October 28, 2015

Edward Gresser,
Acting Chair, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508


Dear Mr. Gresser:

On behalf of the American Bar Association (ABA), I submit the following in response to the Office of the U.S. Trade Representative’s request for comments to compile the National Trade Estimate Report on Foreign Trade Barriers (80 Fed. Reg. 50377-79 (August 19, 2015)). Our comments focus on trade barriers to the provision of legal services and highlight existing barriers in two countries of particular importance to the U.S. legal profession – South Korea and India.

With over 415,000 members, the ABA is the largest voluntary professional membership organization in the world. Our members include lawyers from practice settings of all sizes and types, and from every U.S. jurisdiction and many foreign countries. Through entities such as its Task Force on International Trade in Legal Services and the Section of International Law, the ABA monitors ongoing trade negotiations and other initiatives that impact trade in legal services; informs and educates ABA members and state regulators about legal services trade issues and their implications for the regulation and practice of law in the U.S. and abroad; and regularly communicates with USTR and the Department of Commerce regarding legal services issues.

The ABA has long supported a liberalized, rules-based system of international trade, both as a mechanism to advance the rule of law and as a means to enhance the ability of U.S. lawyers and law firms to effectively serve their clients through cross-border practice. The ongoing globalization of commercial activity by American individuals and businesses makes it imperative for U.S. lawyers to be able to provide advice and assistance to their clients wherever the clients need that assistance. In 2002, the ABA adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. In support of this policy, the ABA is actively working to enhance the ability of U.S. firms to establish offices overseas and to associate freely with foreign lawyers and law firms.

The United States is the largest legal services exporter in the world, with over $9 billion in exports in 2013. With imports just under $2 billion, the U.S. enjoys a strong trade surplus in the legal
services sector. While some of these services were provided from domestic offices, many were either generated by or performed in foreign offices of U.S. firms. U.S. law firms increasingly desire to establish offices abroad to provide integrated and comprehensive services desired by their clients in this global business environment.

Legal services market access barriers remain in place in many countries, but we concentrate our comments here on current and potential future barriers in South Korea and India. These economies are among the fastest growing markets for U.S. exports and investment and, as such, are key destinations for U.S. lawyers and law firms. For each of these markets, and for all U.S. trading partners, the ABA urges efforts toward the ultimate goal of ensuring that U.S. law firms are able to establish offices, associate freely with local lawyers and law firms, and provide services through temporary entry of lawyers.

South Korea

Under the US-Korea Free Trade Agreement (KORUS), Korea made a series of commitments with regard to legal services. These commitments, set forth in Annex II of the KORUS, establish a three-step process for liberalizing legal services in Korea. In the first phase, U.S. firms were allowed to establish representative offices in Korea. In the second phase, U.S. firms were allowed to establish specific cooperative agreements with Korean firms. In the third and final phase, U.S. firms are supposed to be able to establish joint ventures with Korean firms. Annex II makes clear that liberalization was intended to expand access and that new restrictions would not be imposed.

Relying on the commitments made in KORUS, more than a dozen U.S. firms established offices in Korea. Approaching the third phase (to begin in 2017) of liberalization, U.S. law firms have assumed there would be meaningful opportunities to establish Joint Ventures and hire Korean-trained lawyers. Unfortunately, Korea is now considering amendments to its implementing legislation, the Foreign Legal Consultants Act, which would impose severe restrictions on U.S. law firms.

Some of the most restrictive aspects of the Act would: (1) impose unrealistic equity requirements for U.S.-Korean joint venture firms; (2) limit the scope of practice of joint venture firms, for example, prohibiting practice in the real estate, mining, and intellectual property sectors; (3) restrict the types of Korean law firms (e.g., only those in existence at least three years) that would be eligible to partner with U.S. law firms in joint ventures; and (4) prohibit joint ventures from practicing before local courts. These provisions appear designed to limit foreign access to the Korean legal services market in ways that are inconsistent with Annex II and would nullify benefits for which the U.S. negotiated in KORUS.

India

India continues to be one of the most restrictive markets for U.S. lawyers and law firms. Under a ruling issued by the Bombay High Court in 2009, neither U.S. nor other foreign law firms may establish offices in India. Following that decision, a suit was filed against a number of U.S. and other foreign firms challenging the right to provide services relating to home country or
international law on a temporary “fly-in/fly-out” basis. In February 2012, the Madras High Court issued a decision finding that there is no bar to foreign lawyers’ or law firms’ providing services on a fly-in/fly-out basis for the purpose of giving advice on home country or international law or to their participating in arbitration proceedings involving international commercial transactions. The Bar Council of India appealed the Madras ruling to the Supreme Court of India, where it is still pending at this time. A ruling by the Supreme Court prohibiting fly-in/fly-out access or participation in arbitration proceedings by foreign law firms in India would have serious consequences for the U.S. legal profession and would likely inhibit U.S. commercial transactions in India as well.

Over the past year, the government of India has publicly stated support for liberalization, and we understand an Inter-Ministerial Group has been formed to consider the opening of Indian legal market. As a part of that process, several stakeholders in the Indian legal profession have put forward proposals that include both a framework for staged liberalization and specific proposed rules to govern the regulation of foreign lawyers and law firms operating as foreign legal consultants. However, some of the proposals would put in place rules so restrictive as to effectively maintain the prohibition on U.S. and other foreign firms’ establishing offices in India. Any proposal considered by the government of India should include meaningful reforms to ensure that U.S. law firms can establish offices in India, associate with local Indian lawyers and law firms, engage in temporary practice (fly-in/fly-out), and participate in international arbitration.

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We appreciate past and ongoing initiatives by the U.S. Trade Representative to address legal services market barriers and to improve the ability of U.S. law firms to serve their clients overseas. However, serious barriers remain in countries that are key U.S. trading partners, and we urge continued efforts towards reducing or eliminating those barriers, both in the countries discussed above and in other countries around the world.

We appreciate the opportunity to share these comments.

Sincerely,

Thomas M. Susman  
Director  
Governmental Affairs Office