enhance multilateral or regional growth in foreign law firm branches and the migration of lawyers, provided, however, that trade liberalization trends prevail over competing currents of regionalism, protectionism, and ethnocentrism.

D. The Demand for Advice on Foreign Laws

Many jurisdictions regard foreign law as a matter of fact that must be proven, presuming it to be identical to the law of the forum. However, commercial and noncommercial developments now demand more accuracy in ascertaining foreign law. Before investing or trading abroad, a business needs to review foreign laws. Individuals with relatives abroad need accurate information on family and inheritance matters. Travelers need to be informed about local laws and customs. Law firms and lawyers that can provide this information have an advantage over their colleagues.

The presence of foreign-trained lawyers strengthens ties among nations and facilitates the understanding of foreign jurisdictions' legal systems. However, one or two years of study or practice abroad cannot replace foreign nationals who have years of training and practice.

Other professionals and commercial entities dispense much legal advice in an abbreviated form. Accounting firms, banks, tax advisers, and corporations have been at the forefront in offering global business and personal services. Without a legal framework providing for international cooperation and recognition within the legal profession, lawyers with an interest in international practice will be drawn to such professions and entities. Furthermore, law firms will lose business to other professions and commercial entities, resulting not only in a decline in the prestige of the international lawyer, but also in a loss of influence in the legal profession as a whole.

E. Common Issues in Foreign Lawyer Practice Rules

Regardless of the terminology, foreign lawyer practice rules in all jurisdictions address similar issues. However, they do so in different ways, straining each legal system as lawyers look over the shoulders of their foreign colleagues, eager not to be more generous than their neighbors in recognizing foreign lawyers. This phenomenon is referred to as reciprocity.

The following areas are of major concern to the U.S. lawyer or law firm practicing abroad and the foreign lawyer or law firm in the United States: rules of professional conduct, authority over lawyer discipline, scope of practice, relationships allowed with local lawyers, relationships to local bar associations, experience and other qualification requirements, residency requirements, and restrictions on local offices. As countries experiment with rules governing practice by foreign lawyers and law firms, more issues are certain to emerge.

1. *Professional Conduct.*—The rules of ethics or professional conduct for local attorneys generally bind foreign lawyers and law firms practicing in the host state. In addition, many home jurisdictions assert continued authority over their members wherever they practice.⁹ The phenomenon of dual jurisdiction gives rise to potential conflicts particularly concerning fees and confidentiality. For example, the CCBE Code of Conduct for Lawyers in the European Community prohibits all contingency fees, while many U.S. jurisdictions selectively allow such success-based fees.¹⁰ Moreover, the European Court of Justice has ruled that no attorney-client privilege exists between foreign lawyers and their clients in Europe to protect against disclosure of attorney-client communications to the EC Commission.¹¹

2. *Discipline.*—Professional conduct rules usually give the issuing authority jurisdiction to pursue violators of the rules. On most disciplinary matters, host and home country rules have similar guides for conduct and, thus, reach similar results. However, where host and home states' rules differ, the outcome of disciplinary measures is also likely to vary. Joint disciplinary panels are one way to avoid inconsistent treatment. Another way is for one forum to defer to another or for both to defer to the authority of a third forum.

3. *Scope of Practice.*—The scope of permitted practice is treacherous terrain, well known for cutting short the celebration of

9. "Home state" refers to the place of original of admission as a lawyer. "Host state" refers to the place in which legal practice is conducted, either exclusively or in addition to the home state or a third jurisdiction.

10. Code of Conduct for Lawyers in the European Community, C.C.B.E. (Council of the [mandatory] bar associations and law societies of the European Union) § 3.3 (*pactum de quota litis* prohibited). The Law Society of England and Wales takes a more tolerant approach. Contingency fee arrangements are prohibited except with respect to an action outside of England and Wales to the extent local law permits a contingency fee arrangement. SOLICITORS PRACTICE RULES Rule 8 (1990).

11. Case 155/79, *AM&S Europe Ltd. v. Commission*, 1982 E.C.R. 1575, 2 C.M.L.R. 264 (1982).

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diplomats and bar associations after the introduction of a new rule. The scope of permitted practice can vary widely. While some countries may allow foreign attorneys to freely practice the host country's law after passing an examination, other countries may limit foreign attorneys to giving advice on the laws of the attorney's home country without requiring them to pass an exam. In between these extremes, a number of possibilities exist. The country may only allow a foreign attorney to give advice on its laws if the advice of a local lawyer is first obtained; may only allow the attorney to give advice on international law,¹² sometimes with exclusions for regional law, such as the law of the European Union; may prohibit the attorney from providing representation in certain areas such as transactions dealing with real estate, inheritances, or domestic relations; or may prohibit the attorney from appearing in front of a judicial or administrative tribunal.

4. *Relationships with Local Lawyers.*—Cooperation with local lawyers may take many forms. Generally, few limitations exist prohibiting commercial entities, lawyers, or law firms from employing foreign lawyers. The reverse situation — foreign lawyers or law firms employing local lawyers within the host state — is frequently prohibited. Shared offices, fees, costs, and liability may also be forbidden between foreign and local lawyers.

5. *Relationship to Local Bar Association.*—Whether foreign lawyers and firms enjoy full membership in the local bar association varies as does the significance of membership. Some jurisdictions regard membership as a condition for creating partnerships or other forms of associations between foreign and local lawyers. Exclusion even from voluntary bar associations may detrimentally affect the foreign lawyer's standing in the host country. Some jurisdictions allow foreign lawyers within their territory to be members of particular local bar associations according to the nationality of the foreign lawyer. The varying functions of bar associations in different countries have led to substantial differences of opinion about the importance of membership in local professional bodies.

6. *Experience and Other Qualification Requirements.*—In 1974, based on waiving-in provisions for out-of-state U.S. lawyers, the New

12. The restriction to home country law is ambiguous as far as international law is concerned. International law is regarded as part of the domestic law of many jurisdictions. See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900) (public international law is a part of U.S. law). Domestic law also includes conflict of law rules, which sometimes lead to the application of foreign law.

York Court of Appeals required legal consultants to show that they were engaged in the practice of law in their home state for five of the seven years prior to their application for membership in the New York State bar.¹³ Other U.S. states and Japan quickly adopted similar practice requirements for the licensing of foreign attorneys in their jurisdictions. Such experience requirements, often combined with reciprocity provisions that recognize only foreign attorneys whose home state jurisdictions offer equivalent access to host state lawyers, reduce the eligible applicants to a trickle. Duplicative registration formalities, fees, and liability insurance requirements can also turn away all but the most determined and well-placed lawyers.

7. *Residency Requirements*.—The longer a foreign lawyer remains in a host state, the more likely it will become that she will need to obtain official permission to reside, work, or both. This restriction obviously affects the individual lawyer and influences a law firm's decision to establish a branch abroad. Foreign law firms may have to rely on local lawyers rather than lawyers from the home state or a third country. The authorities handling residency and work permits usually have little knowledge of regulations on foreign lawyer practice and apply generic guidelines regarding commercial presence and residency for foreign nationals.

Citizens of countries that belong to the European Economic Area (EEA) who are admitted to practice law in one of these countries do not need residency or work permits within the region.¹⁴ However, freedom of movement does not automatically apply under European Union laws to citizens of third countries residing within one of the EEA countries.¹⁵ The terms of bilateral agreements the United States has negotiated with many countries grant the nationals of each party reciprocal rights of commercial presence,¹⁶ but local authorities often ignore these agreements in administrative regulations and practice.

13. *United States: Foreign Legal Consultant Rules of California, The District of Columbia and New York*, 26 I.L.M. 977, 996 (1977).

14. See *infra* text accompanying note 135.

15. See *infra* text accompanying note 135.

16. For example, the Friendship, Commerce and Navigation Treaty between Germany and the United States guarantees citizens and companies of each party national treatment and most favored nation treatment with respect to the exercise of "every type of commercial, industrial, financial or other compensated activity." Law of May 7, 1954, art. VII(1), (4), 1956 BGBI.II 487 (in effect in Germany since July 14, 1956).

8. *Local Offices.*—Some jurisdictions require foreign lawyers to maintain an office within the jurisdiction.¹⁷ Others prohibit branch offices within the same jurisdiction.¹⁸ The former requirement may impede practice by a foreign lawyer in more than one jurisdiction. The latter restriction makes practice less lucrative, although it is defensible where local lawyers face similar rules.

II. The New International Framework

One hundred and seventeen states participated in the Uruguay Round negotiations on amendments to the General Agreement on Tariffs and Trade (GATT).¹⁹ For the first time in recent history, an international trade organization with mandatory jurisdiction for negotiating rules and resolving disputes will come into existence. However, one should not expect too much from these agreements. The GATT agreements are commitments that countries make at the international level. Complaints about their sufficiency or implementation can only be brought in the GATT structure by other member states of GATT.²⁰ Moreover, the new General Agreement on Trade in Services (GATS) subjects legal services to trade-offs for concessions on goods and other services. Finally, some governments may simply avoid using GATT negotiations and dispute settlement procedures.

A. GATT Negotiations on Legal Services

The United States first proposed liberalizing trade in services in 1982 after the General Agreement on Trade and Tariffs (GATT) Tokyo Round of negotiations.²¹ The Uruguay Round of GATT negotiations,

17. Examples are the District of Columbia and New York. See N.Y.R. 521.1(a)(5); D.C. CT. APP. 46(c)(4)(A)(3).

18. An example is Japan. See Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers art. 50 [hereinafter Special Measures Law].

19. See GATT 1994, *supra* note 8. The European Communities participated in the negotiations, but not as a state. *Id.*

20. See, e.g., General Agreement on Tariffs and Trade, 1947, art. XXII(1), 19 T.I.A.S. 1700, 55-61 U.N.T.S. (1950) ("Each contracting party shall . . . afford adequate opportunity for consultations regarding such representations as may be made by another contracting party . . ."); GATT Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1994) ("Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member . . ."); GATS, *supra* note 8, art. XXIII(1) ("If any Member should consider that any other Member fails to carry out its obligations or specific commitments under the agreement, it may . . . have recourse to the [dispute settlement] procedures.").

21. See Generalkonsul Toshiyuki Kawakami, Symposium der Deutsch-Japanischen Juristen Vereinigung (DJJV) in Hamburg, 5 DJJV-MITTEILUNGEN 17 (1991) (introductory speech by Consul General of Japan at the first symposium of the German-Japanese Lawyers Association in Hamburg).

which began in 1987, initially laid out the following framework for an agreement on services: defining concepts, formulating basic principles, defining the covered sectors, developing international rules regarding service transactions, and establishing standards that contribute to expanding or restricting sectoral services.²²

In the mid-1980s, a U.S. goal in the new GATT round of talks involved two aspects of legal services: the right of law firms to establish a commercial presence and the right of individuals to practice law abroad.²³ The latter was to be subject to limitations of immigration and licensing policies.²⁴ Three generic principles were promoted for services: national treatment — treating foreign nationals and nationals of the host country equally, with consideration to national regulations; market access — liberalizing the access of foreign service providers to local markets; and most favored nation (MFN) treatment — offering the same market access or other commitments to nationals of all participating countries.²⁵ It was thought that the use of specific sectoral agreements would further restrict MFN treatment so that countries could choose on a sectoral basis whether to grant MFN treatment.²⁶

The GATS closely follows these initial principles. With regard to legal and other types of services, countries determine the nature of their offer.²⁷ This “nondecision” with regard to legal services was sealed in a meeting between the federated bar of Japan (the Japan Federation of Bar Associations), the federated bar of the European Union (the CCBE), and representatives of the leading voluntary U.S. bar association, the

22. *Id.*

23. Thierry N. Noyelle & Anna B. Dutka, *International Trade in Business Services: Accounting, Advertising, Law and Management Consulting*, in AMERICAN ENTERPRISE INSTITUTE TRADE IN SERVICES SERIES 123-26 (1988).

24. *Id.* at 121, 124.

25. *Id.* at 124-26.

26. *Id.* at 123-26.

27. See GATS, *supra* note 8, art. XVI(1) (“With respect to market access . . . each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its schedule.”); *id.* art. XVI(2) (defining measures that a Member shall not maintain or adopt “(i)n sectors where market access commitments are undertaken . . . unless otherwise specified in its schedule”); *id.* art. XX(1) (“Each Member shall set out in a schedule the specific commitments it undertakes.”).

Although the 1994 GATT agreements were concluded on December 15, 1993, countries could at any time improve their offers (but not reduce them) until the signatory conference in Marrakesh, Morocco, in mid April of 1994. See Erich Reyl, *In Genf beginnt nun die Sichtung der Papierberge*, HANDELSBLATT, Jan. 12, 1994. The GATT Secretariat attempted to get the parties to translate their tabular schedules into written form. Telephone interview with sources involved in the GATS negotiations (January 5, 1994) (on file with author). However, the prospects of this effort were uncertain. *Id.*

American Bar Association.²⁸ At this October 1993 meeting in Evian, France (a short boat ride from GATT headquarters in Geneva), the United States proposed using its "best efforts" to persuade all U.S. jurisdictions to adopt foreign legal consulting rules and agreed to commit the United States to permitting U.S. lawyers to form partnerships with foreign lawyers.²⁹ The Japanese offered to create a form of legal services in which Japanese and foreign lawyers in Japan would practice law together.³⁰ The Europeans offered to commit their member states to allowing foreign lawyers to consult on international and their home jurisdiction's law and to practice international arbitration.³¹ They were not willing to commit all EU member states to permitting European lawyers to be employees or partners of foreign lawyers and law firms.³²

The Europeans deleted European Community law from the scope of international law in their offer after U.S. representatives refused to commit themselves to opening federal courts and agencies to EU lawyers.³³ The EU and Japan rejected the U.S. proposal for an annex of the GATS on legal services by foreign legal consultants.³⁴ Thus, the GATS itself contains no specific reference to legal services. However, GATS principles apply to trade in legal services between countries participating in GATS, unless a country makes a specific exception in its schedule.

B. *The GATS and Legal Services*

1. *Definitions.*—The GATS defines services as "any service in any sector except services supplied in the exercise of governmental authority."³⁵ The Treaty of Rome, which defines the European Economic Community, contains a similar exclusion.³⁶ However, the European Court of Justice has held that the provision of legal services,

28. See Edward A. Adams, *US Lawyers Lose Opportunities in GATT Agreement*, N.Y.L.J., Dec. 17, 1993, at 5 (describing the meeting between the Japan Federation of Bar Associations, the CCBE, and the ABA).

29. *Id.*

30. *Id.*

31. John Toulmin, Speech at the Plenary Session of the CCBE (November 26, 1993).

32. *Id.*

33. Interview with sources involved in the GATS negotiations, in Brussels, Belg. (Dec. 14, 1993) (on file with author).

34. Telephone interview with sources involved in the GATS negotiations (Jan. 5, 1994) (on file with author).

35. GATS, *supra* note 8, art. I(3)(b).

36. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 55 (Activities in a state that are connected, even occasionally, with the exercise of official authority are excepted from the chapter on the right of establishment.).

except for services provided by notaries in some member states such as the preparation of documents conveying interests in real estate, is not an exercise of official authority.³⁷ This precedent, together with the internationally recognized general principle of the independence of lawyers, should place legal services within the new GATT regime on services.³⁸

The GATS refers to four "modes" of supplying services, only two of which deal with practice abroad by foreign lawyers. The first two modes are the least controversial and do not involve the physical location of the service provider — the lawyer or law firm. The first mode refers to the supply of services across national borders, with no physical presence by the lawyer or law firm abroad.³⁹ In this mode, the lawyer remains at home while providing advice to a client or colleague located abroad. The second mode concerns services a consumer receives while in the lawyer's home country.⁴⁰

The third and fourth modes refer to the physical presence of a service supplier in a foreign country. These modes specifically deal with the commercial presence abroad of a service supplier⁴¹ and an individual's presence abroad on behalf of a service supplier.⁴² These provisions state nothing about the scope of such services, the extent of presence or the length of stay. In the case of individuals, the GATS applies only to persons who have received "specific commitments" with

37. Case 2/74, *Jean Reyners v. Belgian State*, 1974 E.C.R. 631. This case is most notable for holding that a person who carries on a trade or profession may not be prevented from exercising it by reason only of his nationality in another member state of the EEC. *Id.* As an initial matter, the court ruled that the Treaty of Rome's provision on services was applicable to the legal profession and that the exclusion for governmental authority did not apply. *Id.* The court further ruled that for the exclusion to apply, official authority must be linked with the relevant profession in such a way that non-nationals would exercise, even occasionally, functions appertaining to official authority. *Id.*

38. The concept of treating lawyers' work as a service may be grating to a few traditionalists who still view the legal profession as other than a commercial trade. However, the GATS does not lump all services together, but separates them by sectors. GATS promotes links among the members of the legal profession throughout the world. The rub is that this effort is subject to bargaining involving other services as well.

