AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW AND PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLVED, to better enable American lawyers to assist clients globally through offices established in countries that have signed the General Agreement Trade in Services of the World Trade Organization, the American Bar Association supports the negotiation proposals to the United States Trade Representative regarding access to foreign markets for U.S. lawyers through permanent establishments as expressed and incorporated in the attached "Proposal on Market Access for U.S. Lawyers" dated September 10, 2001.

NEGOTIATION PROPOSALS

REGARDING FOREIGN MARKET ACCESS FOR U.S. LAWYERS

September 10, 2001

1. BENEFITS OF ACCESS TO LAWYERS AND LAW FIRMS

Access to lawyers and law firms with relevant expertise greatly facilitates the growth of world trade, related foreign direct investment in developed as well as developing nations, and cooperative ventures that cross national borders. Lawyers and law firms are also essential for access to capital markets. Individuals and business organizations who are participating in these trans-national economic activities thus quite rationally prefer to obtain legal advice, consultation and assistance from lawyers with relevant experience and expertise. They often prefer to use lawyers and firms with which they are familiar, and in general benefit from having a range of competitive choices for legal assistance.

In short, relaxation of restrictions on foreign lawyers and firms would promote economic development. A WTO agreement along the following lines on access to legal services is thus desirable and justified.

2. ACCESS TO LEGAL ASSISTANCE; RIGHT OF ESTABLISHMENT

a. Right of Establishment

A lawyer who is a member in good standing of a legal profession in a WTO Member, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or public authority ("Lawyer") and a law firm or other association of Lawyers ("Law Firm") such as law firm partnerships shall be permitted to create and maintain a professional establishment in the territory of the Host Member ("Establishment").

b. Registration of Lawyers

As a prerequisite to such Establishment by a Law Firm, each WTO Member may require that senior foreign Lawyers of, or the Law Firm responsible for, the intended establishment register with its Registration Authority ("RA").

c. Registration of Law Firms or Other Associations of Lawyers

One or more Lawyers or a Law Firm may register an Establishment of a Law Firm by notice to the Host Member RA. A Law Firm shall be entitled to permanence of its Establishment, but each WTO Member may condition such permanence on the giving of an undertaking by the Law Firm of responsibility for the Establishment.

3. REQUIREMENTS FOR REGISTRATION

a. Standards for Consideration

The RA's consideration of an application for registration pursuant to Section 2.b. shall be objective and based on neutral criteria. The evaluation criteria shall be defined in writing by the RA, and must be directed toward the applicant's competence to function as a Lawyer or Law Firm. The applicant's educational and professional experience as a Lawyer or Law Firm, and admission to practice law in the Home Member, shall be of primary importance.

b. Application Procedures

Each RA shall process applications for registration fairly and shall act on them in a reasonable period of time.

(i) Written application procedures shall be established by the RA. The written procedures shall be published and made available upon request pursuant to Section 3.d.

(ii) In addition to the language(s) of the Host Member, application procedures and any application forms shall be available in one of the official languages of the WTO.

(iii) Proficiency in the language(s) of the Host Member shall not be required for registration. An objective examination of the professional rules applicable to lawyers of the Host Member may be administered. Such examination shall be consistent with written preparatory materials that are reasonably available to the applicant in the language(s) of the Host Member and one of the official languages of the WTO.

(iv) Denial of an application for registration filed pursuant to Section 2.b. will be in writing, and a statement of reasons will be furnished to the applicant within a reasonable period following submission of the application. A right of appeal shall be available in the case of the denial of an application.

(v) Applicants who have been denied registration shall be permitted to renew their applications, and consideration shall be given to whether the basis for the prior denial has been overcome.

c. Compliance with Professional Rules

The RA may restrict registration under Section 2.b. to Lawyers and Law Firms which agree: 1) to abide by the professional rules in force in the Host Member; and 2) to be subject to the disciplinary rules of the responsible authority in the Host Member. The professional rules must be reasonably available to the applicant in the language(s) of the Host Member and one of the official languages of the WTO.

d. Notification Requirements

In order to ensure the efficient and transparent administration of any requirements for registration, Members shall notify the following to the WTO:

Enquiry points through which all interested persons can obtain written information on requirements for registration; and

Titles of the publications in which requirements for registration, changes thereto and interpretations thereof (including decisions of the RA) are published.

