

# Transnational Legal Practice: Cross-Border Legal Services: 2002 Year-in-Review

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## I. Major Issues

The creation of a more coherent global system governing cross-border services, including legal services, has lagged behind the opening of the global system governing the trade of goods. Several interwoven historical trends, including the wholesale adoption of neo-liberal trading policies in nearly all national economies, the tremendous growth in global trade in services, and the successful creation of the World Trade Organization (WTO), have helped forge a context in which the issue of cross-border services has been pushed to the forefront in international trade negotiations. These developments led to the adoption of the General Agreement on Trade in Services (GATS) during the Uruguay Round.<sup>1</sup> Although an important breakthrough in creating a global system to regulate trade in services, the GATS agreement by itself did not require any WTO Member (114 countries were members of the WTO at December 31, 2002) to overhaul its regulation of any particular service sector; instead its major achievements were to: (1) establish a normative framework to guide WTO Members in their regulation of cross-border services; (2) create an obligation to negotiate for further liberalization; and (3) freeze, for those service sectors “scheduled” by a WTO Member, existing legislation to the extent it contradicts GATS normative principles. This focus on creating a global system governing international trade in services, including legal services, may yield in coming years to a comprehensive global agreement regulating various

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1. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS], available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) (last visited Aug. 15, 2003).

aspects of cross-border services. Regulating legal services will be increased when the rules of more individual states are liberalized so as to afford fair access to foreign lawyers and firms.

During 2002, several seminal events occurred with important implications for those interested in the regulation of cross-border legal services. This Year-in-Review summarizes these events and attempts to place them into context. Of the various events that occurred, two stand out as the most important. First, during 2002, the GATS 2000 negotiations, as discussed below, picked up steam by entering a phase in which WTO Members exchanged "requests" relating to legal services. This phase is the process by which WTO Members signal to each other their expectations for the negotiations.<sup>2</sup> Second, in August of 2002, the House of Delegates of the American Bar Association (ABA) adopted the Report of the Commission (Commission) on Multijurisdictional Practice (MJP Report), which included two proposals to modernize the approach of state regulation of the international cross-border provision of legal services.<sup>3</sup>

The negotiation of global rules governing legal services faces a number of impediments. First, while goods entering a foreign market can be seen, counted, and their value ascertained, the four "modes" in which services cross borders are not easily traced or valued.<sup>4</sup> This murkiness makes it very difficult for individual WTO Members to quantify what trade flows for services currently exist and what changes new rules would bring to those flows. Second, while it is logical for traders in goods to exchange concessions for different products (wine for wool is the classic example), most services, at least those with high value added like legal services, tend to be exported from developed countries. This trend reflects the structural shift of more developed countries from industrial based to service based economies over the past several decades. Therefore, unlike GATT tariff negotiations regarding various goods, it is harder to find the wine-for-wool tit-for-tat when creating rules for services.<sup>5</sup> The developing countries in the WTO see agreement to grant access to foreign

2. See WTO Council for Trade in Services, Special Session, *Report of the Meeting Held on 26 May 2000*, S/CSS/M/3 (June 26, 2000), as cited in Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002), available at [http://www.abanet.org/cpr/gats/terry\\_full\\_vanarticle.pdf](http://www.abanet.org/cpr/gats/terry_full_vanarticle.pdf).

3. See AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 2002), available at <http://www.abanet.org/cpr/mjp-home.html> [hereinafter MJP Report].

4. The negotiations regarding legal services rules reach all of the various GATS Modes by which legal services are provided: (1) supplying, by means of, for example, the mail, telephone, or internet, legal services from one jurisdiction into another jurisdiction without the provider establishing a permanent or temporary presence in the receiving jurisdiction; (2) permitting consumers in the receiving jurisdiction to purchase legal services from or in another jurisdiction; (3) allowing lawyers from the providing jurisdiction to establish a commercial presence in the receiving jurisdiction; and (4) permitting providers to enter and stay temporarily in a receiving jurisdiction to deliver their services (so-called FIFO Rules for Fly-in/Fly-out). However, as a practical matter, Modes (1) and (2) are difficult to control because they are generally provided by communications not subject to regulation or control, other than when and where delivered. It is Modes (3) and (4) that are the heart of the rules "in play".

