July 28, 2011

The Honorable Hillary Clinton
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Secretary Clinton:

The American Bar Association welcomes the report that the U.S. is resuming technical-level negotiations with India on a bilateral investment treaty (BIT) in August 2011. The ABA recognizes the importance of India as the fourteenth biggest trading partner of the United States. Uniquely among our trading partners, India has a present equal balance of trade with the U.S., amounting to $50 billion in services and goods annually. By reason of the Federal Government’s efforts in general and yours in particular, the ABA hopes that this bilateral trade and investment will flourish in the future.

A critical element in increasing the size of that trade and investment and the relationship between the two nations is the provision of legal services in their support. Such services of lawyers well versed, not only in the laws of the United States and India but also cross border transactional and arbitration matters, are plainly essential for such an increase. Obviously, the ability of lawyers in the United States to provide such services is an important issue for the ABA and its membership.

However, there is currently a serious risk that unless action is taken by the Government of India and the Bar Council of India, such legal services will be curtailed significantly, creating serious and perhaps overwhelming obstacles to the desired increase in United States/India investments contemplated by the BIT.

Under the auspices of the ABA, overseas licensed lawyers including those from India have been enabled to establish an office in the United States and provide their legal services to businesses in the United States. As this letter will summarize, there is an effort in India to deny such reciprocal treatment to U.S. licensed lawyers. Even a U.S. lawyer’s presence in India to assist such lawyer’s clients on issues arising out of the U.S. and/or international law on a “fly in and fly out” basis is under attack.
The ABA's Model Rule for Licensing and Practice by Foreign Legal Consultants has been adopted by 32 U.S. jurisdictions (including the leading U.S. commercial states, such as New York, California and Illinois, as well as the District of Columbia). This regime allows licensed lawyers from outside the U.S., including Indian lawyers, upon acceptance of a registration with the local bar or court, to establish an office in the United States and advise clients, face to face or otherwise, on the law of the jurisdictions in which they are members of the bar without passing any examinations or undergoing any training in the United States. U.S. lawyers who wish to provide U.S. law advice in India request that the State Department urges the Government of India, during the upcoming BIT negotiations, to establish a similar rule allowing non-Indian lawyers to provide advice to their clients in India on laws of their home jurisdiction. The inclusion of this issue on the agenda will greatly assist U.S. lawyers in making progress in their discussions with the Government of India and other authorities responsible for regulating non-Indian lawyers. The ABA would be pleased to provide an advisor to work with your negotiating team to assist with issues that arise and in the formulation of the requisite language.

On a related matter, a recently brought lawsuit is pending in the High Court of Madras in which a private Indian lawyer seeks to limit the ability of U.S. lawyers to travel to India and give advice on their home jurisdiction's laws to Indian clients or to U.S. clients that are at the time present in India. Many of the largest U.S. law firms including Covington & Burling LLP, Paul, Weiss, Rifkin, Wharton & Garrison, White & Case LLP and the U.S. law firms listed on the attachment to the letter, are joint respondents in the proceeding (the "U.S. Respondent Firms"). Other U.S., British and Australian law firms are named respondents as well. The Government of India as well as the Bar Council of India are also named respondents.

Indian lawyers also travel frequently to the U.S. on an "in and out basis" to advise American clients on issues arising out of Indian law without registration. Indian firms have already established offices in the U.S. to perform such consulting services. Given the increasing number of cross-border transactions involving India and the U.S. (i.e., issuance of Indian Depository Receipts, investments in and acquisitions of U.S. businesses by India based multi-national companies, etc.), this practice is likely to become even more prevalent.

At the present time, none of the Respondent U.S. Firms has an office in India. Even though an Indian lawyer, upon registration, can open an office in the U.S. to give advice on Indian law, the U.S. Respondent Firms are confining their activity to travel to India on a temporary basis to provide advice on the law of their home jurisdictions. U.S. lawyers want no more than the rights Indian lawyers have in the United States – a reciprocal opportunity to advise clients on the laws of their home jurisdiction without presuming to advise on the law of a country where they are not admitted to practice.
Prohibiting American lawyers from visiting their India based clients to advise and counsel them on matters pertaining to U.S. law, even on a short run basis, would adversely impact their ability to represent their clients and unnecessarily disadvantage these U.S. law firms. Requiring officials of Indian companies to travel outside India to obtain advice concerning non-Indian law would significantly raise the transaction costs of Indian companies, creating an additional impediment to retaining the services of U.S. based law firms.

In addition, prohibiting American lawyers from traveling with their U.S. clients to India in order to advise and counsel them on U.S. related legal issues in connection with transactions, ventures, financings, international arbitrations or the like being pursued with India based companies will severely handicap the ability of U.S. based companies in pursuing activities in India with India counter-parties – activities that, undoubtedly, will benefit the Indian and U.S. economies and promote bilateral investment and trade.

We hope that the courts will not intervene in this matter, which should be resolved through appropriate governmental and regulatory means, and that the status quo (under which lawyers from both countries can and do visit the other on a temporary, transient basis to advise only on home country law) can be maintained while authorities in India address the broader issue of permitting U.S. lawyers to have a more established role in India.

We would like the Government of India to adopt rules and regulations that are consistent with the ABA’s Foreign Legal Consultant Rule which allows foreign lawyers to establish offices in the U.S. and give advice on the law of their home countries. This would allow U.S. lawyers to open offices in India, just as Indian lawyers can in the U.S., without the risk of lawsuits and action by courts.

I urge the State Department to consider including this pressing issue on the agenda for the upcoming BIT negotiations with India. If I can provide any further information please have your staff contact me. Again, thank you for your attention to this matter. In the event that you have any questions or if there is any way that I can assist in resolving this matter by working with you or your colleagues, please do not hesitate to contact me.

Sincerely,

Stephen N. Zack

Attachment
List of U.S. law firms

White & Case LLP
Wilmer Hale
Shearman & Sterling LLP
Hogan & Hartson
Davis Polk & Wardwell
Akin Gump Strauss Hauer & Feld LLP
Paul, Weiss, Rifkin, Wharton & Garrison
Pillsbury Winthrop Shaw Pittman
Wilson Sonsini Goodrich & Rosati
Arnold & Porter LLP
Covington & Burling LLP
Perkins Coie
Mayer Brown LLP