4. SCOPE OF PRACTICE

a. Law Practiced in Home Member

A Lawyer or Law Firm shall be permitted to practice law and to render advice regarding matters with respect to which the Lawyer or Law Firm is authorized to practice law and render advice in the Lawyer's or Law Firm's Home Member.

b. Host Member Law

i. Unless a Lawyer has been qualified as a Host Member Lawyer, a Host Member may prohibit a Lawyer from practicing Host Member law [within the territory of the Host Member], to the same extent that it imposes such prohibitions on its own nationals. The opportunity to qualify as a Host Member Lawyer shall be available to all Lawyers on a non-discriminatory basis.

ii. A Lawyer shall be permitted to associate with Host Member Lawyers pursuant to Section 5, and may transmit to clients advice regarding Host Member law rendered by the Host Member Lawyer with whom the Lawyer is associated.

c. Arbitration Proceedings

A Lawyer shall be permitted to participate, in any capacity, in arbitration proceedings in a Host Member without the need to register pursuant to Section 2.b.

5. FORMS OF PRACTICE AND ASSOCIATION

The Host Member shall not restrict the manner in which a Lawyer associates with other Lawyers or with Host Member Lawyers and shall not restrict the business form in which Lawyers organize their practice, provided that such forms do not differ from the forms in which Host Member Lawyers may practice.

a. Foreign Lawyers, with or without Host Member Lawyers, shall be permitted to form, or to participate together in an existing law firm, to the same extent that Host Member Lawyers are permitted to do so, or to organize their practice jointly in any other business form which is used in the Host Member by Host Member Lawyers.

b. Lawyers shall be permitted to hire, and be hired by, Host Member Lawyers. Lawyers and any entity in which Lawyers associate, including associations with Host Member Lawyers, shall be permitted to hire the personnel considered necessary to provide legal services.

c. A Lawyer shall be permitted to practice law and to render advice under the Lawyer's own name and under the name of a law firm or other entity with which the Lawyer is associated. A Lawyer shall be permitted to use in the Host Member the professional title used by the Lawyer in the Home Member, with reference to the Home Member jurisdiction of admission.

d. Foreign Law Firms shall be permitted to hire Host Member Lawyers, to admit Host Member Lawyers to partnership or equivalent status, and to practice law and render advice under the name of the Law Firm.

REPORT

Introduction.

The ongoing globalization of commercial activity by American businesses makes it imperative that U.S. lawyers and law firms be assured of the right to provide advice and assistance to their clients wherever the clients desire that assistance. The proposal before the House seeks ABA support for recommendations presented to the U.S. Trade Representative for assuring American lawyers the right to establish offices in the other countries that have signed the General Agreement on Trade in Services ("GATS"). The GATS is one of the agreements signed at the conclusion of the Uruguay Round in 1994 establishing the World Trade Organization (WTO). Under WTO procedures, signatories to the various agreements from time to time thereafter continue to negotiate expansions of access to their markets accorded to nationals of other signatories.

The instant proposal supports a request the United States may make in the context of further GATS negotiations to assure American lawyers the right to establish offices in other GATS member countries. It does not address "transient access" for lawyers who do not seek to open permanent offices abroad. In essence, this proposal seeks on a global basis the principles the ABA has been urging the Japanese Government to adopt for the past 20 years. The requests directed to Japan bore fruit and at least two dozen U.S. firms (and some English and other European firms) have since then been allowed to open offices in that country. Similar efforts

were pursued in assuring rights to open offices in China as that country becomes a WTO member.

The fact that the United States may request such "market access" for its lawyers, does not imply that it must be prepared to offer identical and reciprocal treatment for foreign lawyers wishing to open offices in the United States. The negotiations in the WTO are consciously designed to enable countries to request concessions on market access for particular goods or services that they wish to export without accepting the same terms for imports of the same goods or services. As relatively few foreign countries have expressed an interest in seeking rights of establishment for their lawyers in the United States, this request can be made without a commitment to accord identical treatment to foreign lawyers in this country.