5. See General Agreement on Tariffs and Trade (Oct. 30, 1947), available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (displaying the original GATT 1947 agreement dealing with trade in goods). In *World Trade Law*, Kevin Kennedy defines GATT as follows:

The General Agreement on Tariffs and Trade (GATT) is the fountainhead of international trade law. Signed by 23 nations—12 developed, and 11 developing economies—on October 30, 1947, and headquartered in Geneva, Switzerland, GATT performed double duty for 47

lawyers as a bargaining chip for non-services concessions, such as agricultural goods or for the admission of unskilled labor. There is little room for equivalent exchanges in comparable services as there may be with regard to legal service concessions between, for example, the United States and the European Union (EU) or Japan or Australia.<sup>6</sup>

In addition to these global problems, the United States faces an additional problem in negotiating rules governing legal services. The existing rules in most states within the United States regarding foreign lawyers, to the extent that they even have one, appear protectionist, even if not intended to be so.<sup>7</sup> Fewer than half of the states provide expressly for the establishment of offices by foreign lawyers. However, in the absence of a citizenship requirement, foreigners may qualify for admission to the bar with the right to establish offices on a par with U.S. nationals, provided they satisfy the educational requirements and pass a state bar examination. Most foreign lawyers wishing to establish offices in the United States (and even many who do not) attend U.S. law schools, take the U.S. bar exams, and become full members of the U.S. bar, making irrelevant reliance on special rules for foreign lawyers *who have not satisfied local educational and bar examination requirements*. This is possible in all states if the foreign lawyer enrolls in the typical three-year U.S. law school program, and in New York and a handful of other jurisdictions, if the foreign lawyer selects a one-year graduate program in a U.S. law school. Most U.S. lawyers are less able to take advantage of comparable rules that may exist in foreign countries, because fewer Americans are sufficiently fluent in foreign languages to take and pass bar examinations administered in a language other than English.

U.S. lawyers and law firms face a host of barriers to providing cross-border legal services. For example, some countries have attempted to regulate establishments by requiring: (1) that all partners (including both direct and indirect equity owners) of the home country entity establishing a presence in the host country qualify in some form in the host jurisdiction; (2) that any association with host jurisdiction lawyers contain more host country lawyers than U.S. lawyers; and (3) that host country lawyers maintain a majority ownership in

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years as both the premier multilateral trade agreement and international trade organization. GATT is the immediate predecessor of GATT 1994 and the World Trade Organization, which assumed GATT's dual roles on January 1, 1995. The GATT-WTO system celebrated its 50th anniversary on January 1, 1998.

RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 1 (1998).

6. Although the empirical evidence that does exist supports the proposition that the United States and the EU would disproportionately benefit from more liberalized trade flows of legal services, countries receiving those services would benefit in a number of important but somewhat amorphous ways. For example, host country lawyers, working as either local counsel or directly employed by a multi-national firm will be exposed to the forms and procedures of modern commerce and legal transactions.

7. In most other WTO Members, national entities—the national government—regulate the practice of law. Although some other WTO Members, the EU, Switzerland, Germany, Canada, and Australia, have a sub-national regulatory structure governing legal services, these jurisdictions appear to have a greater willingness to accept national government supremacy than the United States and U.S. lawyers seem willing to accept. In *Holland*, the Supreme Court held that, through treaties, the national government could undertake international commitments that addressed matters normally reserved to state power. *Missouri v. Holland*, 252 U.S. 416 (1920). However, whether the analysis adopted by the court in 1920 would be followed by the present Supreme Court is questionable and, in any event, the Congress and Administration have generally indicated an unwillingness to use treaty powers to override state law. See, e.g., Section 102(b) of the Uruguay Round Agreements Act, 19 U.S.C. § 3512(b).

the entity established in the host jurisdiction. Although a difficult task, the MJP Report provides a coherent road map for the states to align their existing rules with GATS principles. If such rules were implemented in the United States, the WTO Members that have linked their liberalization to the argument that the United States' house is not in order, would, obviously, no longer be able to make such an argument.

