

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 4-5, 2002

RESOLVED, That 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 consistent with, and as expressed and incorporated in, the ABA's "Model Rule for the Licensing of Legal Consultants" in the United States, dated August 1993.

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 without opening a permanent office there. They wish to be assured continued rights for transient 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 all 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 matter it 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).

Respectfully Submitted,

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