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Transnational Legal Practice

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Legal services are within the compass of forthcoming negotiations on international trade in services under World Trade Organization (WTO) auspices. This has translated into heightened awareness on the part of lawyers in the United States and abroad that their profession cannot immunize itself from the worldwide diffusion of information, technology, investment, wealth, and ideas. This awareness is reflected in some of the developments reported below.

I. Forum on Transnational Practice for the Legal Profession

On the invitation of the American Bar Association Section of International Law and Practice, the Council of the Bars and Law Societies of the European Community (CCBE) and the Japan Federation of Bar Associations (JFBA), over 100 bar leaders from twenty-seven nations, as well as representatives of the International Bar Association, Union Internationale des Avocats, Inter-American Bar Association, and Inter-Pacific Bar Association, met in Paris on November 9 and 10, 1998, to discuss a range of matters that are of interest and concern to the profession. All the participants were presidents or other senior officers of national bar associations from countries that are members of the Organization for Economic Co-Operation and Development.

One of the principal objectives of the forum was to investigate the possibility that the international legal community could make a concerted presentation to the WTO's Working Party on Professional Services (WPPS), which is formulating proposals for the liberalization of trade in services, including professional services. To this end, the colloquium considered three broad subjects, each consuming a half-day of discussion and debate. These were (i) uniqueness and responsibilities of the legal profession, including such matters as multidisciplinary practice and ethical issues that present themselves in transnational practice; (ii) measures that might be taken to reduce impediments to the ability of lawyers to practice in jurisdictions other than those of their original licensure; and (iii) forms of licensure. The ABA, CCBE, and JFBA prepared discussion papers on each of these subjects, which were distributed to the participants some weeks before the forum, and as a result, the discussion

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was for the most part informed and focused. Philip Anderson, the ABA President, attended the forum—as did Michel Gout, President of the CCBE, and Shigeru Kobori, President of the JFBA—and delivered one of the introductory addresses. In the concluding session, Mr. Anderson expressed the view that the forum had been a "remarkable" success and recommended the continuation of the forum process. Another forum in 1999 is unlikely, but the ABA, CCBE, and JFBA are discussing the timing and agenda of a colloquium in 2000, perhaps in Asia.

II. Paris Bar

In formal and informal meetings with representatives of the Conseil of the Ordre des Avocats, the ABA argued that the so-called Article 100 examination, a two-day written and oral examination administered in French on the whole range of French law which Americans must pass in order to practice in France, is unnecessarily burdensome. The ABA urges that any such aptitude test should have at least four characteristics in order to be acceptable under the General Agreement on Trade in Services (GATS) principles. These are: (1) transparency as to the content of and procedures for taking the examination; (2) readily available and regularly scheduled preparatory courses; (3) subject matter reasonably related to the applicants' intended fields of practice in the host country; and (4) conduct of the examination in one of the WTO official languages—French, Spanish and English—with the choice of language to be made by the applicant. The current Article 100 examination does not have any of these characteristics. The ABA's efforts to make the test less burdensome have not been successful, but an effort to promote these changes continues.

Francis Teitgen won a contested election in November to become the Bâtonnier of the Paris Bar in 2000. He will serve as "Dauphin" to the incumbent Bâtonnier, Dominique de la Garanderie, during 1999. It was reported that M. Teitgen's margin of victory was provided by younger lawyers and those who were persuaded by his "internationally-minded" campaign—a hopeful portent so far as the ABA is concerned. In spite of its frustrations with the Article 100 examination described in the preceding paragraph, the ABA enjoys cordial relationships with Dominique de la Garanderie and her predecessors, and such relations will without doubt continue in the administration of M. Teitgen.

A third French development of note is that ABA and section member John Riggs was awarded the medal of Chevalier de l'Ordre National du Merite by President Chirac. Mr. Riggs is a member of the Conseil of the Paris Bar and has been active for many years in Franco-American affairs, including relationships between the bars of those countries.