## II. Developments During 2002

### A. GATS NEGOTIATIONS

Although the GATS was an historic agreement for the liberalization of the global rules regulating cross-border trade in services, it was only the first step in the process and not a wholesale adoption of a new global system. The second step was initiated with the inception of the GATS 2000 negotiations, which thereafter became part of the Doha Development Agenda negotiations.

#### 1. GATS Requests

The current GATS negotiations began through the submission by participants of "requests," which were due June 30, 2002, which stated what the requesting Member expected from the other Members to whom the request is related.<sup>8</sup> In its legal services requests, for example, the United States could and did ask Japan to abolish its limitations on the right of foreign firms to employ or admit as a partner a Japanese lawyer to advise on Japanese domestic matters.<sup>9</sup>

During the February 2002 Midyear Meeting in Philadelphia, the ABA approved a resolution, sponsored by the Section of International Law and Practice (SILP), urging the United States Trade Representative (USTR) to seek for U.S. lawyers rights consistent with those afforded foreign lawyers in states that adopt the ABA Model Rule for the Licensing of Legal Consultants (Model FLC Rule).<sup>10</sup> On June 30, 2002, the USTR submitted its legal services requests. The details of these requests are still confidential, but legal services representatives have been advised that the requests were developed in close cooperation with lawyers of the New York City and New York State Bar Associations, as well as the Coalition of Service Industries, and are consistent with Recommendation 8 of the MJP Report.

The United States' requests recommended adoption of a reference paper on legal services that closely tracks the ABA Model Rule. If adopted by a foreign country and implemented,

8. WTO Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001). For a brief discussion of the Doha Declaration and deadlines, see Laurel S. Terry, *Latest Developments Regarding the GATS and Legal Services*, THE BAR EXAMINER, Vol. 72, No. 3, Aug. 27, 2003, at 27, available at [http://www.abanet.org/cpr/gats/gats\\_home.html](http://www.abanet.org/cpr/gats/gats_home.html).

9. The Japanese have requested that the United States eliminate or reduce the requirements of some states requiring a lawyer to have five years of prior experience before being considered as eligible for foreign legal consultant status.

10. The House of Delegates adopted the Model Rule in 1993. See AMERICAN BAR ASSOCIATION, MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS (1993), available at [http://www.abanet.org/cpr/jclr/for\\_legal\\_consultants.pdf](http://www.abanet.org/cpr/jclr/for_legal_consultants.pdf) (last visited Mar. 17, 2003) [hereinafter MODEL FLC RULE]. Key elements are a broad "scope of practice" provision tied to the lawyer's competence to advise on home country, international, and third country law and, to some limited extent, host country law. It also allows FLCs to be employed by, to employ, and to become associates, partners, or members of any host country lawyer or organization permitted to practice law. The Model FLC Rule has not been adopted, as such, in any jurisdiction, although New York law is the closest.

the U.S. proposal would enable U.S. lawyers and U.S. law firms, as applicable, to (1) freely establish offices in that country; (2) serve as foreign legal consultants” without examination, in such countries and to practice whatever law they are permitted to practice in the United States (e.g., home country law, third country law, and international law) other than limited aspects of host country law; (3) form joint ventures or partnerships with host country lawyers and law firms; (4) hire local lawyers in the host country or be hired by foreign lawyers and law firms in other countries; and (5) become licensed in countries that currently do not permit foreign lawyers to become full bar members, although examinations could be required of such persons.