Nevertheless, under the leadership of the American Bar Association, the United States has taken important steps to assure foreign lawyers rights to open offices in this country. In 1993 the House of Delegates approved a "Model Rule for Foreign Legal Consultants" that it urged the several States and the District of Columbia to adopt. Since then, 23 States, including most of these with major centers of international trade, such as New York, California, Illinois and Texas, as well as the District of Columbia, have enacted such a Rule. The ABA is continuing to urge all States to adopt such a rule consistent with the 1993 Model and the proposal that is before the House as a model for foreign countries.

The stake of the U.S. legal profession and the ABA in these negotiations

The magnitude of U.S. interest in opening offices abroad cannot be precisely measured, but it is suggested by the fact that approximately 100 U.S. law firms already have one or more foreign offices. The majority of those offices are in London and in other cities of members of the European Union. However, offices have been opened in Eastern Europe, Japan, China, Australia, Canada, Mexico, Brazil and Indonesia, to mention the most significant locations for current world trade. Department of Commerce statistics, that probably understate the value of exports of U.S. legal services, report that "exports" of U.S. legal services were valued at more than $2.8 billion in 2000. While many of these services were provided from domestic offices, a large part was either generated by foreign offices or actually performed in such offices of U.S. firms. The exports exceeded by a factor of more than 500% the value of "imports" of legal services.

Although U.S. law firms have been allowed to open offices in many countries, their rights to continue their practices are generally not guaranteed by treaty, and in some countries are prohibited or severely restricted. Under the auspices of the General Agreement on Trade in Services (GATS) members are seeking binding commitments to assure a liberal regime for legal and other professional services in as many member states as are prepared to sign. The Office of the United States Trade Representative (USTR) is conducting those negotiations on behalf of this country. It has specifically requested input from affected private sector representatives and invited the American Bar Association, as the principal membership organization of the U.S. legal profession, to express formal endorsement of the proposal that has been developed by ABA members working with the Legal Services Group of the Coalition of Service Industries (CSI). While the ABA need not endorse this (or any other similar proposal), the USTR believes that U.S. economic interests should assist it in negotiating sensible rules affecting their products and

services. Therefore, if the ABA is to affect the course of negotiations on legal services access abroad, it should adopt the present (or a comparable) proposal.

The scope of the Proposal for which support is sought.

The Section of International Law and Practice urges adoption of the accompanying Resolution to express ABA support for the principles under which U.S. lawyers may obtain and secure rights to practice from offices abroad. The Proposal was initially prepared by the Legal Services Committee of the CSI, with which ABA representatives and personnel from the USTR closely worked. The Committee worked on these proposals for more than two years, polled all 100 U.S. law firms known already to have offices outside the U.S. and interacted regularly with the Transactional Practice Committee of the Section of International Law and Practice. Thus, although the main sponsor of the Proposal now in the hands of the USTR was the CSI, the ABA had a vital role in the preparation of the document.

CSI is a major non-profit group that has brought together representatives of most of the "service" sectors of the US economy. These include the professional services of architecture, accounting, education, engineering, nursing and, of course, law. They also include the much larger service sectors such as air transport, audio-visual production and distribution, energy exploration, insurance, telecom and tourism -- to name but some of the 32 different sectors represented on the Department of Commerce/USTR Industry Sector Advisory Committee on Trade in Services. The USTR estimates that more than 75% of the US GNP is now attributable to services and that they account for 30% of US exports. (The latter figure is probably grossly understated due to difficulties in obtaining reliable statistics on the payment for services. Merchandise is easy to count and value as it crosses an international boundary and must be declared to customs authorities. No comparable regime exists for services.)

The Recommendation does not expressly deal with the issue of possibly even greater interest to more U.S. lawyers, namely, their right to provide legal services in foreign countries <u>without</u> opening a permanent office there. They wish to be assured continued rights for <u>transient</u> access. Lawyers are far from alone in that desire. However, it was the decision of the CSI (and the recommendation of the USTR) that the United States should seek assurances for transient access for <u>all</u> service providers - - or at least all professional service providers - - through a "horizontal" agreement covering all such sectors. If such an agreement were reached, the ability of U.S. lawyers to enter foreign countries on a temporary and occasional basis to provide services to both local and non-local clients (including most importantly their U.S. clients) would be best assured.