39. This type of service is supplied "from the territory of one Member into the territory of any other Member." GATS, *supra* note 8, art. I(2)(a).

40. The service is supplied "in the territory of one Member to the service consumer of any other Member." *Id.* art. I (2)(b).

41. Here, the service supplier of a country participating in the GATS acts "through commercial presence in the territory of another Member." *Id.* art. I(2)(c).

42. Since commercial presence in this case is not a factor, this mode refers to the temporary supplying of legal services abroad. *Id.* art. I(2)(c). The service supplier of a country participating in GATS acts "through [the] presence of natural persons of a Member in the territory of any other Member." *Id.* art. I(2)(d).

respect to the supply of a service abroad.⁴³ Persons seeking jobs abroad are not covered.⁴⁴

2. *The Dance of Words: Obligations and Commitments.*—The GATS provides partisans of every issue ample opportunity to rely on the same provisions to support their positions. Participating countries essentially can state in their schedules their positions on the practice of law by foreigners in their territory.⁴⁵ The institutions to be created under the new Uruguay Round GATT agreements are intended to create an atmosphere for multilateral consensus and, where consensus can't be reached, a forum for binding interpretation of a participating country's obligations and commitments to foreign nationals.⁴⁶ The three fundamental principles enshrined in the GATS are most favored nation (MFN) treatment,⁴⁷ market access,⁴⁸ and national treatment.⁴⁹ Exceptions and waivers riddle each of these principles.

(a) *Most Favored Nation Treatment.*—A participating country can claim an exemption to its obligation to provide MFN treatment on any measure.⁵⁰ "In principle," this exemption is not to exceed ten years.⁵¹ Agreements for economic integration⁵² and integration of labor markets⁵³ can result in preferred treatment of nationals of the integrating countries. However, juridical entities located in the integrated countries are to receive the benefits of economic integration agreements.⁵⁴ Foreign lawyers will lose MFN treatment with regard to nationals of the integrated countries but will have MFN treatment as to nationals of all other participating countries in the GATS.

(b) *Market Access.*—The limitations and conditions of market access for service providers depend on what a country offers in its

43. GATS, *supra* note 8, Annex on Movement of Natural Persons Supplying Services Under the (GATS) Agreement, ¶¶ 1, 2.

44. *Id.*

45. See GATS, *supra* note 8, art. XVI(1).

46. See Understanding on Rules and Procedures Governing the Settlement of Disputes §§ 25, 23.1, 33 I.L.M. 112 (1994).

47. GATS, *supra* note 8, art. II.

48. *Id.* art. XVI.

49. *Id.* art. XVII.

50. *Id.* art. II(2).

51. *Id.* Annex on Article II exceptions, para. 6.

52. GATS, *supra* note 8, art. V.

53. *Id.*

54. *Id.* art. V, para. 6. Only agreements among developing countries may withhold MFN treatment to juridical entities owned or controlled by foreign nationals. *Id.* art. V(3)(b).

“schedule.”⁵⁵ The GATS imposes no obligations on market access to foreign service suppliers. Accordingly, where no commitments are made, no obligations arise.⁵⁶ However, once offered, a commitment becomes an obligation.⁵⁷ Moreover, unless a country otherwise specifies in its schedule, numerical and transactional volume limits on market access and measures that restrict or require a foreign service provider to use a particular form of joint venture or entity are prohibited.⁵⁸

(c) *National Treatment*.—National treatment of foreign service providers is subject to conditions and qualifications in a country’s schedule.⁵⁹ A host country may treat foreign service providers differently than its nationals, provided that it does not modify conditions of competition in favor of its nationals.⁶⁰

(d) *Recognition of Professional Qualifications*.—GATS allows participating countries to recognize qualifications of foreign service providers, but does not obligate them to do so.⁶¹ Recognition may be agreed upon through harmonization or otherwise, or may be granted unilaterally.⁶² This section opens the door for restrictive provisions. Through nonrecognition of education or experience, a country may exclude foreign lawyers or set such rigorous conditions that few foreign lawyers will be able to qualify.⁶³

55. *Id.* art. XVI(1). Article XVI(1) states, “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its schedules.” GATS, *supra* note 8, art. XVI(1).

56. *See id.* art. XVI(1), (2). The GATS allows countries to restrict market access and limit national treatment for specific sectors in which commitments are undertaken. *Id.* art. XX(2).

57. *Id.* art. XX(3) (“Schedules of specific commitments shall be annexed to this Agreement and form an integral part thereof.”). The optional nature of the GATS is summed up in the fable of the pig and the chicken. When the chicken suggests to the pig, “Let’s have ham and eggs for breakfast,” the pig responds, “No thanks. For you it’s a contribution. For me it’s a commitment.” A state signing GATS loses nothing unless its schedule contains a commitment, but it gains whatever other states commit themselves to.

The GATS obligations have a limited life. Any state may modify or withdraw any commitment in its schedule after three years from the date on which the commitment enters into force. *Id.* art. XX(1)(a).

58. GATS, *supra* note 8, art. XVI(2)(a)-(f).

59. *Id.* art. XVII(1).

60. *Id.* art. XVII(2), (3).

61. *Id.* art. VII (1) (“[A] Member may recognize the education or experience obtained, the requirements met, or the licenses or certifications granted in a particular country.”).

62. *Id.*

63. The GATS has other provisions that are intended to forestall such effects. Recognition rules for the authorization of licensing or certification of service suppliers may not discriminate between countries in the application of standards or criteria. GATS, *supra* note 8, art. VII(3). “Measures of

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The GATS contains provisions intended to safeguard against such action by prohibiting qualifications, technical standards, and licensing requirements that constitute “unnecessary barriers for trade in services.”⁶⁴ A GATS jurisprudence will likely develop in this area because the GATS encourages the creation of multilateral standards, criteria, and procedures.⁶⁵ A country can challenge recognition requirements on the grounds that they are not based on competence and ability to supply the service; are more burdensome than necessary to ensure the quality of the service; or are themselves a restriction, through the procedures imposed, on the supply of the service.⁶⁶ A separate agreement of the 1994 GATT envisions the development of multilateral standards on qualifications, requirements, and procedures; technical qualifications; and licensing requirements concerning professional services.⁶⁷

3. *Country Schedules*.—One hundred and two countries have submitted schedules to the GATS.⁶⁸ The schedules include space for entries concerning limitations on market access, limitations on national treatment, and additional commitments, with separate blocks for each mode of supplying services.⁶⁹ Countries are permitted to modify or withdraw any commitment in its schedule three years after the commitment enters into force.⁷⁰ Modification or withdrawal entitles any other participating country in GATS to request negotiations on compensatory adjustments.⁷¹ The GATS envisions successive rounds of negotiations to achieve “a progressively higher level of liberalization.”⁷²

general application affecting trade in services” are to be administered reasonably, objectively, and impartially. *Id.* art. VI(1). Rules on the recognition of education and experience should fall within the above named category. Finally, the council for trade in services to be established in the world trade organization is to develop international standards to ensure that “qualification requirements and procedures . . . and licensing requirements do not constitute unnecessary barriers to trade in services.” *Id.* art. VI(4).

64. *Id.* art. VI(4).

65. *Id.* art. VII(5).

66. GATS, *supra* note 8, art. VI(4)(a)-(c).

67. Decision Concerning Professional Services paras. 1, 2, GATS Doc. MTN/FA III-7(g). Priority is to be given to the accounting sector as a result of requests by international accounting firms. *Id.* para. 2.

68. Of the 90 schedules submitted, the European Union provided a single schedule covering the 12 member states of the EU.

69. GATS, *supra* note 8, art. XXI(1)(a)-(c).

70. *Id.* art. XXI(1)(a).

71. *Id.* art. XXI(2)(a).

72. *Id.* art. XIX(1).

This Article reviews the schedules submitted by Japan, the European Union, and the United States. Surprisingly, the United States, which pushed hardest for the inclusion of legal services in the GATS, concentrated its negotiation efforts on opening the Japanese market, a market with far fewer lawyers and potential clients than the European market. The European market contains many jurisdictions, where many more U.S. lawyers and law firms are already present.⁷³ The U.S. schedule permits U.S. lawyers to form partnerships with foreign lawyers.⁷⁴ Partnerships may be made with respect to the activity of foreign lawyers located outside the United States (the first two modes of service)⁷⁵ and to foreign lawyers in the United States who are licensed pursuant to a legal consultant rule in a U.S. jurisdiction.⁷⁶

The U.S. schedule offers qualified lawyers the opportunity to consult on the law of the jurisdiction where they were originally licensed to practice law.⁷⁷ This offer only applies to foreign lawyers who seek licensing in U.S. jurisdictions that have provisions on foreign legal consultants.⁷⁸ The schedule offers several additional commitments for practice by foreign lawyers in such U.S. jurisdictions. For instance, licensed consultants may provide advice on international law to the extent it is incorporated into foreign law,⁷⁹ or if the lawyer is competent.⁸⁰

The Japanese schedule contains a vague commitment to allow some form of association between Japanese lawyers (*bengoshi*) and foreign lawyers established as legal consultants in Japan.⁸¹ However, the

73. See, e.g., MARTINDALE-HUBBELL LAW DIRECTORY 2771B-2826B, 2340B-2414B (1990) (International Corporation Section). Twenty-seven law firms that have no lawyers admitted as *bengoshi* (Japanese lawyers) are listed with offices in Japan, compared with 92 entries alone for non-European Union based law firms with offices in England. *Id.*

74. U.S. Attachment on Legal Services, Dec. 20, 1993, § (a)(1) (copy on file with law review).

75. The United States defines this category as practice by or through a qualified U.S. lawyer. It may be argued that the additional commitment applies only to foreign nationals who obtain a full license to practice law in the United States. Regardless, the U.S. commitment does not mean that jurisdictions licensing and overseeing lawyers in the United States or abroad will permit such partnerships. It is unlikely that U.S. legislation implementing the GATS can or will preempt U.S. jurisdictions prohibiting such associations from doing so.

76. The U.S. schedule includes sixteen jurisdictions with foreign legal consultant rules. See *infra* note 292.

77. U.S. attachment on legal services, *supra* note 74, § a(2).

78. *Id.*

79. See *id.* (schedules for California, Florida, Georgia, Illinois, Michigan, New Jersey, Oregon, Texas, and Washington).

80. See *id.* (schedules for Alaska, District of Columbia, Hawaii, and New York). Ohio's schedule allows foreign legal consultants to advise on international law without further restriction. *Id.*

81. See David E. Sanger, *Japanese Say They Plan to Relax Restriction on Foreign Lawyers*, N.Y. TIMES, Sept. 21, 1993, at A8.

Japanese offer makes no commitment to allow foreign lawyers in Japan to employ *bengoshi*. The form of association to be permitted — whether as partner of a foreign law firm or as a joint venture separate from foreign law firms — remains unclear under the Japanese offer. The study commission on which the Japanese offer is based recommends that foreign lawyers be authorized to represent parties in international commercial arbitration in Japan.⁸² The commission also recommends relaxing the current rule that prohibits foreign law firms from using any name other than that of the individual lawyers who are licensed in Japan with their title as foreign office lawyers.⁸³

The EU schedule is abstruse. First, it refers to the category of “professional services, legal advice” and describes its scope as legal advice on home country law and public international law, excluding European Community law. Next, the commitment is withdrawn as being “unbound” for the provision of legal advice by foreign lawyers in the EU. Finally, the commitment is seemingly reinstated insofar as commitments are made in the introductory part of the EU’s services offer, labelled the “horizontal” section.⁸⁴

Specific limitations on market access and national treatment for foreign lawyers are listed for five member states: Greece, Denmark, Germany, Luxembourg, and Portugal. Greece requires nationality (it is unclear if this means Greek or EU nationality); Denmark only allows persons with Danish law licenses to own law firms in Denmark; Germany requires acceptance in the local bar association; Luxembourg requires registration at the national bar; and France reserves giving legal advice “as a main activity and for the public” to members of the legal and judicial professions in France.⁸⁵ The only restrictions stated on providing foreign legal advice from abroad into the EU are that France and Portugal do not commit to allowing foreign lawyers to draft legal documents abroad for use in their respective territories.⁸⁶

C. *New GATT Institutions*

The Uruguay Round agreements are to result in the creation of a world trade organization originally intended in the 1947 GATT, but never

82. EXECUTIVE SUMMARY OF THE REPORT OF THE STUDY COMMISSION ON THE ISSUE OF FOREIGN LAWYERS 5-6 (Japan Ministry of Justice and Japan Federation of Bar Associations, Sept. 30, 1993).

83. *Id.*

84. EU Schedule on Professional Services (copy on file with law review).

85. *Id.*

86. *Id.*

implemented principally because of U.S. objections.⁸⁷ The World Trade Organization (WTO) is to begin facilitating the implementation of the 1994 GATT agreements and to provide a forum for further negotiations with a startup date of no later than July 1, 1995.⁸⁸ The WTO is to have a general council composed of representatives of all member countries and three specialized councils: one for services, one for goods and one for intellectual property rights.⁸⁹ The council for trade in services may create sectoral committees.⁹⁰

Like the periodic country reports many U.S. agencies issue, the new world trade body is to issue periodic trade policy reviews of member countries.⁹¹ The WTO will also administer dispute settlement.⁹² Dispute settlement will occur through consultations among concerned states, the use of good offices, conciliation and mediation where requested by a state, and panel decisions.⁹³ A standing appellate body of seven persons is to be created to hear appeals from panel decisions.⁹⁴ The dispute resolution procedures are remarkable on three counts: they are compulsory, exclusive, and offer tough remedies ranging from suspension of benefits to compensatory payments.⁹⁵

III. Regional Frameworks: The North American Free Trade Agreement and the European Economic Area

A. *The North American Free Trade Agreement (NAFTA)*

NAFTA was signed by the United States, Mexico, and Canada on December 17, 1992, and has been ratified by the legislatures of all three countries.⁹⁶ The U.S. implementing law authorizes the President to

87. Von Wolfgang Kartte, *Ein Handelskodex der Großen Sieben: Die Erneuerung der liberalen Weltwirtschaftsordnung*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 15, 1992, at 13.

88. Agreement Establishing the Multilateral Trade Organization art. III(1), (2), 33 I.L.M. 13 (1994) [hereinafter MTO]. The name was changed to the World Trade Organization (WTO) too late to change the text of the GATT agreements issued on December 15, 1993.

89. *Id.* art. IV(2), (5).

90. Decision on Institutional Arrangements for the General Agreement on Trade in Services 1 para. 1, GATS Doc. MTN/FA III-7(a).

91. MTO, *supra* note 88, art. III(4).

92. *Id.* art. III(3).

93. Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1994). Binding arbitration may be voluntarily agreed upon in place of panel decisions. *Id.* § 25.

94. *Id.* § 17.

95. *Id.* § 23.1 ("members . . . shall have recourse [to the GATT procedures]"); § *Id.* 23.2(a) ("Members shall not make a determination . . . that a violation has occurred . . . except through recourse to [GATT procedures]."); *Id.* § 22 (compensation and the suspension of GATT concessions).

96. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. [hereinafter

implement NAFTA in the United States on or after January 1, 1994.⁹⁷ Chapter 12 concerns cross-border services.⁹⁸ Like the GATS, NAFTA contains general obligations for national treatment and most favored nation treatment for each country's service providers.⁹⁹ NAFTA also has a unique provision, a "most favored treatment" clause providing that if a country treats its own nationals better than the nationals of the most favored foreign country, or treats a foreign country's nationals better than its own nationals, the better treatment will be given to nationals of the other countries that are parties to NAFTA.¹⁰⁰

No local presence is required as a condition for providing a cross-border service.¹⁰¹ In an annex concerning foreign legal consultants, each country agrees to ensure, subject to reservations in its schedules, that nationals of another party can "practice or advise on the laws of any country in which that national is authorized to practice as a lawyer."¹⁰² A "national" under NAFTA includes permanent resident aliens as well as citizens.¹⁰³

NAFTA defines cross-border trade in services to include providing services from the territory of one party to the territory of another party

NAFTA]. Presidents Bush and Salinas and Prime Minister Mulroney signed the NAFTA at the Organization of American States headquarters in Washington, D.C. The Canadian parliament ratified the treaty in May 1993; the U.S. House of Representatives approved it on November 17, 1993; the U.S. Senate approved it on Nov. 20, 1993; and the Mexican Senate ratified it on November 23, 1993. *Mexikanischer Senat ratifiziert NAFTA*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 24, 1993, at 16; *Immer mehr Staaten der Erde rücken wirtschaftlich zusammen*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 24, 1993, at 17, 18. Two supplemental agreements concerning environmental and labor cooperation and an understanding on emergency action under chapter eight of NAFTA were concluded on September 13, 1993. See NAFTA ch. 8.

97. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 114 S. Ct. Rep. LXIII (No. 6, Jan. 15, 1994). The President must first determine that Mexico and Canada have brought their own laws into conformity with NAFTA requirements. *Id.* By contrast, NAFTA provisions that are inconsistent with U.S. laws are to have no effect. *Id.*

98. Chapter 12 of the North American Free Trade Agreement is entitled, "Cross-Border Trade in Services." NAFTA ch. 12.

99. *Id.* arts. 1202, 1203. There are two broad exceptions relevant to legal services. First, existing nonconforming measures of states are permitted until January 1, 1996, and thereafter, as listed on each country's schedule. *Id.* art. 1206(1)(a)(ii)(2). Second, measures adopted in accordance with each country's sectoral schedules are also permitted. *Id.* art. 1206(3).

100. *Id.* art. 1204.

101. NAFTA art. 1205.

102. *Id.* Annex 1210.5, § B, para. 1.

103. *Id.* ch. 2. By contrast, the GATS allows countries to deviate from treating a permanent resident as a national with respect to countries that provide less favorable treatment to permanent residents. GATS, *supra* note 8, art. XXVIII(k)(ii) (definition of national). Thus, NAFTA parties may rely on GATS in denying access to permanent residents of a NAFTA country who are nationals of a country with more restrictive rules. NAFTA contains a clause stating that NAFTA applies over any inconsistencies with other international agreements, but it is unlikely that nonparties to NAFTA could use this provision to their own advantage in a GATT proceeding. NAFTA art. 102(2).

and providing services within the territory of one party to a national of another country within the same territory.¹⁰⁴ In neither of these modes does the service provider have a presence abroad. In the third mode, combining what the GATS separates into two categories, a national of one party provides services in the territory of another party.¹⁰⁵

Like the GATS, NAFTA does not require mutual recognition of the licensing or certification of nationals of other parties.¹⁰⁶ Instead, NAFTA requires that measures member countries take on regarding such matters not impose unnecessary barriers, not be more burdensome than necessary to ensure the quality of a service, and not constitute a disguised restriction of trade.¹⁰⁷ Licensing and certification measures must be objective and based on publicly available criteria.¹⁰⁸

NAFTA does not contemplate integration of the legal professions of Mexico, the United States, and Canada through recognition of each country's licensing and certification of lawyers. The parties agree, however, to consult with professional associations of lawyers on foreign legal consultants and on the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants.¹⁰⁹

One stated intent of NAFTA is to develop common procedures throughout the territory of each party for the authorization of foreign legal consultants.¹¹⁰ Since in the United States state law primarily controls lawyer licensing and certification,¹¹¹ enforcing common procedures would mean enacting federal legislation.¹¹² However, many

104. NAFTA art. 1213(2)(a)-(b).

105. *Id.* art. 1213(2)(c).

106. *See id.* art. 1210(2) (recognizing that a NAFTA party may recognize "unilaterally or by agreement, education, experience, licenses or certifications obtained in the territory of another Party or of a non-Party"); *id.* art. 1210(2)(a) (stating that the principle of most-favored-nation treatment in Article 1203 does not require one party to recognize education, experience, licenses or certifications obtained in the territory of another party).

107. *Id.* art. 1210(1).

108. NAFTA art. 1210(1).

109. *Id.* Annex 1210.5, § B, para. 2.

110. *Id.* para. 4.

111. Admission to practice before federal agencies is controlled by the respective agency. *See, e.g.,* FTC Rules of Practice 16 C.F.R. § 4.1 (1991). Admission to practice in federal court is subject to regulation by the federal judiciary, but invariably requires full admission to practice law in at least one U.S. jurisdiction. *See, e.g.,* U.S. Sup. Ct. R. 5(1) ("It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice in the highest court of a State . . ."); E. Dist. Pa. R. 11(a) ("Any attorney who is a member in good standing of the bar of the Supreme Court of Pennsylvania may . . . make application to be admitted generally as an attorney of this court.").

112. The Annex on Foreign Legal Consultants does not refer to the means of carrying out the common procedures. NAFTA Annex 1210.5. Moreover, it obligates the parties only to "establish

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states would oppose a federal law establishing a licensing scheme for foreign legal consultants or setting specific guidelines for states to follow, considering it an intrusion into the state regulation of lawyers.¹¹³ Instead, it is likely that the United States will encourage state legislatures and courts to voluntarily enact foreign legal consultant rules and will claim if needed that states attracting the majority of foreign legal consultants already have such rules.

The annexes of NAFTA contain Mexican and U.S. declarations reserving the right to adopt any measure regarding the provision of legal services by nationals of the other.¹¹⁴ On the issue of partnership between Mexican and Canadian lawyers, Mexico adopts reciprocity. Only partnerships with Canadian lawyers licensed in Canadian provinces having reciprocal rules for Mexican lawyers are permitted.¹¹⁵ Mexico will only accept such partnerships where Canadian lawyers and ownership

a work program" and not to adopt or enforce common procedures. *Id.* Annex 1210.5, § B, para. 4. More likely, in the case of the United States, NAFTA will rely on the American Bar Association to make recommendations concerning foreign legal consultants to the state courts and boards that have licensed U.S. lawyers and foreign legal consultants to date. Each party is to consult with their relevant "professional bodies" for recommendations on foreign legal consultants. *Id.* Annex 1210.5, § B, para. 2. The development of joint recommendations by the professional bodies "designated by each of the other Parties" is encouraged. *Id.* Annex 1210.5, § B, para. 3. The American Bar Association approved a recommended model rule on foreign legal consultants at its annual meeting in August 1993. *See A.B.A. Section of International Law and Practice Report to the House of Delegates, Model Rule for the Licensing of Foreign Legal Consultants*, 23 INT'L LAW 207, 225 (1994).

113. The question will be whether NAFTA and its implementing legislation can remove authority from the states to regulate the admission of persons to the legal profession or whether the Constitution allows a dual system of licensing for foreign legal consultants.

Congress can preempt state law under its powers to regulate foreign and interstate commerce and foreign affairs. In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court upheld federal legislation implementing a treaty on the protection of migrating birds, despite contentions that the treaty and implementing act violated state hunting laws and, thus, infringed on powers reserved to the states under the Tenth Amendment. *Id.* at 432. Writing for the court, Justice Holmes stated that the United States has the power to make treaties under the Constitution and that treaties made under the authority of the United States and ratified as provided in the Constitution are the supreme law of the land. *Id.* As for limits on federal action, Holmes wrote, "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 433, 434. Thirty seven years later, following a proposed constitutional amendment to nullify treaties conflicting with the Constitution, the Supreme Court stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion of Justice Black). In the event of a mandatory federal licensing scheme for foreign legal consultants, it remains to be seen whether the Supreme Court would uphold it as readily as the Supreme Court upheld federal protection for migratory birds in *Missouri v. Holland*.

114. NAFTA Annex II (Schedule M-10 of Mexico and Schedule U-7 of US).

115. *Id.* Annex I (Schedule M-46 of Mexico). A Mexican-Canadian law firm may hire Mexican lawyers as employees. *Id.*

are not in the majority.¹¹⁶ Mexico also adheres to reciprocity in the licensing of foreign legal consultants, only allowing U.S. and Canadian lawyers to practice as foreign legal consultants in Mexico if Mexican lawyers are given equivalent treatment in the jurisdiction in which the foreign lawyer is licensed.¹¹⁷ Canada and the United States do not condition the licensing of foreign legal consultants on reciprocity, instead listing those jurisdictions with such rules and promising to include any others which have adopted similar rules by January 1, 1994.¹¹⁸

B. *The European Union and the European Economic Area*

1. *A Closed Shop?*—Two recent events have further integrated Western Europe, at least on paper, in the last year: the Treaty on European Union, commonly known as the Maastricht Treaty, which came into effect on November 3, 1993, and the Agreement on the European Economic Area, which came into effect on January 1, 1994.¹¹⁹ The first agreement creates a European Union (EU) founded on the three European Communities¹²⁰ and grants the administrative-executive branch of the EU — the EC Commission — an even stronger role in creating binding rules.¹²¹ The second agreement creates a European Economic Area (EEA) consisting of the twelve members of the EU¹²² and six of

116. *Id.* Canadian partners are prohibited from giving advice on Mexican law in such a mixed partnership. *Id.*

117. NAFTA Annex VI (Mexican Schedule M-2, paras. 1, 2).

118. *Id.* Annex VI (Canadian Schedule C-1) (listing the provinces of British Columbia, Ontario, and Saskatchewan); *id.* Annex VI (U.S. Schedule U-2) (listing fifteen jurisdictions); *see also infra* note 304.

119. *See Ein europäischer Wirtschaftsraum von der Arktis bis zum Mittelmeer*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 4, 1994, at 15.

120. Treaty on European Union, Feb. 7, 1992, art. A, 32 I.L.M. 1593 (1993) [hereinafter Maastricht Treaty]. The three Communities are the European Economic Community (EEC), the European Coal and Steel Community, and the European Atomic Energy Community. The Treaty changes the name of the EEC to the European Community (EC). *Id.* art. G.

121. The Treaty on European Union enlarges the Commission's jurisdiction to include measures dealing with public health; culture; consumer protection; trans-European transport, telecommunications, and energy "infrastructures;" the competitiveness of EU industry; the economic and social cohesion of the EU, research, and technological development; and the environment. *Id.* arts. 129, 129a, 130, 130a, 130f, 130r. A vigorous debate concerning the scope of subsidiarity occurred in ratifying the Treaty. *See Wirtschaftsprofessoren Kritisieren den Vertrag von Maastricht*, FRANKFURTER ALLGEMEINE ZEITUNG, June 27, 1992, at 12. Article 3b states, "In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member State and can therefore, by reason of the scale or effects of proposed action, be better achieved by the Community." Maastricht Treaty, *supra* note 120, art. 3b.

122. These 12 states are Belgium, Denmark, France, Italy, Ireland, Portugal, Germany, Spain, Luxembourg, the United Kingdom, The Netherlands, and Greece.

the seven members of the European Free Trade Association (EFTA).¹²³ The EEA has been called a waiting room for entry into the EU because four of the six participating EFTA members will become members of the EU on January 1, 1995, provided the European Parliament approves the individual membership agreements and the voters of the applicant countries approve the respective membership agreements by referendum.¹²⁴ The EEA Agreement adopts most Community provisions and regulations, including provisions on employment, establishment, and services applicable to lawyers.¹²⁵

The momentous political changes of 1989 have spurred a wave of association agreements and requests from Eastern European countries to join the EU, similar to their interest in joining NATO (the North Atlantic Treaty Organization).¹²⁶ The EU has concluded association agreements with Poland, Hungary, the Czech Republic, Slovakia, Romania, and Bulgaria¹²⁷ and is negotiating partnership and cooperation agreements with Russia, Ukraine, and Belarus.¹²⁸

At first glance, these events seem to have nothing to do with foreign lawyer practice. However, upon examination of the content of these

123. The six states are Finland, Iceland, Norway, Sweden, Liechtenstein, and Austria. In a referendum held on December 6, 1992, Swiss voters rejected the EEA Agreement. See Dr. Arnold Streit, *Das Abkommen über den Europäischen Wirtschaftsraum*, 47 NEUE JURISTISCHE WOCHE [NJW] 555 (1994).

124. The membership agreements are to be presented to the European Parliament on May 4, 1994, with signature by the foreign ministers of the EU member states and the applicant states expected soon thereafter. See *Am Ende steht die Regierungskonferenz*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 31, 1994, at 5. Austria, Finland, Sweden, and Norway are to hold referenda in June, September, November, and December 1994, respectively. *Id.*

125. See generally Agreement on the European Economic Area Part II, arts. 28-39 [hereinafter EEA Agreement].

126. In the case of NATO, the United States opposed requests by Eastern European countries and the Baltic countries for membership, successfully urging instead the conclusion of "partnership agreements for peace" without concrete prospects for full association. See *Der Disput über die Ausweitung der NATO: Wünsche, Bedenken, Widerstände vor dem Gipfel der Allianz*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 7, 1994, at 6. Since the United States is a member of NATO, the political-military alliance of 16 states (including Turkey, Norway, Canada, Iceland and all EU member states except Ireland), but not a member of the EU, the American strategy paradoxically blocked the only integration process in Europe in which the United States could have had full participation.

127. Many of these agreements contain provisions that grant professionals of these countries freedom of establishment within the EU and vice versa. See *Niederlassungsfreiheit*, FRANKFURTER ALLGEMEINE ZEITUNG, March 25, 1993, at 15 (agreements with Poland, Hungary, and Romania). Hungary and Poland have submitted applications to become member states of the EU. *Polnischer Antrag auf EU-Mitgliedschaft*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 30, 1994, at 2; *Polen will heute die EU-Mitgliedschaft beantragen*, FRANKFURTER ALLGEMEINE ZEITUNG, Apr. 4, 1994, at 2.

128. The EU agreement with Ukraine was initialled in March 1994. See *Partnerschaftsabkommen mit Kiew unterzeichnet*, HANDELSBLATT, Mar. 23, 1994, at 10.

agreements and the administrative regulations issued in pursuit of their goals, it becomes clear that Europe is on the verge of becoming a closed, centralized administrative law oriented society, where lawyers, no less than goods and other services, enjoy free movement only if they originate in the EEA. Non-European observers often consider the European Community to be a sort of federal government of Europe whose decisions preempt member states' law.¹²⁹ The large international presence in Brussels, chief European outpost for many non-EU law firms, strengthens this view.¹³⁰ Some governments prefer to deal with one counterpart — the Commission — rather than twelve member states.

In reality, the member states continue to regulate law in Europe, except for practice before EU institutions and the Council of Europe, and transpose or ignore decisions taken or promoted in Brussels in extraordinarily diverse ways. Member state governments appoint the seventeen members of the Commission, who head twenty three directorates and various services of the Commission in Luxembourg and Brussels.¹³¹ The member state governments exercise more direct control over basic EU policy through the Council of Ministers, the body that reviews and then approves or rejects most of the Commission's proposals before they become Community law.¹³² In trade matters, the Community has looked inward towards economic integration since 1985.

129. For example, one commentator stated, "[S]omeday the post-1992 EC single market will have a cohesive set of employment regulations applicable throughout the Community." Donald C. Dowling, Jr., *EC Employment Law After Maastricht: Continental Social Europe?*, 27 INT'L LAW. 1, 26 (1993).

130. The 1990 Martindale-Hubbell Law Directory lists, probably with some understatement, 47 non-Belgian based law firms with offices in Brussels. MARTINDALE-HUBBELL LAW DIRECTORY 2152B-2170B (1990).

131. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958), amended by the Maastricht Treaty, *supra* note 120, art. 157; DIRECTORY OF THE COMMISSION OF THE EUROPEAN COMMUNITIES 3-4 (1992). Beginning on January 1, 1995, the European Parliament must approve nominations for Commission members. Maastricht Treaty, *supra* note 120, art. 158. Their appointment then follows "by common accord of the governments of the Member States." *Id.* art. 158(2).

132. See Maastricht Treaty, *supra* note 120, arts. 189b, 189c (description of procedures for adoption of EU acts). In U.S. political terms, the Council is a second legislative chamber, like a stronger U.S. Senate whose members represent state governments and not the people of a state. In this sense, the Council resembles more the United States in congress under confederacy established by the short-lived Articles of Confederation (1781 until 1789) than the U.S. Senate.

Some observers view the Commission as being equivalent to the U.S. federal government, ignoring fundamental criticism, raised most frequently by the British, that neither the Council nor the Commission has any direct popular mandate. If, as Hamilton wrote in number 85 of the Federalist Papers, "a nation without a national government is . . . an awful spectacle," the EU in its present form could serve as an example; it is too shallow in democratic controls for a single political entity and too deep in claims of jurisdiction, resulting in a dangerous accumulation of unfulfillable expectations. THE FEDERALIST PAPERS No. 85 (Alexander Hamilton).