At approximately the same time that the United States submitted its requests, the United States received requests from several other countries concerning legal services. At the time this Year-in-Review summary was prepared, these requests were still confidential. However, since then they have been circulated to state contact points and, in general, ask states lacking any FLC rule to adopt one, and to reduce the period of prior practice in the home country to qualify for FLC status. Furthermore, several WTO Members in their requests asked the federal government to remove the U.S. citizenship requirement to register as an attorney practicing before the U.S. Patent Office. Once the USTR, the federal official primarily responsible for the negotiation of trade agreements with foreign countries, including the GATS, has analyzed these requests and heard from applicable states and U.S. interests, the United States will prepare and submit its “offers” regarding legal services due by the March 31, 2003 deadline. At the time of the preparation of this report, the United States had not submitted any new “offer” with respect to legal services.<sup>11</sup> However, additional requests and offers can be made at any time prior to the completion of the negotiations, now scheduled to be completed by January 1, 2005.

## 2. Accountancy Discipline

A supplement to the “offer-request” track is the possibility of expanding the rules developed for accounting services. In December 1998, the WTO Council for Trade in Services issued a document called *Disciplines for the Accountancy Sector*.<sup>12</sup> As its name suggests, this document applies only to accounting services. It was prepared pursuant to GATS article VI, which requires the WTO Council for Trade in Services (or its delegate) to prepare disciplines on domestic regulation to ensure, among other things, that licensing and qualification measures are not more burdensome than necessary to fulfill a legitimate objective and do not constitute barriers to trade.<sup>13</sup>

11. The Office of the United States Trade Representative Web site provides the current status of the GATS negotiations. See Office of the United States Trade Representative, GATS Negotiations, at <http://www.ustr.gov/reports/index.shtml> (last visited Aug. 25, 2003).

12. See WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector*, S/L/63 (Dec. 15, 1998) and WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64 (Dec. 17, 1998). These Disciplines are available on the GATT webpage of the ABA Center for Professional Responsibility at [http://www.abanet.org/cpr/gats/gats\\_home.html](http://www.abanet.org/cpr/gats/gats_home.html).

13. World Trade Organization, Uruguay Round Agreement: General Agreement on Trade in Services, Article VI: Domestic Regulation, available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm) (last visited Aug. 24, 2003). With respect to the preparation of disciplines so as to ensure that licensing and qualification measures are not more burdensome than necessary, article VI:4 Domestic Regulation reads as follows:

With a view to ensuring that measures relating to qualification requirements and procedures, technical

Currently, there is a WTO entity called the Working Party on Domestic Regulation that is studying whether the *Disciplines for the Accountancy Sector* can and should be extended “horizontally,” that is, to all service sectors, including legal services. Many service sectors, including representatives of legal services, have argued that their sector deserves its own discipline. Thus, one of the issues that WTO Member States will have to resolve in the near future is whether to adopt a horizontal discipline and whether legal services should be included within the coverage of that horizontal discipline or have its own discipline. Each WTO Member State is entitled to participate in the Working Party on Domestic Regulation.

Some WTO Member States have already issued statements indicating whether, in their view, the *Disciplines for the Accountancy Sector* should be extended horizontally to all other service sectors. Some bar associations, most notably the Canadian Bar Association and the Federation of Law Societies of Canada, have already issued position papers in which they indicate those provisions they find acceptable and unacceptable in the *Disciplines for the Accountancy Sector*. The WTO Member States have agreed that each country’s representative should be consulting the relevant domestic organizations about these issues.

The issue of how legal services should be regulated at a global level is now on the table. These rules could have an important impact on how law is practiced internationally, as well as on practitioners and law firms with an international nexus.

#### B. ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE

Within the context of the ABA’s re-examination of all of the Model Rules of Professional Responsibility, the MJP Report addressed concepts affecting foreign lawyers in the United States. This development was useful for outbound U.S. lawyers because of three important realities in today’s global economy: (1) that lawyers in one country often wish to (or are asked by their clients to) open offices in other countries; (2) that thousands of lawyers from the United States regularly visit other countries to perform legal work there on behalf of home, host, or third country clients; and (3) that unless the United States, working with the individual states, assures “market access” to foreign lawyers in this country, it will be much more difficult for the United States to argue in the current GATS negotiations that other WTO Members should liberalize their rules regulating the various modes of supply for legal services.