III. Japan

The ABA has also persevered in its efforts to improve the ability of American lawyers to practice in Japan, but without notable success. President Clinton and former Prime Minister Ryutaro Hashimoto signed a U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy in June 1997. On May 13, 1998, the Japanese Diet adopted an amendment to the Foreign Attorneys' Law that somewhat relaxed restrictions on foreign lawyers' scope of practice and reduced the period of required practical training for foreign lawyers in Japan from five to three years. The core restrictions that the American profession and the Department of Commerce have particularly objected to or largely remain untouched are the inability of American and Japanese lawyers to form partnerships, and the inability of American lawyers to employ Japanese lawyers. The February 10, 1999, issue of *International Trade*

Reporter noted the determination of the Japanese that "at least one-third of the deregulation requests presented to the Japanese government by [Japanese] private sector groups cannot be implemented because of their potential adverse impact on the country's social order . . ." and anxieties of that nature have been voiced by our Japanese colleagues in negotiations respecting legal services. The Japanese Ministry of International Trade and Industry announced in February 1999 that Japan seeks implementation of mutual recognition accords in professional services in the WTO 2000 negotiations, and one can hope, but not necessarily expect, that those negotiations will provide a long-sought breakthrough.

IV. Department of Commerce Services 2000 Conference

The Transnational Legal Practice Committee participated in an October 1998 Conference and Dialogue on Global Policy Developments and U.S. Business, co-sponsored by the Department of Commerce and the U.S. Coalition of Service Industries, to which committee member Peter Ehrenhaft serves as an ABA representative. The conference was a part of a continuing effort by the U.S. government to prepare itself for the Millennium Round of WTO negotiations and presented an opportunity to acquaint government officials and others with difficulties encountered by American lawyers in their efforts to practice abroad.

The U.S. government has increasingly devoted attention to the role of services, including legal services, in improving this nation's trade performance.

> The current account U.S. balance of payments in 1997 shows that U.S. cross-border service exports exceeded imports by nearly $88 billion and offset 44 percent of the merchandise trade deficit of $198 billion. . . . During 1990–97, U.S. exports of business, professional and technical services rose by an annual rate of more than 17 percent.[1]

The Commission has also reported that in 1996 cross-border exports of legal services totaled $1.9 billion, an increase of nearly fifteen percent over the previous year, and predicted that global demand for U.S. legal services will grow at an annual rate of six to seven percent.[2]

V. WTO Action on the Accountancy Sector

On December 14, 1998, the WTO Council on Trade in Services, the parent of the WPPS, adopted the Disciplines on Domestic Regulation in the Accountancy Sector (Disciplines) recommended by the WPPS. The Disciplines contain injunctions designed to assure that regulatory requirements are based on objective and transparent criteria and are not more burdensome than necessary, as required by Article VI-4 of the GATS, and that they also establish guidelines for the recognition of professional qualifications. The document is of some interest to the legal profession because it could constitute a precedent for the WTO's examination of restrictions on the ability of lawyers to practice abroad, although the International Bar Association and others have argued vigorously that this should not be the case. The Disciplines do not have immediate legal effect, but before the end of the round of services negotiations beginning in January 2000, all the Disciplines developed by

1. U.S. International Trade Commission, INDUSTRY TRADE & TECH. REV., Sept. 1998, at 17.
2. U.S. International Trade Commission, RECENT TRADE IN U.S. SERVICES TRADE, May 1998, at 361–62.

the WPPS will be integrated into the GATS and legally binding. Meanwhile, the council decision contains a standstill provision under which all WTO members, whether they have made GATS commitments in the accountancy sector or not, agree not to take measures that would be inconsistent with the accountancy disciplines.

It is unclear how legal services will be dealt with in the Millennium Round negotiations. Some Latin American and Asian nations have urged that it is too great a strain on WTO human and financial services to examine each profession—law, engineering, and architecture, in particular—independently, after the pattern of the accountancy sector study. Each profession should instead be dealt with "horizontally." Indeed, some have argued that all services, not just the professions, should be dealt with in this fashion. The structure of the negotiations will be determined at a WTO ministerial meeting in Seattle during November 1999.