Specifically, it undertook its ambitious 1992 regulatory program aimed at the creation of a single, "internal" market.¹³³

Member states still frequently interpret, implement, and enforce Community law differently. However, Community law requires "mutual recognition" of other member states' services and goods in order to have oversight exercised only once, usually by the home state or, in the case of non-EU goods, at the entry state.¹³⁴

The free movement and establishment of persons and services within some member states is disturbingly parochial. They apply only to nationals of the EEA.¹³⁵ Thus, if a U.S. citizen (who holds no dual Community citizenship) attends a university in England and becomes a solicitor, she will not be entitled under Community law to practice in

133. The Single European Act of 1986, which amended the Treaty of Rome, states in Article 8A that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992." EEC TREATY art. 8A. The Treaty of Rome's initial terminology of a "common" market was thus replaced by a more inward-looking concept. See *id.* art. 8(1) (1973 version) ("The common market shall be progressively established . . ."). This criticism is not directed at the undeniable economic advantages of creating a single, barrier-free market in Europe. However, a single or internal market, whatever its name, should not discriminate against or exclude foreign commerce.

134. See Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979) (*Cassis de Dijon* decision invalidating a German law requiring a minimum alcohol content of 25 percent in order to sell a fruit liquor in Germany).

135. See EEC TREATY, amended by the Maastricht Treaty, *supra* note 120, art. 8a(1) (concerning freedom of movement) ("Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States . . ."). The Schengener Agreement envisions free movement (but not residence) without visa requirements for nationals of non-EU countries residing in the EU. See *HANDELSBLATT*, February 16, 1994, at 3.

See EEC TREATY art. 52 (concerning commercial establishment and the provision of services) ("[R]estrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be abolished . . ."); EEA Agreement, *supra* note 125, art. 31(1) ("[T]here shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States . . ."); *id.* art. 36(1) ("[T]here shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA states . . .").

The Treaty of Rome does not discriminate against third country nationals with respect to their employment or self-employment, the establishment of juridical entities by non-EU nationals, and, to a limited extent, the provision of services by non-EU nationals. See *infra* text accompanying notes 145, 184. Nevertheless, the member states' practice controls how these sometimes inconsistent treaty provisions are applied.

Public debate on non-EU nationals in Europe focuses not on employment provided or performed by them, but on asylum seekers (the term used in countries where immigration remains a taboo subject) and war refugees. The latter groups are generally perceived as posing psychological and physical threats and economic burdens rather than offering opportunities for economic growth and cultural enrichment. In a modest change of course, the EU Commissioner for Social Affairs recently proposed giving third country nationals residing in the EU a right of employment in another member state when the position involved cannot be filled by another EU citizen. *Kommission kurzfristig für restriktive Zuwanderungspolitik*, *FRANKFURTER ALLGEMEINE ZEITUNG*, Feb. 16, 1994, at 6.

other member states as are her fellow British solicitors. In the same manner, a U.S. lawyer who is a registered foreign attorney in England is not entitled under Community law to provide legal advice on U.S. law in other member states of the EU. The same applies to a U.S. firm with a branch office in London.

The GATS does not remedy this situation because it exempts integration agreements from most favored nation treatment.¹³⁶ Thus, the EU will not have to change its discriminatory policies, unless reciprocal measures encourage it. The GATS does commit EU member states to introduce foreign legal consulting rules.¹³⁷ However, their scope of practice and associational rights are likely to be far narrower than the rights accorded to EU legal professionals in at least some member states. If so, non-EU lawyers and law firms will continue to be distinctly disadvantaged in regard to providing representation to clients in the EU and to persons outside the EU wishing to do business there.

2. *The Treaty of Rome and the Legal Profession.*—The relevant sections of the Treaty of Rome¹³⁸ concerning practice by lawyers cover the freedom of movement for workers;¹³⁹ the right of establishment, including the right to establish a professional practice or business;¹⁴⁰ and the provision of services.¹⁴¹

(a) *Freedom of Movement for Employed Lawyers.*—Member states had until 1969 to introduce freedom of movement for workers within the Community by removing all discriminatory treatment of workers based on nationality in relation to employment, wages, and working conditions.¹⁴² The definition of worker has been limited in practice to employees from the member states.¹⁴³ Thus, the Japanese lawyer

136. GATS, *supra* note 8, art. V(1), (4) (Economic integration agreements providing for more liberalization of services among states within an integrated area are permitted so long as the overall level of barriers to trade in services with non-members is not raised.); *id.* art. V (permitting agreements to integrate labor markets by removing requirements for residency and work permits between citizens and member states).

137. *See supra* text accompanying note 45.

138. *See* EEC TREATY.

139. *Id.* arts. 48-51.

140. *Id.* arts. 52-58.

141. *Id.* arts. 59-66.

142. *Id.* art. 48(2).

143. *Cf.* Elspeth Guild, *Provision of Services and Free Movement of Workers — Has the European Court Opened the Door to Third Country Nationals?*, 1991 LAW. EUR. 6 (considering application of rights of establishment and provision of service to third country nationals); Rohwedder, *EC Aid Programs Fuel Reform in Former East Bloc*, WALL ST. J. EUR., Feb. 22, 1993, at 1 (noting that some international firms are "careful not to include any Americans in project teams" because the EC Commission prefers to hire Europeans for its \$1.8 billion a year assistance grants).

working in a company or law firm in London is not entitled under Community law to move to another member state to work for the same or another employer. It is also unclear under Community law whether the employer has a right under EU law to transfer this lawyer to a branch in another member state.¹⁴⁴

(b) *Right of Establishment or Commercial Presence.*—The most crucial provision of Community law for self-employed lawyers and lawyers practicing in association with other lawyers involves the right to establish a practice or business. It is also limited to nationals of member states.¹⁴⁵

Following *Cassis de Dijon*,¹⁴⁶ the Commission developed the concept that member states had to reciprocally admit each others' goods unless rejection was shown to be necessary in order to protect public health or safety or fair trading.¹⁴⁷ Although the original 1957 EEC Treaty, the Treaty of Rome, directed the Council of Ministers to issue a directive giving mutual recognition of diplomas, test certificates, and other documents of professional education "(i)n order to make it easier for persons to take up and pursue activities as self-employed persons,"¹⁴⁸ more than thirty years passed before such a directive was issued.¹⁴⁹

The 1989 diploma directive¹⁵⁰ applies to a member state's nationals wishing to pursue a regulated profession in a self-employed capacity or as an employee.¹⁵¹ It requires member states to offer an opportunity for legal professionals of one member state who are Community nationals to become a member of the legal profession of

144. In a case arising before Portugal became a full member of the Community, the European Court of Justice ruled that Articles 59 and 60 of the EEC Treaty allowed a Portuguese construction company to bring its Portuguese workforce into France to perform a contract there. Case 113/89, *Societe Rush Portuguesa Lda v. Office national d'immigration*, 1 E.C.R. 1417, 2 C.M.L.R. 818 (1990). The requirements that non-EU citizens obtain residence and work permits provide ample opportunity for local officials to restrict employment, even where their employers can transfer them to or within the EU.

145. EEC TREATY arts. 52, 53.

146. Case 120/78, *Rewe-Zentral*, 1979 E.C.R. at 649.

147. The grounds for rejecting goods are based on Article 36 of the Treaty of Rome, which lists exceptions to the obligation to remove quantitative restrictions on trade in goods among member states. EEC TREATY art. 36.

148. *Id.* art. 57(1).

149. Council Directive 89/48, 1989 O.J. (L 19) 16 [hereinafter the Diploma Directive].

150. *Id.*

151. The Treaty of Rome envisions the gradual abolition of restrictions on the recognition of the qualifications of medical, dental, and pharmaceutical professionals within the member states. EEC TREATY art. 57(3).

another member state after a training period or a special examination.¹⁵² The diploma of the home country must reflect at least a three year university level education.¹⁵³ Where one's education and training are at least one year less than required in the host member state, professional experience of up to four years in the home member state may be required.¹⁵⁴ Member states are given the choice to either require a training period in the host country of up to three years or an examination when study subjects or professional activity differs in the home and host states.¹⁵⁵

Thus far, all member states usually require an examination. Some provide for a waiver of all or part of these requirements upon recognition of education or training.¹⁵⁶ The diploma directive for lawyers and its implementing laws have been criticized for being too strict, thus impeding the integration of the legal professions in the EU.¹⁵⁷

152. Diploma Directive, *supra* note 149, Preface, art. 4.

153. *Id.* art. 1.

154. *Id.* art. 4(1)(a).

155. *Id.* art. 4(1)(b).

156. *See, e.g.*, (Belgium) Arrêté Royal dur l'accès à la profession d'avocat des ressortissants des états membres des communautés européennes, draft law, Ministry of Justice, Service du Droit judiciaire; (France) Arrêté du 7. janvier 1993 fixant le programme et les modalités de l'examen d'aptitude à la profession d'avocat, Journal officiel de la République Française J.O. 1494-1498 (Jan. 29, 1993)); (Germany) Gesetz zur Umsetzung der allgemeinen Diplomanerkennungs-Richtlinie für die Berufe des Rechtsanwalts und des Patentanwalts, 1990 Bundesgesetzblatt [BGBl.I] 1349 et seq., and the regulation, Verordnung des Bundesministers der Justiz vom 12. Dezember 1990 über die Eignungsprüfung für die Zulassung zur Rechtsanwaltschaft, 1990 BGBI.I 2881 et seq.; (Greece), Presidential decree No. 52, Official Gazette, Part A, No. 20 (Feb. 20, 1993); (Ireland) Statutory Instrument No. 1 of 1991, European Communities (general system for the recognition of higher education diplomas) Regulations, 1991, Pl. 7797, *entered into force* Jan. 4, 1991 (for solicitors); Amendment No. 3 to the Qualified Lawyers from other EC Member States (for barristers) 1987 Q.B. (Rules of the Honorable Society of King's Inn) (Amendment No. 3 with effect from Jan. 4, 1991), Rule 19(A); (Italy), Decreto legislativo no. 115, Jan. 27, 1992, Attuazione della direttiva n.89/48/CEE relativa ad un sistema generale di riconoscimento dei diplomi di istruzione superiore che sanzionano formazioni professionali di una durata minima di tre anni; and the draft regulation for EC lawyers, Bozza di regolamento ministeriale concernente la prova attitudinale di cui all'art. 8 del decreto legislativo, Jan. 27, 1992, no. 115; United Kingdom (England and Wales — barristers), Consolidated Regulations of the Honorable Society of the Inns of Court, Consolidated Regulations 28-34, Sched. 13A EC (Recognition of Professional Qualifications) Regulations 1991; EC Qualified Lawyers Transfer (Scotland) Regulations 1990, Council of the Law Society of Scotland, Dec. 22, 1990; Estatuto General de la Abogacia, RD 2090/1982, de 24 Julio, *modificado por* RD 174/1991, de 15 de Febrero (Spain). Legislation in the Netherlands establishing an aptitude test for other EU lawyers desiring admission to the Dutch bar passed by the Dutch Parliament in December 1993. Letter from the Netherlands Bar Association, Jan. 24, 1994 (on file with author).

157. The criticism centers on the difficulty of the examinations and language barriers. *Freiberufler wollen im Binnenmarkt nicht unter die Räder kommen*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 12, 1992, at 12; Dr. Christian Hackl, *Eignungsprüfung für die Zulassung zur Rechtsanwaltschaft — Verstoß gegen EG-Recht?*, 43 ANWALTSBLATT 312, 315 (1993).

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To date, there is no EU directive enabling lawyers from various states to establish law firms. In 1985, the EC Council of Ministers issued a regulation establishing the European Economic Interest Group (EEIG), which was to serve as a vehicle for cooperation among individuals or firms from different member states.¹⁵⁸ The purpose of the EEIG is to enhance or develop the economic activity of its members.¹⁵⁹ The profits or losses of each member are not shared. There are numerous EEIGs consisting of law firms from different member states, but they remain legally individual entities under their respective member state's law.

In October 1992, the CCBE approved a proposal for a directive on the right of establishment for lawyers designed to further integrate the legal profession in Europe.¹⁶⁰ The document has been submitted to the Commission, and a proposed directive is expected to be issued in 1994 based on the CCBE draft.¹⁶¹ The CCBE's draft would allow practice under a lawyer's "home title" in another member state without examination or experience requirements.¹⁶² The CCBE's draft provides this right only to lawyers who belong to the legal profession of a member state of the EU and are nationals of a member state of the EU.¹⁶³ The scope of practice under the lawyer's home title is unlimited, with the exception of three relatively narrow subjects: (1) representing clients in legal proceedings or before national public authorities, where such activities are reserved to lawyers of the host state under the EC service directive;¹⁶⁴ (2) drafting documents to administer estates; and (3) drafting documents creating or transferring interests in land.¹⁶⁵

After three years of "effective and permanent activity" in a host member state, a lawyer would be able to obtain the right to use the host country's title. To obtain the host title, the lawyer would have to show her activity included practice in the law of the host state.¹⁶⁶ Member

158. Council Regulation 2137/85, 1985 O.J. (L 199) 1.

159. *Id.* art. 3(1).

160. Draft Directive on Right of Establishment for Lawyers, C.C.B.E. (Lisbon, October 1992) [hereinafter C.C.B.E. Proposal]. Two of the 12 member state delegations — Luxembourg and Spain — voted against the proposal. *Id.* at 20-26.

161. *Solicitors Report on Progress with Paris and Brussels Bars*, 1993 LAW. EUR. 8 (No. 27).

162. C.C.B.E. Proposal, *supra* note 160, art. 5(1) (registration in host state under lawyer's home title is automatic upon submission of a certificate of good standing from the home state).

163. *See id.* art. 1(2) (A lawyer is a national of a member state who is certified to conduct professional activities in a member state under one of the professional titles accepted in such member state; the English language terms of "lawyer" or "attorney" are not on the list).

164. *See* Council Directive 77/249, 1977 O.J. (L 78) 17 [hereinafter Service Directive].

165. C.C.B.E. Proposal, *supra* note 160, art. 6(1), (2).

166. *Id.* art. 4(2).

states are to exempt such lawyers from all or a substantial part of the examination or adoption period required under the diploma directive.¹⁶⁷ While the CCBE's motives are understandable, one wonders how receiving advice on host country law from a lawyer practicing under a different title without training or education in the law of the host country can be in the interest of a client.

Other sections of the CCBE proposal concern association with local lawyers, professional conduct rules, jurisdiction over disciplinary proceedings, and agreements among bar associations.¹⁶⁸ The proposal allows lawyers from one member state to "establish" themselves in another member state either as an individual lawyer or as a member of the association in which she practices in her home state.¹⁶⁹ Associations in the host member state among lawyers using home titles and local host state lawyers are to be permitted.¹⁷⁰

Host state rules of professional conduct are to apply to lawyers practicing under home title in the host state.¹⁷¹ Only host country rules that are consistent with the CCBE common code of conduct must be followed.¹⁷² However, home state rules aimed at "safeguarding clients' interests," such as rules on handling clients' money or on obtaining professional liability insurance, are to be applied in preference to "duplicative or equivalent" host state rules.¹⁷³ This provision sidesteps cases where the provisions in host and home countries are inconsistent with one another. It also fails, however, to define what safeguarding clients' interests means.

The proposal envisions dual disciplinary proceedings. The host state may conduct disciplinary proceedings against lawyers practicing in its territory.¹⁷⁴ However, the home state may also discipline the home state lawyer for activity carried out in a host state.¹⁷⁵ In the case of a lawyer practicing in the host state under home state title, joint disciplinary

167. *Id.*

168. *Id.* arts. 11 (practice in association), 8 (rules of conduct for lawyers registered under their home title), 9 and 10 (disciplinary proceedings), and 12 (conventions between competent authorities, such entities being defined in Article 1(2)(e) as professional organizations or authorities of the member state who issue rules of education, training, admission, professional conduct, and legal discipline).

169. *Id.* art. 11(1).

170. C.C.B.E. Proposal, *supra* note 160, art. 11(3). Prohibitions in the United Kingdom and Ireland on barristers practicing with solicitors or their equivalents are to be recognized. *Id.*

171. *Id.* art. 8(1).

172. *Id.* See Code of Conduct for Lawyers in the European Community, C.C.B.E. (1988).

173. C.C.B.E. Proposal, *supra* note 160, art. 8(3).

174. *Id.* art. 9(1).

175. *Id.* art. 9(5).