Two issues the USTR may face are not addressed in the Recommendation: First, foreign countries may demand comparable rights in the US, and the federal government has been reluctant to commit itself to require the States - - that retain the right and responsibility to license professional service providers - - to change their rules or practices. However, this does not make the case for seeking U.S. access to foreign markets less compelling. As noted earlier, few foreign countries have sought to "export" legal services to the U.S. Their major interests in the next round of WTO negotiations are likely to focus on other types of service providers (e.g., nurses or computer specialists) or on agricultural goods or reforms of U.S. antidumping law. Moreover, U.S. implementing legislation with respect to the GATS (the Uruguay Round

Agreements Act) specifies that no individual may sue a State for its failure to abide by commitments accepted by the federal government in the GATS or other WTO Agreements. Only the federal government, itself, may bring such suits were it persuaded to do so. No such suits have been brought to date.

Second, the "Foreign Legal Consultant" Model Rule adopted by the ABA and in force in one form or another in 24 jurisdictions addresses only the issue of permanent establishments by foreign lawyers, that is, the counterpart of the attached CSI proposal. The FLC Rule does not address transient practice in the US by foreign lawyers. This is a subject with which the ABA's Commission on Multijurisdictional Practice is dealing and as to which no consensus as yet emerged in that body. Nevertheless, the ABA need not await the Commission's report to support the attached Recommendation. The resolution deals only with permanent establishments by U.S. lawyers, just as the ABA's FLC Rule deals with foreign lawyers seeking to open offices here. It merits approval on its own as it deals with a key issue apart from the transient access question. That issue is likely to be considered by the GATS on a broader basis than only legal services. Securing temporary rights to provide services and assistance into and within WTO member nations can be most effectively accomplished on a horizontal basis applicable to all providers of professional services, including, for example, accountants, architects, engineers, nurses and teachers. The ABA may await USTR action in that fashion on that issue which is at the core of the MJP Commission's work.

What the Proposal Seeks

The Proposal seeks commitments, from all GATS members willing to accept them, that they will create a "transparent" and fair regime for registering qualified foreign lawyers that wish to practice from offices in that country. Both individual lawyers and firms may register, reflecting the fact that in many countries there are few, if any, rules regarding the qualifications of persons rendering legal advice but substantial rules applicable to the establishment of permanent offices from which consulting services are offered.

The Proposal suggests that admission to the bar in another GATS member ought, as a rule, be sufficient basis for permitting registration, so long as the individual registrant remains in good standing. The evaluation of competence is to be based on "objective" and "neutral" criteria. Denial of registration would be in writing and cannot be based on a lack of proficiency in the local language. However, familiarity with local rules of professional responsibility may be required and tested in one of the official languages of the WTO (English, French or Spanish).

The most critical portion of the Proposal deals with the "scope of practice" in which a foreign lawyer may perform. Section 4.a. states that the foreign lawyer will be permitted to practice law and render advice with respect to any matter which the lawyer or his/her firm is authorized to practice in the lawyer's "home" jurisdiction. This is intended to incorporate the ABA's Model Rule 1.1, namely, that the "scope of practice" is essentially based on the individual lawyer's competence. Thus, a lawyer in New York may be able to advise on the corporation and sales and banking law of New York but not on probate or criminal law of New York. At the same time, that lawyer may be competent to advise on the corporation law of Delaware, the UN Convention on International Contracts for the Sale of Goods and the ICC forms of international letters of credit. The lawyer may be competent to render advice on the sales or employment or intellectual

property laws of a number of countries other than the law of New York. As the Report accompanying the ABA's Model Rule for FLCs pointed out,

> "The scope of practice is a critical issue for American lawyers practicing abroad. Practice at the transnational level inevitably involves advice … that are, or may be, affected by the laws of several jurisdictions as well as the growing body of international law. …. As a practical matterit is simply not feasible to break that advice down into independent elements. … Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract; indeed, part of the task of the international practitioner is the determination as to which country's (or countries') laws will in fact apply to a given matter." Report to the House of Delegates of the Section of International Law & Practice, at 20 (1993).