VI. Transatlantic Economic Partnership

At the London European Union-United States summit of May 18, 1998, a Transatlantic Economic Partnership (TEP) was declared, and a joint statement described an initiative to intensify and extend multilateral and bilateral cooperation in the fields of trade and investment. The summit also adopted an Action Plan for achieving market liberalization in certain sectors before the year 2000.[3] The plan contains a section on services, but legal services are not specifically mentioned, and whether legal services should be included in the TEP negotiations was not definitively decided at an E.U.–U.S. meeting in Washington during February 1999.

In February 1999, the President of the CCBE inquired whether the ABA had an interest in undertaking discussions with the CCBE with a view to advancing TEP objectives. The Transnational Legal Committee responded that although neither the U.S. government nor the ABA had formally agreed that legal services should be a part of the TEP agenda, "the CCBE and the ABA, through the TEP initiative and in other ways, should actively participate in the realization of the goal set by the European Commission on March 11, 1998, *viz.* 'the creation of a [transatlantic] free trade area in services' " and added that the Section of International Law and Practice was prepared to explore these possibilities with CCBE representatives.

VII. *Birbrower* Case in California

A development of some consequence which is not, strictly speaking, transnational nevertheless deserves a place in this report. In *Birbrower, Montalbano, Condon & Franc P.C. v. Superior Court*,[4] the California Supreme Court held that out-of-state lawyers who were not admitted to practice in California violated the state's unlicensed-practice-of-law statute when they represented California parties in an arbitration proceeding conducted in California. Decisions of this nature by American courts and regulatory authorities provide fodder to foreign lawyers and government officials who resist liberalization of their systems by pointing to the irrationalities of American regulation. The good news is that the California legislature overturned the *Birbrower* holding in a statute approved by the Governor on September 28, 1998.[5] The statute sets out a procedure for out-of-state lawyers to seek

3. Press releases relating to the TEP are available on the *United States Trade Representative Home Page* (visited July 2, 1999) <http://www.ustr.gov>.

4. Birbower, Montalbano, Condon & Franc P.C. v. Superior Court, 930 P.2d 339 (1997).

admission *pro hac vice* in order to participate in California arbitrations and creates an exception to the California Business and Professions Code provision that requires anyone who practices law in the state to be an active member of the California Bar.

VIII. ABA Model Rule

The Transnational Legal Practice Committee's efforts to persuade states to adopt the ABA Model Rule for the Licensing of Legal Consultants have been rewarded with some modest success.[6] In October 1998, the Rules Committee of the Massachusetts Supreme Judicial Court approved a version of the rule, which was to have been effective January 1, 1999, but the rule is now the subject of further proceedings relating primarily to administrative matters. Colorado is once more considering the subject, and the Tennessee Bar Association has expressed interest. American lawyers would be performing an important service if they persuaded their States to adopt the Model Rule; the fact that only twenty-two states have done so is a weapon in the hands of overseas bars who resist efforts to liberalize their systems for the admission and licensing of foreign lawyers.

IX. Internet Subcommittee

The Transnational Legal Practice Committee has created a subcommittee on the deployment of internet technology in transnational practice. The subcommittee is headed by Jeffrey M. Aresty, a Vice Chair of the Committee (jaresty@abanet.org), and lawyers who are involved or interested in this subject are encouraged to communicate with him. International lawyers have used computer technology for years, but emerging Internet technologies present new applications that will have far-reaching consequences for lawyers involved in transnational practice, and these technologies will be the focus of the subcommittee's work. It will concentrate on virtual relationships among law firms, telecommuting (i.e., anywhere, anytime law practice), ethical issues confronting lawyers who provide legal information over the Internet, the impact of electronic communications on the attorney-client privilege, conflicts of interest, and formation of attorney-client relationships by electronic means.

The committee now has a listserve: inttlp@abanet.org. Members of the committee and others who have an interest in transnational practice are invited to sign on.

5. Assembly Bill 915, 1998 Cal. Adv. Legis. Serv. 915 (Deering) (Cal. 1998).

6. Louis B. Sohn, *American Bar Association Section of International Law and Practice Report to the House of Delegates Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994).