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panels would be formed upon request by the home state, with equal numbers of members from the home and host states.¹⁷⁶ The CCBE proposal, not surprisingly, would allow bar associations to enter into agreements to “define, organize and facilitate” the rights of establishment under the directive, so long as such rights are not thereby restricted.¹⁷⁷

(c) *Services*.—The Treaty of Rome provides for the gradual removal of restrictions on the providing of services within the Community for nationals of member states who perform services in other members states.¹⁷⁸ Unlike the worker and establishment provisions, the services section, Article 59, specifically allows the Council to extend its benefits to services performed by citizens of a third state who are not residents of the Community.¹⁷⁹ Activities of professionals are included in the definition of service.¹⁸⁰

Strangely, Community implementing legislation authorizes “nationality neutral” legal practice before member state tribunals, but not in providing out-of-court advice.¹⁸¹ It is in this area, however, that the expertise of the foreign lawyer is most frequently called upon. The Treaty of Rome’s provision on services provides the jurisdictional basis for a directive on services by non-EU lawyers in the Community.¹⁸² Such a directive need not be limited to representation in court or temporary visits. The GATS shows that treaty and customary international law now define services as extending far beyond temporary courtroom appearances. Commercial presence and establishment are a form of providing services, and the EU can implement its GATS obligations on foreign legal consultants by issuing a directive applying to non-EU lawyers in the EU under Article 59 of the Treaty of Rome.¹⁸³

176. *Id.* art. 10.

177. *Id.* art. 12.

178. EEC TREATY, *amended by* The Maastricht Treaty, *supra* note 120, art. 59.

179. *Id.*

180. *Id.* art. 60(d).

181. *See infra* text accompanying notes 144, 186.

182. *See infra* text accompanying note 183.

183. EEC TREATY art. 59. A similar legal situation already exists for non-EU law firms in member states that permit lawyers to incorporate or form other legally separate entities. Article 58 of the Treaty of Rome provides that companies or firms formed under a member state’s law and having a registered office within the EU shall be treated in the same way as a firm or company consisting of natural persons who are nationals of a member state. Thus, non-EU law firms must be granted permission to open an office within the countries that recognize incorporated practices or other juridically separate entities for law firms. The coming into effect of GATS will strengthen this interpretation for law firms based in GATS signatory countries.

The directive "to facilitate the effective exercise by lawyers of freedom to provide services"¹⁸⁴ had a long gestation from 1969 to 1977. The EC directive does not distinguish lawyers according to nationality, but covers only persons who are admitted to the legal profession defined for each member state.¹⁸⁵ Each member state is obligated to recognize a person admitted to the defined legal professions for the purpose of representing a client in legal proceedings in the host state.¹⁸⁶ The host state may require an individual to register with a domestic professional organization or to establish residence in the host state.¹⁸⁷

The visiting lawyer may only use her home state professional title.¹⁸⁸ Member states may require that the lawyer cooperate with local counsel and be introduced to the presiding judge by the local lawyer.¹⁸⁹ The European Court of Justice rejected France and Germany's initial implementing laws of this directive insofar as they required the local lawyer to be present in court during the foreign lawyer's appearance.¹⁹⁰ The revised German law implementing the service directive eliminates this requirement.¹⁹¹ No introduction by a German attorney is required in courts where counsel representation is not mandatory, e.g., the municipal court and trial aspects of the labor and social welfare courts.¹⁹²

IV. National Rules of Practice for Foreign Lawyers

In this section, national foreign attorney practice rules of major trading countries are examined. This review is not intended to be

184. Service Directive, *supra* note 164, at 17.

185. *Id.* art. 1(2). The German law implementing this directive restricts its applicability to lawyers who are nationals of a member state of the EU. See *Gesetz zur Durchführung der Richtlinie des Rates der Europäischen Gemeinschaften vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte vom 16. August 1980*, § 1(1), BGBl.I 1453, amended by 1990 BGBl.I 479.

186. Service Directive, *supra* note 164, art. 1(1), (2). Although the directive in Article 1(1) refers broadly to "the activities of lawyers pursued by way of provision of services," the remainder of the directive addresses the representation of clients in legal proceedings. See, e.g., *id.* arts. 4(1), 5, 6.

187. *Id.* art. 4(1).

188. *Id.* art. 3.

189. *Id.* art. 5.

190. Case 294/89, EC Commission v. Republic of France (July 10, 1991) (LEXIS, Intlaw library, ECcase file) (transcript); Case 427/85, EC Commission v. Federal Republic of Germany, 1988 E.C.R. 1123, 1989 C.M.L.R. 677 (1988).

191. *Änderungsgesetz*, 1990 BGBl.I 479. Only German lawyers may appear in the highest civil court, the *Bundesgerichtshof*. EC Commission v. Federal Republic of Germany, 1988 E.C.R. at 1123. The European Court of Justice recognized this exception in its 1988 decision. *Id.*

192. *Änderungsgesetz*, 1990 BGBl.I 479.

exhaustive, but simply affords an initial comparison of the rules of various jurisdictions in the European Union, the United States, and Japan. In the EU, England and Wales and the Netherlands have the most liberal rules governing practice by foreign lawyers. In the United States, New York and Michigan are the most open jurisdictions for foreign lawyers. Japan is expected to introduce modest changes to its foreign legal consultant rules soon.

A. *England and Wales*

The English trading and colonial legacy planted Anglo-Saxon law systems in countries throughout the world, such as the United States, Canada, India, South Africa, and Australia.¹⁹³ English lawyers received much global experience representing the "Empire" abroad, and many individuals from the newly independent Commonwealth countries (such as Gandhi) received their legal training in England or from English

193. The colonial law reporters of the North American colonies, India, Burma, South Africa, and Australia, and the numerous contemporary references to current English case law in courts of Commonwealth countries are legal tribute to the influence of English jurisprudence around the world. Charles Wolfram observes, "One of the remarkable vestiges of English colonialism is the extent to which English law and legal institutions took firm root in former colonies." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 6 (1986).

Rudyard Kipling wrote more colorfully about British worldliness in 1896 in *Et Dona Ferentes* (from Virgil's *Aenid* II.49, "I fear the Greeks when they come bearing gifts"), starting with the verses:

In extended observation of the ways and works of man,
From the Four-mile Radius
roughly to the Plains of Hindustan:
I have drunk with mixed assemblies, seen the racial ruction rise,
And the men of half Creation damming half Creation's eyes.

I have watched in their tantrums, all that pentecostal crew,
French, Italian, Arab, Spaniard, Dutch and Greek, and Russ and Jew,
Celt and savage, buff and ochre, cream and yellow, mauve and white,
But it never really mattered till the English grew polite;

Till the men with polished toppers, till the men in long frock-coats,
Till the men who do not duel, til the men who war with votes,
Till the breed that take their pleasures as Saint Lawrence took his grid,
Began to "beg your pardon" and — the knowing croupier hid.

Then the bandsmen with their fiddles, and the girls that bring the beer,
Felt the psychological moment, left the lit Casino clear,
But the uninstructed alien, from the Teuton to the Gaul,
Was entrapped, once more, my country, by that suave, deceptive drawl.

RUDYARD KIPLING, *ET DONA FERENTES*, reprinted in *THE NORTON ANTHOLOGY OF POETRY* 438 (Arthur M. Eastman ed., 1970).

professors.¹⁹⁴ This traditional exchange has kept the English legal advisor, the solicitor, in the forefront of global practice.¹⁹⁵

England was also enriched during World War II with an influx of talented lawyers from the Continent.¹⁹⁶ In March of 1942, the UK Home Office wrote to the Law Society of England and inquired whether the Law Society had any objection to allowing properly qualified aliens to establish themselves in the UK as consultants in the laws of their own countries.¹⁹⁷ The Law Society replied that it did not object so long as the foreign lawyers were of good character, did not hold themselves out as solicitors or otherwise infringe upon the provisions of the Solicitors Act, and observed the code of ethics applicable to all English practitioners.¹⁹⁸

In the late 1960s, U.S. lawyers began to discover England firsthand as well. By 1983, lawyers from over seventy countries were practicing in England and Wales.¹⁹⁹ Formal rules did not govern this activity, and because there was no perceived need for cross-national partnerships, practices between solicitors and foreign lawyers established in London remained separate.²⁰⁰

The UK turned to rules only when sufficient interest arose in multinational partnerships. The primary rulemaker, as reflected by the 1942 government request, has been the law society (for solicitors) and the bar association (for barristers), not the government.²⁰¹ In 1989, the

194. See, e.g., ASIA IN THE MODERN WORLD 178 (Helen G. Matthew ed., 1963) (Gandhi's legal training in England); WESTEL W. WILLOUGHBY, FOREIGN RIGHTS AND INTERESTS IN CHINA 35, 36 (1920). His Britannic Majesty's Supreme Court for China (and Korea), established in 1904, had judges the King of England appointed who had to be members of the Bar of England, Scotland or Ireland. WESTEL W. WILLOUGHBY, FOREIGN RIGHTS AND INTERESTS IN CHINA 35, 36 (1920). The United States followed the British example in 1906 with the creation of a U.S. Court for China based in Shanghai. *Id.* at 35.

195. The Council of the Law Society of England and Wales has issued special rules covering solicitors who practice abroad. See SOLICITORS OVERSEAS PRACTICE RULES (1990) (England). In addition, the same principles of professional conduct applicable in England and Wales are considered to bind solicitors practicing abroad. *Id.* Rule 1 explanatory n.(i).

196. An example was Otto Kahn-Freund, who became an authority on comparative labor law and conflicts of law. See, e.g., OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW (1976).

197. David Vaughn & Mark Sheldon, *Practicing Law Abroad: An English Viewpoint, in Justice for a Generation*, 1985 A.B.A. 14 (Plenary Program of the Annual Meeting of the American Bar Association held in London July 15 through 19, 1985, in cooperation with the Law Society of England and Wales and the Senate of Inns of Court).

198. *Id.*

199. *Id.* at 14, 18.

200. *Id.* at 18-19; John AE Young, *MNPs, RFLs and all That — Multi-national Practices in England and Wales*, 17 INT'L LEGAL PRAC. 40 (1992).

201. Young, *supra* note 200, at 40-41.

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Law Society of England and Wales urged the removal of legal and professional barriers to partnerships between solicitors and foreign lawyers.²⁰² This was made possible by a change in the professional rules of the Law Society,²⁰³ the lifting of statutory prohibitions requiring that solicitors could only enter into partnerships with other solicitors in England or Wales,²⁰⁴ and the Law Society's adoption of multinational legal practice rules in 1990 and foreign lawyer registration regulations in 1991.²⁰⁵

Three ways presently exist for non-EU lawyers and law firms to provide legal advice in England and Wales: (1) by opening a branch office of a foreign law firm or an independent practice without registering in England or Wales,²⁰⁶ (2) by filing as a Registered Foreign Lawyer (RFL) with the Law Society, which entitles the foreign lawyer to form a partnership or incorporated body with a solicitor,²⁰⁷ or (3) in the case of an individual lawyer, by working as an employee of a law firm or company without registering in England or Wales.²⁰⁸

The Law Society requires the foreign lawyer to produce confirmation that the rules of her home bar permit her to enter into a partnership with a solicitor unless such confirmation has already been received from a member of the same professional body in connection with earlier applications.²⁰⁹ This is a reciprocity provision that may not violate the most favored nation treatment subscribed to by the EU in the

202. *Id.*

203. SOLICITORS' PRACTICE RULES Rule 7(6)(a) (1990).

204. Courts and Legal Services Act 1990 § 89 sched. 14.

205. MULTI-NATIONAL LEGAL PRACTICE RULES (1991) (available from The Law Society of England and Wales, Professional Ethics Division, Ipsley Court, Berrington Close, Redditch, Worcestershire B98 0TD, England).

206. See Maurice Sheridan & James Cameron, *England and Wales*, in EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE 19 (Maurice Sheridan & James Cameron eds., 1992).

207. Registration is not required if both the foreign lawyer and solicitor only practice overseas and have no office in England and Wales. THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS 155 (1993). If the partnership or incorporated practice has an office in England and Wales, however, the foreign lawyer must register as an RFL in the case of a partnership or incorporated body. *Id.* In addition, an incorporated practice in England and Wales must register as a recognized body (RB). *Id.* Annual fees of 925 pounds plus mandatory liability insurance must be paid if offices are maintained in England and Wales, with reduced fees if an RFL practices mainly outside of England and Wales. MULTI-NATIONAL PRACTICES, INFORMATION PACK 3 9 (The Law Society).

208. Young, *supra* note 200, at 41.

209. Confirmation has been received for six EU member states (Denmark, France, Germany, Italy, Netherlands, and Spain); 11 U.S. jurisdictions (Arizona, California, District of Columbia, Florida, Illinois, Louisiana, Massachusetts, New Jersey, New York, Wisconsin, and Virginia); and for several other jurisdictions (three provinces of Australia, Israel, Lesotho, Nigeria, Pakistan, South Africa, and the Isle of Man). See *id.* at 15-16.

GATS. There seems little reason to allow a partnership where its validity would be in doubt.

The prohibition in the UK on partnerships between legal advisors (solicitors) and trial lawyers (barristers) continues to exist, as does the prohibition on barristers forming partnerships among themselves.²¹⁰ Therefore, a foreign lawyer may not enter into partnership with a barrister or with a dually admitted solicitor and barrister. A foreign lawyer may have chambers in England and Wales so long as she has no other office in the UK and uses her name and title of the home country where she is licensed to practice law.²¹¹ A barrister may enter into a partnership with a foreign lawyer to share offices or provide services outside the UK.²¹²

Other than individual competence, few requirements restrict the scope of practice of a non-EU lawyer in England and Wales, whether or not registered. She may not try cases in the courts of England and Wales or give instructions without the use of a solicitor, nor may she execute documents for the transfer of land or act as an administratrix of an estate in England or Wales.²¹³

The traditional openness towards branch offices of foreign law firms and the introduction of legal multinational practice rules have helped to maintain the UK's role as a center for international legal practice. While rules focus on multinational partnerships between foreign lawyers and solicitors, full integration for non-EU lawyers into the bar of England and Wales has not been offered. However, a foreign lawyer may apply for nonvoting affiliate status with the Law Society, and registered foreign lawyers who practice mainly in England and Wales may do so without further charge.²¹⁴

B. France

The recent French rules on foreign lawyer practice are contained in statutes and administrative decrees. They are more liberal than the British rules in that they entitle non-EU nationals to become full members of the French legal profession.²¹⁵ However, doing so involves

210. *Id.* at 40; Sheridan & Cameron, *supra* note 206.

211. BAR CODE OF CONDUCT Annex K (The Foreign Lawyers Chambers Rules).

212. *Id.* Annex F; SOLICITORS' PRACTICE RULES Rule 7 (1990).

213. THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS § 8.01 (1993) (citing actions reserved to solicitors by the Solicitors Act of 1974); Sheridan & Cameron, *supra* note 206, at 19-20.

214. MULTI-NATIONAL PRACTICES, INFORMATION PACK 3 7.

215. Law No. 90-1259 of Dec. 31, 1990, art. 1(1), 1991 *Journal Officiel de la République Française* [J.O.] 219, 200.

essentially requalifying as a French lawyer over a three year period.²¹⁶ One cannot obtain status as a foreign legal consultant advising on home country law and international law. Moreover, one must show reciprocity as a condition of admission.²¹⁷

The EU offer in the GATS preserved the requirement of full membership in the French bar as a condition for giving legal advice in France.²¹⁸ However, although the French choice to allow full admission would seem to justify the stiff entry requirements, France will likely be obligated to eliminate the reciprocity requirement for eligibility in the French bar, and its qualification requirements may also be challenged. The easier entry given to EU nationals is permitted under the GATS, although it distorts competition.

Until 1971, any person in France could give legal advice whether or not legally trained.²¹⁹ Such a person could practice under the name of *conseil juridique* or *agent d'affaires*.²²⁰ Accordingly, foreign lawyers were able to establish offices in Paris without registration or other formalities.²²¹ This situation changed in 1972. Foreign nationals desiring to practice law in France became obligated to register as *conseil juridique* with the federal prosecutor.²²² Their practice was confined to providing advice and preparing documents on foreign and international law, with no limitation to the law of their home jurisdiction.²²³ However, for nationals of another EC member state or nationals who could prove that their home jurisdiction granted French nationals reciprocal rights, the restriction on scope of practice was removed.²²⁴

216. *Id.* art. 10.

217. *Id.* art. 9, amending Law No. 71-1130 art. 11(1):

[N]o one can enter the legal profession if he does not fulfill the following conditions:
 . . . be under the jurisdiction of a state or territorial unit that is not a part of the Community which accords to French nationals the right to exercise professional activity under the same conditions that is proposed to be exercised in France.

218. EU Schedule on Professional Services, Dec. 15, 1993 (copy on file with law journal). The additional commitment of France provides: "Host country law and international law (including EC law) are allowed to the member of the regulated legal and judicial professions." *Id.*

219. See CHARLES SZLADITS, EUROPEAN LEGAL SYSTEMS 280b (1976) ("In France . . . many persons, although not members of the legal professions, and sometimes even without possessing a legal education, have practiced under the name of '*conseil juridique*' or '*agent d'affaires*.'"). HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 54 (1976); RUDOLF B. SCHLESINGER, COMPARATIVE LAW: CASES, TEXTS, MATERIALS 272 (1972) (citing Lepaulle, *Law Practice in France*, 50 COL. L. REV. 945, 947-48 (1950)).

220. SZLADITS, *supra* note 219.

221. *Id.*

222. Loi No. 71-1130 du 31 decembre 1971 portant réforme de certaines professions judiciaires et juridiques, arts. 54-61, 1972 J.O. 131, 136-37.

223. *Id.* art. 55(1).

224. *Id.* art. 55.

Foreign lawyers practicing in France as of July 1, 1971, with five years professional experience (without regard to where this experience was amassed) were automatically registered as *conseil juridique*.²²⁵ A three year period of practical training (*stage*) became mandatory for others.²²⁶ Half of the training could be performed outside of France as a member of a regulated legal profession.²²⁷ In addition, since 1988 *conseils juridiques* were also required to take 200 hours of course work on French law at an approved regional professional training center during the *stage*.²²⁸

The *conseil juridique* title was abolished in 1991.²²⁹ All *conseils juridiques* and trial lawyers (*avouets*) became attorneys (*avocats*) on January 1, 1992, regardless of their nationality.²³⁰ The new rule imposed no limitation on the scope of practice by these non-French nationals, resulting in many foreign lawyers gaining full admission to the French bar without showing any proficiency in French law or even the French language.²³¹

Since January 1, 1992, foreign nationals wishing to be admitted as an *avocat* are required to pass an entrance examination on French law. The individual must then complete a one year course on theory and practice given by a regional training center, serve a two year *stage*, and pass an examination on French law.²³² This examination may be

225. *Id.* art. 61.

226. *Id.* art. 54(2); Decret No. 72-670 of July 13, 1972 modifié relatif à l'usage du titre de conseil juridique, art. 3, 1972 J.O. 7556.

227. Decret No. 72-670 art. 3.

228. Decret No. 88-771 of June 22, 1988, modifiant le décret No. 72-670 of July 13, 1972 relatif à l'usage du titre de conseil juridique et le décret No. 78-306 of Mar. 15, 1978 instituant des commissions régionales et une commission nationale des conseils juridiques, art. 1(1), 1988 J.O. 8322.

229. Law No. 90-1259 art. 1(1).

230. *Id.*

231. In addition, lawyers from other EU member states, or lawyers from jurisdictions giving French nationals equivalent treatment, were entitled to waive into the French bar without examination or apprenticeship, provided they could show five years legal experience before January 1, 1992, and they applied for admission before January 1, 1994. Law No. 90-1259 art. 24(VII), amending Loi. No. 71-1130 art. 50. The legal experience did not have to be accumulated in France. *Id.*

232. Law No. 90-1259 art. 10, amending Law No. 71-1130. The examination is oral with the possibility of one paper for nationals of other member states of the Community. Arrêté du Jan. 7, 1993 fixant le programme et les modalités de l'examen d'aptitude à la profession d'avocat, 1993 J.O. 1494; Arrêté du Jan. 7, 1993 fixant le programme et les modalités de l'examen d'accès au centre régional de formation professionnelle d'avocats, 1993 J.O. 1496. For non-EU nationals, the exam is oral with three written papers. *Id.* While the EU national can be exempted from all or part of the examination, the non-EU national can obtain at best a partial exemption. *Id.* Further information is obtainable from Monsieur le Batonnier de l'Ordre des Avocats, Palais de Justice, Paris, or for bars outside of Paris, Conférence des Batonniers, 12 Place Dauphine, 75001 Paris.

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postponed for up to three years after the start of practice in France.²³³ An *avocat* may take on a foreign lawyer as a trainee for a year and renew the apprenticeship twice for one year terms before the foreign attorney will be required to take the examination.²³⁴ Non-EU nationals must prove that their "country or territorial unit" offers the same right to join the bar to French nationals.²³⁵ Once admitted as an *avocat*, the foreign attorney is a full member of the local French bar and may employ *avocats* with French citizenship or enter into a partnership with them.²³⁶

U.S. lawyers who work as in-house counsels in France need not and, indeed, will not be permitted to take the examination for admission as *avocat* because in-house counsels are thought to lack the required independence.²³⁷ This exemption does not extend to associates in law firms because under French law associates as well as partners must be *avocats*.²³⁸

C. Germany

In contrast to England and France, Germany lacks clear guidelines for foreign lawyer practice. The sole legal basis for non-EU lawyer practice in Germany remains an obscure law that allows lay advocates to provide advice on specific subjects including foreign law. This law, enacted fifty-nine years ago, was basically abandoned in 1980.²³⁹

Germany has not entirely been inactive in the legislative area with regard to foreign lawyers. In late 1989, the Federal Lawyers Act was

233. Decret No. 91-1197 of Nov. 27, 1991 modifie organisant la profession d'avocat arts. 84, 935(3), 1991 J.O. 15502, 15509, 15510.

234. *Id.* art. 84.

235. Law No. 90-1259 art. 9, amending Law No. 71-1130 art. 11(1).

236. Decret No. 91-1197 tit. III, ch. II, arts. 124-153 (particular means of exercise of the professions).

237. Law No. 90-1259 art. 58.

238. Descriptions of the French admission procedures can be found in Ian W. Jacobs, *Requalification for EC Lawyers in France*, 18 INT'L LEGAL PRAC. 117 (1993); Sokoloff, *Reforming the French Legal Profession*, 26 INT'L LAW 1025 (1992).

239. *Rechtsberatungsgesetz* (RBERG) (Lay Advocacy Law) 1935 RGBl. I 1478 [hereinafter Lay Advocacy Law]. Lay advocates (*Rechtsbeistände*) may give advice on one or more of the following subjects: pensions, the out-of-court handling of insurance claims, the review and handling of freight bills and resulting claims, licensed auctioning, the out-of-court collection of debts, and foreign and European Community law. *Id.* § 1 para. 1 (1)-(6). EC law was added in 1961, perhaps before its importance became clear. The law, together with its implementing regulations, does not require lay advocates to have any formal legal education or training. *Id.* Until 1980, individuals could obtain generalized permission to practice as lay advocates without prohibitions other than a prohibition on representing clients in social welfare court matters. Only "old" lay advocates admitted before the 1980 amendment are permitted to belong to the bar associations. *Bundesrechtsanwaltsordnung* (BRAO) (Federal Lawyers Act) § 209, 1959 BGBl. I 565 (as amended) [hereinafter BRAO]. After 1980, only permission in specific subjects was given. *Id.*

amended to allow European Community lawyers to establish themselves in Germany and join the local bar associations.²⁴⁰ Their practice may extend to foreign and international law, without limitation to the law of their home jurisdiction.²⁴¹ In doing so, Germany provided a model for the "home title" portion of the CCBE draft directive on lawyer establishment in the Community.²⁴²

The Ministries of Justice in the sixteen German states are the authorities that decide applications from foreign lawyers.²⁴³ The foreign lawyer must establish an office within three months after being accepted in the local bar association.²⁴⁴ Once accepted, the foreign lawyer is required to identify her state of origin along with the name of her profession in her home state.²⁴⁵ She may also indicate that she is a member of the local German bar association.²⁴⁶

With the same amendment, the legislature extended the right of non-EU lawyers to establish themselves in Germany, but with the following two limitations: (1) their scope of practice is to be limited to the laws of their state of origin and (2) reciprocity with their state of origin must exist.²⁴⁷ The statute requires the Federal Minister of Justice to issue a regulation determining which states guarantee reciprocity and defining the professions that correspond in training and responsibilities to the profession of the German lawyer, the *Rechtsanwalt*.²⁴⁸ The Minister has not yet issued the regulation, so non-EU lawyers remain excluded

240. BRAO § 206(1), enacted by 1989 BGBI.I 2135. Section 206(1) was amended in 1993 to include lawyers from another contracting state of the European Economic Area (EEA) Agreement. *Europäischer-Wirtschaftsraum-Ausführungsgesetz* art. 35, 1993 BGBI.I 512.

The law implementing the EU services directive for lawyers designates bar associations to supervise services lawyers provide in Germany according to the foreign lawyer's country of origin: Düsseldorf for persons from Belgium and The Netherlands; Koblenz for persons from France and Luxembourg; Hamburg for persons from the UK and Ireland; Munich for persons from Italy; Schleswig for persons from Denmark; Stuttgart for persons from Spain; Oldenburg for persons from Portugal; and Celle for persons from Greece. *Gesetz zur Durchführung der Richtlinie des Rates der Europäischen Gemeinschaften vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte* of August 16, 1980, art. 6(4), 1980 BGBI.I 1453 amended by art. 1(6), 1990 BGBI.I 479, art. 2(2) 1981 BGBI.I 805. The same bar chambers are assigned to review EU lawyer applications under the diploma directive and applications for membership in bar associations under BRAO § 207. Diploma Directive, *supra* note 149; BRAO, *supra* note 239, § 207. It is likely that other local bar associations will be given responsibility for reviewing applications of lawyers from the remaining EEA countries.

241. BRAO § 206(1), amended by 1989 BGBI.I 2135.

242. See *supra* notes 160-180 and accompanying text.

243. BRAO, *supra* note 239, § 207(1).

244. *Id.* § 207(3).

245. *Id.* § 207(4).

246. *Id.*

247. *Id.* § 206(2).

248. BRAO, *supra* note 239, § 206(2).

from membership in the mandatory German bar associations, the *Rechtsanwaltskammern*.²⁴⁹

The EU schedule in the GATS provides that foreign individual attorneys practicing in Germany must belong to a German bar association in accordance with the Federal Lawyers Act.²⁵⁰ Since maintaining reciprocity as a condition of admission will violate MFN treatment, to which the EU took no reservation on legal services, Germany will likely amend the Federal Lawyers Act to delete the requirement of reciprocity. However, the deletion will not necessarily lead to automatic acceptance into a German bar association for non-EU lawyers because the German government may possibly impose other qualification requirements such as a minimum experience requirement.²⁵¹

In the meantime, despite the "unclear" status of non-EU lawyers, their "active presence is tolerated."²⁵² Non-EU law firms usually work through local law firms, use dually admitted German attorneys for their branches in Germany, or practice as consultants without obtaining any permission as lay advocates to advise on foreign law. Nevertheless, the lack of a satisfactory legal framework inhibits the standing and growth of international legal practice in Germany.

The EU schedule in the GATS also commits Germany and other member states to permitting foreign lawyers to give advice not only on their home country law but also on "public international law (excluding EC law)."²⁵³ To bring the Federal Lawyers Act into conformity with Germany's GATS commitment, Germany will have to add international law to the non-EU lawyer's scope of practice.²⁵⁴

249. The *Rechtsanwaltskammer* is the unified bar association in each court district that all German attorneys with offices in the district must join.

250. EU Schedule on Professional Services.

251. A proposal to recognize reciprocity with U.S. jurisdictions having foreign legal consultant (FLC) rules was circulated to German bar associations in 1992. See *Entwurf — 2. Verordnung zur Durchführung des 206 Abs. 2 der Bundesrechtsanwaltsordnung und zur Durchführung des 186 Abs. 2 des Rechtsanwaltsgesetzes*, Apr. 22, 1992 (copy on file with author). The German federal bar association requested the German government to hold the draft and negotiate reductions in the experience requirements of U.S. FLC rules on the grounds that they prevent young German lawyers from working in the United States. *Bundesrechtsanwaltskammer*, 1992 MITTEILUNGEN 87, 129, 190 (1992). The federal bar association also asked the state ministries of justice, which would have had to approve the regulation in the second legislative chamber, the *Bundesrat*, to join in their request. *Id.* These actions as well as the negotiations in the GATS resulted in the temporary shelving of this proposal.

252. Dr. Burkhard Bastuck, *Regional Developments — Germany*, 27 INT'L LAW. 218, 228 (1993).

253. EU Schedule on Professional Services.

254. Cf. *supra* note 12.

Non-EU lawyers can seek admission in Germany as a *Rechtsanwalt*, a process that consumes at least seven years and includes a three and one-half year legal education, two state bar examinations requiring approximately one to two years, and a two and a half year rotating internship as a *Rechtsreferendar*.²⁵⁵ A more likely method for non-EU lawyers wishing to practice in Germany involves obtaining a German masters or doctor of law degree, which takes one to three years, and then working for a law firm or company in Germany as an employee. The foreign lawyer, however, receives no recognition for having the equivalent of a German lawyer's qualification and cannot join the local bar association.²⁵⁶

A third alternative entails obtaining permission to practice as a lay advocate on home state law and European Community law.²⁵⁷ The president judge of the municipal court (*Amtsgericht*) or, if there is no municipal court where the applicant practices, the president judge of the district court (*Landgericht*) grants permission to the lay advocate.²⁵⁸ In deciding whether to grant permission, the president judge seeks opinions of the association of lay advocates and the public authorities in order to assess the applicant's trustworthiness, knowledge, and fitness.²⁵⁹

The Lay Advocacy Law arose in the early period of Nazi Germany when the Nazi government was disbaring Jewish lawyers.²⁶⁰ The Lay

255. During the internship, the lawyer trainee has civil servant status. See Rudolf du Mesnil de Rochement, *Federal Republic of Germany*, in 1 TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES 130 (Dennis Campbell ed., 1990). German and other EU nationals receive a salary from the state government during their internship, but non-EU nationals do not. *Id.* Also, non-EU nationals are not permitted to work at rotations in government offices as prosecutors, in courts, and in administration. *Id.* The civil servant pay of German apprentice lawyers enables them to take internships without pay, putting their compatriots abroad at a disadvantage.

256. BRAO, *supra* note 239, §§ 206-07 (setting the requirements for foreign lawyers to join the local bar association).

257. Lay Advocacy Law, *supra* note 239, art. 1(6):

The entrustment of legal matters including legal advice and the collection or assignment of claims of other persons — whether full-or part-time, compensated or uncompensated activity — can only be done by persons for whom the competent authority has issued a permission. The permission is issued separately for one of the following subject areas: . . . a person with knowledge in a foreign law for entrustment of legal matters in the area of this law and the law of the European Communities.

258. *Verordnung zur Ausführung des Rechtsberatungsgesetzes* of Dec. 13, 1935, § 11(1), 1935 RGBl.I 1481.

259. *Id.* §§ 6, 8, 11(3).

260. The Law for Restoration of the Civil Service Professions (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) of April 7, 1933, issued nine weeks after Reichspresident Hindenberg appointed Hitler as Reichkanzler, allowed Jews to keep their government and judicial positions and bar membership only if they were war veterans, their parents or sons were killed in World War I, or they were already in civil service in August 1914. FRANZ NEUMANN, *BEHOMOTH: STRUKTUR UND PRAXIS DES NATIONALSOZIALISMUS 1933-1944* 152 (Fischer Taschenbuch Verlag 1984) (1944). This

Advocacy Law excluded Jewish persons from being lay advocates and aimed to fill the shortages of lawyers that resulted from their disbarment.²⁶¹ Shorn of its exclusionary provision, the Law was retained after World War II, and lay advocates today continue to attempt to get as close to the status of lawyers as possible, hoping to eventually merge into the legal profession as the *conseil juridique* did in France.²⁶² To fend off the lay advocates, the federal bar association's legal ethics rules prevent lawyers from entering into a partnership or sharing offices with members of other professions, except for patent lawyers, tax advisors, and accountants "who are not admitted as lay advocates."²⁶³

The reluctance to place lay advocates on the same footing with lawyers arises from a fear of competition and has roots in recent German history. As an "independent organ for the administration of justice,"²⁶⁴ the German attorney has sought to exclude any possibility of influence by the state, which includes influence by the courts, however indirect. Because the district courts grant individuals permission to practice as lay advocates and are responsible for their discipline, many attorneys believe that the courts' authority gives the courts too much judicial control over lay advocates, even though the federal Supreme Court²⁶⁵ has the final say in disciplinary matters involving German attorneys.

The foreign attorney receives an inappropriate title through the Lay Advocacy Law because her occupation is functionally equivalent to the German lawyer's. Most modern German commentary considers a

so-called "leveling" quickly accelerated beyond the "legal" requirements so that by mid-1934, even Jews who were war veterans could not work because most clients avoided them. See LUDWIG BENDIX, *ZUR PSYCHOLOGIE DER URTEILSTÄTIGKEIT DES BERUFSRICHTERS UND ANDERE SCHRIFTEN* 29 (1968).

261. See Scheer, *Zulassung ausländischer Rechtsanwälte in Japan und der Bundesrepublik Deutschland*, 1992 *MITTEILUNGEN* 40, 44 (1991) (Deutsch-Japanische Juristenvereinigung e.V.).

262. See, e.g., *Informationen*, 22 *DER RECHTSBEISTAND* 39 (1992) (advocating membership in the bar chambers for all lay advocates who pass an aptitude test such as the test given to foreign (EU) lawyers and referring to the merger of the French lay advocates (*conseils juridiques*) with French lawyers in 1991).

263. Guidelines of the Federal Lawyers Association of June 21, 1973, amended by Legal Ethics Rules of Feb. 1, 1987, § 30, reprinted in WILHELM E. FEUERICH, *BRAO-KOMMENTAR* 263, 292 (2d ed. 1992).

264. BRAO, *supra* note 239, § 1. This concept includes "not only the independence from the state but also the independence from the client and the closely connected economic and financial independence which is the prerequisite for the constitutionally guaranteed freedom of occupation of the attorney." Haas, *Unabhängigkeit der Anwaltschaft und Berufsfreiheit*, 1992 *BRAK-MITTEILUNGEN* 65 (1992).

265. The highest court for nonconstitutional criminal and general civil law matters in Germany is the *Bundesgerichtshof* or BGH. Three lawyers, appointed by the federal Minister of Justice for four year terms, participate as nonadjudicating members on attorney discipline panels of this court. BRAO, *supra* note 239, § 106 (2).

partnership or office sharing arrangement between a foreign lawyer who is a lay advocate and a German lawyer to be proper under German attorney ethics rules.²⁶⁶ In fact, a 1984 decision of the Hamburg regional court held that an Egyptian attorney, admitted as a lay advocate on Arabic law, could share offices with a German attorney.²⁶⁷ One German commentator has even argued that a prohibition on such an association would violate the German lawyer's constitutional right to pursue his profession.²⁶⁸

The present trend is moving away from allowing attorneys to set their own ethics rules, recognizing that allowing a group plenary power to control its own members can result in the exploitation of the weaker members of the group and disadvantages for the public. In 1987, the Federal Constitutional Court invalidated the ethics guidelines of the federal lawyers association, holding them to be an unconstitutional delegation of legislative power.²⁶⁹ Pending a legislative rehaul of ethics rules, the court stated that attorney conduct would be governed by common law (preconstitutional customary law) and by case law interpreting a general clause²⁷⁰ in the Federal Lawyers Act requiring lawyers to exercise their profession conscientiously with the respect and trust required of a lawyer.

The Ministry of Justice's draft law revamping attorney ethics rules²⁷¹ would permit German lawyers to enter into a firm or share

266. See, e.g., Hans-Jürgen Rabe, *Internationales Anwaltsrecht — Dienstleistung und Niederlassung*, 40 NEUE JURISTISCHE WOCHE (NJW) 2185, 2192 (1987); R. ZUCK, 1992 KOMMENTAR ZU DEN GRUNDSÄTZEN DES ANWALTlichen STANDESRECHTS, SONDERTEIL — DIE NEUORDNUNG DES ANWALTlichen BERUFSRECHTS N48 (2d ed. 1992); FEUERICH, *supra* note 263, at 374. See also Dr. Michael Kleine-Cosack, *Zulassungs- und Berufsordnungsrecht, Europäisches Anwaltsrecht*, in BECK'SCHES RECHTSANWALTS-HANDBUCH 914, 968 (Hans-Ulrich Bücking & Dr. Benno Heussen eds., 1989).

267. EGH Hamburg, Decision of Feb. 15, 1984, Case no. I 1/83, *reprinted in part* in BRAKMITTEILUNGEN 89-90 (1984).

268. ZUCK, *supra* note 266. Article 12 of the Constitution, the *Grundgesetz*, states that "[a]ll Germans have the right to freely choose their trade, occupation or profession." GRUNDGESETZ [Constitution] [GG] art. 12 (F.R.G.). The Federal Constitutional Court (*Bundesverfassungsgericht*) has recently emphasized this constitutional right by permitting lawyers to retain their admission, even though they serve as senior corporate counselors or engage in a separate business in addition to practicing as a lawyer. *Bundesverfassungsgericht* (BVerfG), Decision of Nov. 4, 1992, Case no. 1 BvR 79/85. According to the court, restrictions on the occupational activity of lawyers can only be accomplished through or on the basis of a statute and then only to protect a particularly important public value while adhering to the principle of proportionality. *Id.*

269. BVerfG, Decision of July 14, 1987, Case nos. 1 BvR 537/81, 195/87, *reprinted in* ZUCK, *supra* note 266, at N1; Decision of July 14, 1987, Case no. 1 BvR 362/79, *reprinted in* ZUCK, *supra* note 266, at N20.

270. BRAO, *supra* note 239, § 43.

271. *Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte*, DEUTSCHER BUNDESTAG, DRUCKSACHE, May

offices with non-EU lawyers, regardless of the location of the non-EU lawyer. Under this draft law, which is pending in a *Bundestag* committee, German lawyers could "bind themselves in a firm for the common exercise of their profession" with members of a German bar association²⁷² and with "members of legal professions from the member states of the European Community or other states which are entitled under § 206 of the Federal Lawyers Act to establish themselves in (Germany) and who maintain their offices abroad."²⁷³

If and when the *Bundestag* and *Bundesrat* approve the draft law, the Federal Lawyers Act is amended to delete reciprocity for non-EU lawyers, and recognized legal professions and qualifications are established by regulation, Germany will approach England and move beyond France in regard to practice under "home title" by non-EU lawyers.

D. Other European Union Countries

The *de jure* regulation and *de facto* practices that exist in the remaining countries in the European Union cannot be fully explored here. Therefore, a brief overview must suffice. In the Netherlands, dual admission as a local lawyer is granted to anyone who has passed Dutch university or college master of law examinations in Dutch law or obtained a doctor of law or doctor of legal scholarship degree.²⁷⁴ After admission, a three year training period is required under the supervision of another Dutch lawyer, although this period can be reduced upon application.²⁷⁵ Foreign lawyers are allowed to establish an office in the Netherlands and advise on any legal matter, regardless of the national legal system involved.²⁷⁶ However, only lawyers admitted in the Netherlands may present cases in Dutch courts.²⁷⁷

Ireland²⁷⁸ and Luxembourg²⁷⁹ recognize reciprocal arrangements for the recognition of legal qualifications from non-EU lawyers, which

19, 1993, at 8.

272. *Id.* § 59a(1), (4).

273. *Id.* § 59a(3)1, (4).

274. Law of June 23, 1952, on the institution of the Netherlands Order of Advocates and also rules concerning the order and discipline of advocates and procurators (*Advocatenwet*) art. 2(1).

275. *Id.* art. 9b(1)-(2).

276. Letter from the Secretary of the Netherlands Bar Association (*Nederlandse Orde van Advocaten*) (Jan. 10, 1994) (on file with law journal).

277. Law of June 23, 1952, art. 11. Lawyers from other EU member states may render services in The Netherlands in collaboration with a Dutch advocate. *Id.* arts. 16b-16e.

278. Geoghegan, *supra* note 7, at 12.

279. Batonnier Louis Schiltz, *Luxembourg*, in *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* 13 (Maurice Sheridan & James Cameron eds., 1992).

can lead to acceptance as a local member of the bar. Ireland also allows a foreign lawyer to give legal advice in Ireland without being admitted to the Irish bar.²⁸⁰

Belgium permits foreign lawyers to practice in Belgium as long as they do not advise on Belgian law and use their home title.²⁸¹ However, they are required to register with the local bar association,²⁸² and those who are not citizens of a member state of the European Union must obtain a working permit called a professional card.²⁸³ Many British lawyers and law firms advising on European Community law in Brussels ignore the local bar registration requirement because they consider EC law to be part of UK law and do not wish to submit to restrictions relating only to the practice of Belgian law.²⁸⁴

The southern tier of the European Union does not permit non-EU lawyers to establish offices or give advice on foreign law. However, this *de jure* prohibition has not prevented non-EU law firms and lawyers from establishing a presence in these countries.²⁸⁵ Denmark also does not formally permit non-EU lawyers to establish offices.²⁸⁶

E. The United States

Admission to practice law in the United States is governed by fifty-four separate jurisdictions — the fifty states and the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. Practice by foreign lawyers is also considered a local matter and, with one exception, has not been the subject of federal regulation thus far.²⁸⁷ There are three principal ways for a foreign lawyer to practice in the United States on a

280. *Id.*

281. See Carl Bevernage, *Belgium*, in *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* 22 (Maurice Sheridan & James Cameron eds., 1992).

282. Belgium has 27 local bar associations, one for each region except Brussels. Brussels has two bars, one French-speaking and the other Dutch-speaking.

283. The Ministry of Middle Classes, which oversees small businesses with up to 50 employees, issues this permit.

284. *Solicitors Report on Progress with Paris and Brussels Bars*, 27 *LAW. IN EUR.* 8 (1993).

285. See 1993 C.C.B.E. 3 (printed remarks of President John Toulmin at CCBE Plenary Session in Brussels referring to Greece, Italy, Portugal, and Spain).

286. Christian Emmeluth & Michael Rekling, *Denmark*, in *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* 11 (Maurice Sheridan & James Cameron eds., 1992).

287. The Federal Trade Commission (FTC) permits EC attorneys that are licensed in a member state and authorized to practice before the EC Commission to appear on behalf of clients in FTC proceedings. FTC Rules of Practice, 16 C.F.R. § 4.1 (1991). Courts often allow lawyers from another state to appear in a particular case (*pro hac vice*). See, e.g., M. Dist. Pa. R. 202.3 (*pro hac vice* admission). Permission to represent a client before a particular tribunal in a specific case does not include a right to establish or maintain an office within the jurisdiction. *Id.* (representation is permitted "only for the purpose of a particular case").

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regular basis: obtaining dual admission as a local attorney, being employed by or consulting for a company or law firm, or being licensed as a foreign legal consultant. None of these paths exclude the other.

Dual admission for a lawyer already admitted in a foreign jurisdiction involves qualifying for and successfully completing the bar examination required for admission as a lawyer in a U.S. jurisdiction. To qualify to take the bar examination, most states require an individual to complete three years of legal study and obtain a Juris Doctor (J.D.) degree from a recognized U.S. law school.²⁸⁸ However, in several states a J.D. degree is not necessary. New York, Pennsylvania, Georgia, the District of Columbia, and Michigan, for example, permit foreign lawyers to take the bar examination if they have studied designated subjects at a U.S. law school and received the Master of Laws degree (LL.M.).²⁸⁹ A foreign attorney can meet these requirements in New York and Michigan by completing a nine-month LL.M. program. Compliance with Pennsylvania, Georgia, and the District of Columbia rules usually requires a further semester of studies to obtain the necessary credits.²⁹⁰

Upon admission in one state, a lawyer may become eligible to waive into another state without taking another bar examination. Eligibility depends on the reciprocity rules of the state where admission by waiver is sought. Some states do not allow admission by waiver unless the lawyer has a J.D. degree. Other states require an attorney to have practiced for a period ranging between three and five years. Still other states permit immediate admission by waiver.

288. Despite the Supreme Court's ruling in *Griffith*, 413 U.S. 717 (1973), that requiring U.S. citizenship for admission to practice law violates the Equal Protection Clause of the Fourteenth Amendment, twelve states (Arkansas, Iowa, Maryland, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, South Dakota, Utah, and West Virginia) still had this qualification in 1992 according to the Office of the U.S. Trade Representative. Connecticut, the state whose rule was held unconstitutional in *Griffith*, requires bar applicants to show either U.S. citizenship or reciprocal access in the applicant's country of citizenship. See *Griffith*, 413 U.S. 717 (1973). Six more states (Illinois, Louisiana, Massachusetts, Texas, Vermont, and Washington) require bar applicants to be either a U.S. citizen or legal permanent resident alien. *Id.* Both conditions are unconstitutional under *Griffith*. *Id.* In addition, the first requirement violates the principle of national treatment in the GATS. See GATS, *supra* note 8, art. XVII. The second violates most favored nation treatment in the GATS. See *id.* art. II.

289. N.Y.R. 520.5(b)(2) (Rules for the Admission of Attorney and Counselors at Law); PA. R. CT. 205(b); MICH. R. CT. 2(B); GA. SUP. CT. R. 5(d); D.C. CT. APP. 46(b)(4).

290. Pennsylvania and Georgia require 24 semester hours in specific subjects that are unlikely to be obtainable in a nine month period. PA. R. CT. 205(b); GA. SUP. CT. R. 5(d). The District of Columbia requires 36 semester hours, a sum that is impossible to attain in a nine-month program. D.C. CT. RULES ANN. 46(b)(4).

Lawyers admitted in one state are generally permitted to give legal advice on all U.S. law, whether state or federal, regardless of where the lawyer has been admitted.²⁹¹ This does not necessarily mean that a foreign lawyer admitted in one jurisdiction can practice law in another jurisdiction because the lawyer has usually only been admitted in one jurisdiction. Nevertheless, it is not unusual to find foreign lawyers practicing law in one U.S. jurisdiction while being admitted in another U.S. jurisdiction, usually New York. As long as the attorney does not appear in court, deal primarily with the host state's law, or imply that she is locally admitted, problems should not arise.

The second way for a foreign lawyer to practice in the United States entails becoming an employee or consultant of a law firm or corporation. Although no special licensing is required, a foreigner desiring long-term association as an attorney might consider full admission or licensing as a foreign legal consultant in order to enhance his or her status.

The third method of practice by a foreign lawyer involves obtaining a license as a foreign legal consultant without taking an examination. Fifteen states and the District of Columbia have enacted rules through their courts that permit such licensing.²⁹² New York enacted the first such rule in 1974 in response to the French law on *conseils juridiques*.²⁹³ California, the District of Columbia, Hawaii, and Michigan issued their rules in the mid-1980s during negotiations on Japan's laws concerning foreign office attorneys.²⁹⁴

None of these rules prohibit U.S. lawyers from entering into a partnership or employment relationship with a foreign legal consultant, although professional responsibility rules in most states prohibit lawyers from sharing fees with nonlawyers²⁹⁵ or assisting a person who is not a member of the bar in the unauthorized practice of law.²⁹⁶ With the

291. Charges of the unauthorized practice of law have occasionally been leveled against lawyers advising on the laws of a U.S. jurisdiction in which they are not admitted to practice. See, e.g., Stephan Gillers, *Real-World Rules for Interstate Regulation of Practice*, 3 A.B.A. J., Apr. 1993, at 111. The jurisdiction where the lawyer issues the advice has the authority to determine whether lawyers in its territory are engaged in unauthorized practice. To allow other states to intrude when their law is being applied — without the presence of the lawyer in their jurisdiction — is as impractical as it is unwise. See p.17.

292. ALASKA R. CT. 44.1; CAL. R. CT. 988; CONN. R. CT. § 24A-24F; D.C. CT. APP. 46(c)(4); FLA. SUP. CT. R. 16; GA. SUP. CT. R. D; HAW. SUP. CT. R. 14; ILL. SUP. CT. R. 712, MICH. BOARD OF LAW EXAMINERS RULE 5(E); MINN. SUP. CT. R. VII; N.J. SUP. CT. R. 1:21-9; N.Y. R. 521; OHIO SUP. CT. R. XI; OR. R. 10.05; TEX. CT. XVI; and WASH. R. CT. 14.

293. See Amelia Porges, *Introduction to United States: Foreign Legal Consultant Rules of California, District of Columbia and New York*, 26 ILL.M. 977 (1987).

294. *Id.*

295. See, e.g., D.C. R.P.C. 5.4(a); N.Y. C.P.R. 3-102(A).

296. D.C. R.P.C. 5.5(b); N.Y. C.P.R. 3-101(A).

exception of the District of Columbia,²⁹⁷ most state professional responsibility rules prohibit the formation of a partnership with a nonlawyer for the purpose of practicing law.²⁹⁸ These rules are intended to bar lay persons and other professionals from influencing lawyers or usurping their work.

It is unlikely that such rules would be interpreted to bar partnerships between foreign and U.S. lawyers. As long as the foreign attorney is licensed as a foreign legal consultant or as a lawyer in her home country during practice in the United States, the professional responsibility laws should not bar her from being a partner in a U.S. firm. Just as the professional responsibility rules do not prevent multijurisdictional partnerships among lawyers admitted in different states, they should not prevent partnerships with lawyers in foreign countries.

New York, the initiator of the foreign legal consultant rules in the United States, recently amended its rules, expressly providing that legal consultants have the right to affiliate with New York attorneys and with other attorneys maintaining offices in New York.²⁹⁹ The amended rules also provide that legal consultants may employ and be employed by New York attorneys.³⁰⁰ The U.S. commitment in the GATS goes further, declaring that all U.S. jurisdictions will permit local lawyers to practice in a partnership with foreign lawyers who have no office in the jurisdiction.³⁰¹

Many questions exist as to the functioning and utility of international multinational law partnerships. Do they help lawyers provide better services that clients need? Is appropriate professional liability insurance available? Under which jurisdiction can they be established, operated, and dissolved? Individual states in the United States have traditionally shown caution in creating new rules for the practice of law and have followed the recommendations of their local bar associations. In the area

297. The District of Columbia permits a lawyer to enter into a partnership with a nonlawyer who performs professional services that assist the firm in providing legal services. D.C. R.P.C. 5.4(b). The nonlawyers are bound by the Rules of Professional Conduct, the firm must provide solely legal services, and the partners are responsible for nonlawyers in the same way they are for lawyers. *Id.* These conditions must be in writing. *Id.*

298. *E.g.*, N.Y. C.P.R. 3-103(A); PA. R.P.C. 5.4(b).

299. N.Y.R. 521.4(b)(1).

300. *Id.* As of November 30, 1993, 178 foreign lawyers had registered as licensed legal consultants in the State of New York. Interview with New York City court clerks (on file with author). The largest number come from England and Wales (21), France (12), and the Netherlands (12). *Id.* Germany, Italy, and Australia each have seven, Israel eight, and Pakistan six. *Id.*

301. U.S. Attachment on Legal Services. Under Section a(1) of the schedule, the United States additionally commits that in all states "U.S. lawyers are permitted to form partnerships with foreign lawyers." *Id.* § a(1).

of professional responsibility, U.S. law usually responds to trends, rather than creating them.

Proposals to expressly authorize law partnerships with foreign lawyers will likely be made only after firms find closer links with foreign lawyers and law firms to be advantageous. On the one hand for U.S. law firms, the relative ease in which a foreign lawyer can obtain admission to a local bar retards interest in such proposals. On the other hand, law firms are becoming more and more interested in finding institutional partners. Small firms are also interested in establishing international connections.

Rules concerning foreign lawyer qualification, maintenance of offices, and scope of practice raise other important questions concerning foreign legal consultants. Twelve of the sixteen jurisdictions with rules covering these areas require applicants to show they have practiced law in their home country for five years. California and Ohio require four years of experience, and Michigan and New York require three years.³⁰² Once licensed in a state, foreign legal consultants are free to advise clients located in other states. The rules most frequently describe a legal consultant's scope of practice as involving legal services and preclude the performance of certain activities. These activities include representing clients in local courts; preparing documents concerning the transfer real estate in the United States, the inheritance of an estate in the United States, or the marital relations of a U.S. resident; and giving advice on U.S. laws unless based on advice from a lawyer fully admitted within the state.³⁰³

At the request of the U.S. Trade Representative, Florida and Texas deleted clauses requiring foreign attorneys to show that their country gives reciprocal treatment to U.S. lawyers.³⁰⁴ The rules of California, Connecticut, and Washington do not mention reciprocity at all.³⁰⁵ Other jurisdictions permit courts to consider *sua sponte* or upon petition

302. CAL. R. CT. 988(b)(1); OHIO SUP. CT. R. XI § 1(A).

303. E.g., D.C. CT. APP. 46(b)(4)(D); N.Y.R. 521.3; CAL. CT. 988(o). Several states restrict to a larger extent the foreign legal consultant's practice, limiting the consultant to advising on the law of the country where he or she is licensed, with the same exclusions on preparing documents dealing with the transfer of real estate, inheritances, and marital relations of U.S. residents. E.g., CONN. R. CT. 24D (only law of foreign country where licensed); FLA. SUP. CT. R. 17-1.3(a) (foreign country where admitted plus exclusions); GA. SUP. CT. R. D § 2 (foreign country where admitted plus exclusions).

304. FLA. SUP. CT. R. 1.6-1.2(a)(3). Texas had a mandatory reciprocity clause until recently. TEX. R. CT. XVI(a)(7) (deleted in 1993). See A.B.A. Section of International Law and Practice Report to the House of Delegates, Model Rule for the Licensing of Foreign Legal Consultants, 28 INT'L LAW. 207, 225 (1994).

305. See CAL. R. CT. 988; CONN. R. CT. 24A-24F; WASH. R. CT. 14.

whether a local attorney would be able to establish an office in the applicant's home country. Jurisdictions that have discretionary reciprocity provisions should delete them in order for the U.S. to comply with commitments made in the GATS. In several states, an applicant must declare that she intends to maintain an office in the jurisdiction for practice as a foreign legal consultant.³⁰⁶

All jurisdictions make their disciplinary rules and procedures applicable to foreign legal consultants. Regrettably, most states do not authorize foreign legal consultants to be members of state bar associations. However, because courts and not bar associations handle admission into the legal profession in the United States and the majority of states do not require local lawyers to be members of the state bar association, the ineligibility of foreign attorneys for bar association membership is not necessarily an indication of inadequate professional recognition. Moreover, many states permit foreign legal consultants and lawyers from other jurisdictions to join as associate members. Nevertheless, licensed legal consultants should be entitled to join the bar associations where they practice and to obtain full voting privileges because they are subject to the same professional responsibility rules as local members of the bar.

F. Japan

The foreign lawyer in Japan has two possibilities for practicing law. First, she can become an employee of a law firm or company. If she does so, no local license is required.³⁰⁷ This practice is quite common. In 1989, ten of the forty-three lawyers in Japan's second largest law firm were from the United States, Australia, or Canada.³⁰⁸ Second, one can obtain a license from the Ministry of Justice as a foreign office lawyer (*gaikokuho jimu bengoshi*).³⁰⁹ This procedure was introduced as a result of pressure from the United States in the mid-1980s.³¹⁰

While some of the issues debated at that time are no longer controversial, others are. For instance, Americans continue to be

306. E.g., N.Y.R. 521.1(a)(5); D.C. CT. APP. 46(c)(4)(A)(3).

307. Assessorin Susanne Willgerodt, *Japan läßt ausländische Rechtsanwältinnen zu*, 10 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 265 (1990). Japan permits only foreign lawyers who were practicing in Japan in 1955 to become members of the Japanese bar. *Id.*

308. Dr. Harald Baum & Andreas Nelle, *Die Liberalisierung des Dienstleistungsverkehrs zwischen Deutschland und Japan*, in Scheer, *Bericht zum 1. Symposium der Deutsch-Japanischen Juristenvereinigung (DAJV) am 17.2.1989 in Hamburg*, 1990 MITTEILUNGEN 12, 17 (July 1990).

309. Amelia Porges, *Introduction to Japan: Law and Ministerial Order Relating to the Handling of Legal Business by Foreign Lawyers*, 26 I.L.M. 881 (1987).

310. *Id.* at 882; *Report on Japanese Law Practice*, 21 INT'L LAW. 278 (1987).

concerned about having the Japanese Bar Association review and recommend action on the applications of foreign lawyers. In the United States, the courts usually handle attorney licensing and discipline, not the bar associations.³¹¹ Under the Japanese rule, the Ministry of Justice has authority to approve foreign attorney qualifications, but the Ministry must seek the opinion of the Japan Federation of Bar Associations (JFBA) before acting on the application.³¹² After the foreign office lawyer obtains approval, the JFBA and the regional bar association where the foreign lawyer will practice are required to register him as a member.³¹³ The bar association may refuse to register an individual because he has a physical or mental handicap,³¹⁴ or a record of imprisonment, disbarment, other disciplinary action, or bankruptcy.³¹⁵ Moreover, the foreign office lawyer must follow the rules of the JFBA and regional bar association and is subject to discipline by the JFBA.³¹⁶

Another controversial issue involves the scope of practice. Japanese law limits a foreign office lawyer's practice to "legal business concerning the law of the country of primary qualification."³¹⁷ It limits legal business to matters "dealing with a legal case, the whole or a major portion of which is subject or is to be subject to the application of the law of the country of primary qualification."³¹⁸ Japanese law thus permits a foreign lawyer to work on a case that includes more than one country's law as long as the majority of the case concerns the law of his primary qualification.

Japanese rules exclude a foreign lawyer from appearing before a Japanese court, acting as counsel in a criminal case, preparing deeds or

311. In some states, such as New York, individual lawyers conduct interviews with applicants to determine their "character [and] fitness" for the legal profession. However, the courts appoint these individual lawyers, not the bar associations. The courts and not the bar associations uniformly appoint counsel who investigate violations of professional discipline rules.

312. Special Measures Law, *supra* note 18, art. 10(3). See generally Willgerodt, *supra* note 307, at 264; Porges, *supra* note 309, at 881, 883.

313. Special Measures Law, *supra* note 18, arts. 40(1), 24.

314. A decision not to license an attorney in the United States on such grounds would violate the Americans with Disabilities Act of 1990. Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 (West Supp. 1991). This federal law prohibits discrimination on the grounds of physical or mental handicap unless essential requirements of the job cannot be performed due to the handicap and no reasonable accommodation by the employer is possible. *Id.* § 12112(b)(5).

315. Special Measures Law, *supra* note 18, art. 26.

316. *Id.* art. 51.

317. *Id.* art. 2(6).

318. *Id.* art. 2(6). An additional foreign country may be added as a secondary qualification where the applicant is qualified to become a foreign attorney in such country, has the same level of learning as one who is qualified to become a foreign lawyer of that country, or has five years of experience handling legal business concerning such law. *Id.* art. 16(1).

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other documents concerning the transfer of rights in real estate in Japan or industrial rights arising from registration in Japan, or preparing documents regarding the procedures of a foreign court or administrative agency.³¹⁹ The foreign lawyer may not give legal advice on the laws of a country other than the country on which she is primarily qualified.³²⁰ The foreign office lawyer may give legal advice jointly with a Japanese attorney (*bengoshi*) regarding the transfer of rights of real property or industrial property in Japan, family relations in which a Japanese national is a party, and inheritance matters involving property in Japan.³²¹

To qualify as a foreign office attorney, the applicant must show that she has practiced as a lawyer in the country where she acquired her qualifications for at least five years.³²² Moreover, the foreign country must give "substantially equal treatment" to a person who is qualified to become a Japanese lawyer.³²³ The five year experience requirement may be problematic to lawyers from countries that license attorneys at the state level because experience they obtain in states where they are not licensed is not counted.³²⁴

The foreign office lawyer may not employ Japanese attorneys, but the reverse situation is permitted.³²⁵ The foreign lawyer must reside in Japan at least 180 days a year³²⁶ and may establish only one office in Japan.³²⁷ These restrictive rules, together with the costs of maintaining an office in Tokyo (the preferred location of most foreign lawyers and law firms), have discouraged the establishment of foreign law practices in Japan and foreign ties with Japanese lawyers.

319. Special Measures Law, *supra* note 18, art. 3.

320. *Id.* art. 3(3).

321. *Id.* art. 3(2), (6).

322. *Id.* art. 10(1).

323. *Id.* art. 10. The reciprocity requirement will be eliminated as part of Japan's commitment in its GATS offer, but the five year experience requirement is to be retained. EXECUTIVE SUMMARY OF THE REPORT OF THE STUDY COMMISSION ON THE ISSUE OF FOREIGN LAWYERS 4 (Sept. 30, 1993) (on file with law journal) [hereinafter Executive Summary]; Telephone interview with sources involved in the GATS negotiations, January 5, 1994.

324. Employees of Japanese lawyers obtained up to two years credit for their experience as of April 1, 1987, the date of implementation of the law. Special Measures Law, *supra* note 18, art. 2. The 1993 study commission recommended allowing unlimited credit to foreign lawyers for trainee periods in Japan. See Executive Summary, *supra* note 323.

325. Special Measures Law, *supra* note 18, art. 49; *cf. id.* art. 45(3). Japan will introduce a joint enterprise form to allow foreign office lawyers to employ or share fees and profits of *bengoshi* with foreign office lawyers. Executive Summary, *supra* note 323, at 3. However, unspecified supervision by the JFBA will "secure the independence of the activities" of the Japanese lawyers in this joint enterprise. *Id.*

326. Special Measures Law, *supra* note 18, art. 47(2).

327. *Id.* art. 50.

V. The Roles of Bar Associations, Law Schools, and Lawyer Accreditation Authorities

International law has never been cleanly separable into public international law and private law. The involvement of governments in global trade and investment, while positive when stimulating economies, constantly transfers the practice of law from private parties to governmental negotiators. These negotiators often turn to advisors who obtain advantages from insider knowledge of negotiations.

The recognition of foreign lawyer and law firm practice and the formation of transnational law firm partnerships should be left to market demands, at least in developed countries. To a limited extent, governments should play a role by encouraging agreements among bar associations on mutual recognition and admission of each others' members practicing in their respective jurisdictions.³²⁸ However, bar associations may not adequately represent all lawyers, even if they are unified, mandatory organizations. As with other organizations that create technical standards and regulations, the involvement of bar associations in setting standards for the legal profession should be subject to appropriate mechanisms such as public hearings, the participation of competing bar associations, and the formation of committees in order to prevent positions from being abused.

Another avenue for depoliticizing foreign lawyer standards involves fostering recognition agreements among law schools for the awarding of joint degrees recognized in two or more countries. Organizations accrediting required law internships could also reach recognition agreements that would give credit for training in foreign programs. Officials responsible for admitting lawyers into practice in a certain jurisdiction could also develop international standards for recognizing the education, training, and practice of foreign law in their respective jurisdictions.

Finding appropriate negotiating parties and equivalent procedures for lawyer qualification and admission can be difficult. Where the courts occupy the pivotal role in lawyer admission and oversight (as in the United States), it is unlikely that European or Japanese bar associations will be able to conclude meaningful reciprocal agreements with U.S. bar associations on the recognition of qualifications. States generally do not have the authority to conclude international agreements under the U.S.

328. An example is the informal mutual admission arrangement between the Paris and French-speaking Brussels bars for members practicing in the other's city. See *Diploma Directive passed in France*, LAW. IN EUR., March 1993, at 8.

Constitution. More practically, courts have neither the personnel nor the time to negotiate such agreements.

Instituting "roundtable" talks, perhaps through advisory committees for government negotiators, could defuse many disputes that arise from misunderstandings in language, customs, and institutions. Bar associations should have an important but not exclusive role in helping government define trade policy concerning the provision of legal services abroad and the regulation of foreign lawyer services at home.

VI. Conclusion

Increasingly, lawyers and law firms are practicing in foreign jurisdictions and giving advice to foreign clients or on foreign law within their own jurisdictions. Their goal should not be to develop intricate professional licensing systems, but to allow such practice to occur where and when clients seek it. These lawyers need to concentrate not on exporting their home jurisdictions' law and legal culture as arrogant bearers of knowledge, but on enabling their clients to understand and adapt to local opportunities.

In promoting rules for foreign lawyer practice in a global economy, hubris should be avoided. Each generation wants to believe that time stands still for it, and that the issues it confronts are novel. Hastily enacted new international, regional, and national rules governing practice by foreign lawyers may erect a tower of Babel, a maze of conflicting and confusing standards that fail to assist either lawyers or their clients. Caution is warranted so that rules made today do not create barriers tomorrow. It remains to be seen if the new rules on foreign lawyer practice reflect, to paraphrase James F. Blaine's colorful phrase, "cocks that crow at midnight, heralding no dawn," or as one recent American Bar Association report claims, "a window of opportunity to influence" the changing face of the legal profession throughout the world.³²⁹

329. See A.B.A. *Section of International Law and Practice Report to the House of Delegates, Model Rule for the Licensing of Foreign Legal Consultants*, 28 INT'L LAW. 207, 236 (1994).