The principal focus of the MJP Commission was on rules allowing lawyers admitted to practice in one state of the United States to engage in legal services in another state. Thus, the MJP Report called for a significant relaxation of state rules that now prevent a lawyer’s “temporary” presence in a state of non-admission or “Fly-in/Fly-out” (FIFO) practice. It also set forth standard rules for *pro hac vice* admission before courts and agencies in other states and uniform, less onerous, rules for admission without examination for lawyers moving permanently from one state to another.

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standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Although the main focus of the MJP Report was on the states' regulation of inter-state practice of law, the MJP Report explicitly addressed two issues related to international cross-border legal services. First, the MJP Report urged each state to adopt, with minimum departure from the original text, the Model Rule on Foreign Legal Consultants (FLCs) approved by the ABA in 1993.<sup>14</sup> Second, the MJP Report also proposed a rule for "Temporary Practice by Foreign Lawyers."

### 1. Model FLC Rule

Foreign lawyers may now work as legal consultants in twenty-three U.S. states and the District of Columbia where FLC rules have been adopted.<sup>15</sup> The existing rules governing FLCs are varied, but certain conditions are common to nearly all states that have permitted any FLC presence: (1) individual FLCs must be admitted to the bar and be in "good standing" in their home country; (2) they must have practiced law for a certain minimum period in the years just prior to applying for the FLC license; this practice experience must be obtained in the home jurisdiction of admission under the rules of certain states; and (3) they must refrain from advising on particular areas of host country (state and federal) law, including matters relating to real estate, divorce and custody, estates and trusts, and appearance before any court. While these limitations are said to reflect the need for fluency in the local language and for an understanding of local law, they have no objective foundation and no opportunity is available for foreign lawyers to demonstrate language proficiency or expertise in local law.

Aside from restriction on the local law aspects of legal consultants' practice, the jurisdictions with FLC rules take various approaches to the scope of practice permitted to FLCs. For example, nine jurisdictions, including New York and the District of Columbia, permit legal consultants to advise on U.S. federal or state law provided it is based on the advice of a U.S. lawyer who is licensed in the particular jurisdiction where the advice is rendered.<sup>16</sup> Seven states specify that FLCs may not advise on the law of any third country where the FLC is not admitted to practice.<sup>17</sup> And twelve jurisdictions define the scope of an FLC's practice by permitting only advice on the law of the FLC's home country, thus raising a question as to whether these jurisdictions permit FLCs to advise on international law.<sup>18</sup> The rules in a number of other states are ambiguous on these issues.

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14. MODEL FLC RULE, *supra* note 10.

15. The following jurisdictions have adopted a rule to license foreign lawyers as legal consultants: Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Washington.

16. The following states permit FLCs to advise on U.S. federal and state law based upon their consultation with and advice received from a qualified U.S. lawyer: Arizona, the District of Columbia, Hawaii, Indiana, New Jersey, New Mexico, New York, Ohio, and Oregon. In addition, Alaska and North Carolina permit FLCs to obtain written advice from a qualified U.S. lawyer and transmit the advice in writing to a client.

17. The FLC rules in the following jurisdictions state that FLCs may not advise on the law of any third country: California, Hawaii, Illinois, Missouri, New Jersey, Oregon, and Texas. Note that Hawaii, New Jersey, and Oregon permit FLCs to advise on U.S. law based upon the advice of a U.S.-licensed lawyer. *See supra* note 16.

18. Jurisdictions restricting FLCs to advising on their home country law are Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Minnesota, Missouri, New Mexico, North Carolina, Oregon, and Texas. Note that Indiana, New Mexico, and Oregon also permit FLCs to advise on U.S. law if based on the advice of a U.S.-licensed lawyer. *See supra* note 16.

Another division among the states with FLC rules relates to the practice experience required, both in terms of the duration of the required practice period and in terms of the location and kind of practice in which the FLC has engaged. Two jurisdictions, Utah and the District of Columbia, do not require any particular practice experience, and Ohio requires a period of admission but does not specify that the FLC applicant must have practiced during that period; the remaining twenty-one jurisdictions require between three and five years experience.<sup>19</sup> A number of states require that this practice period be completed in the home country of the legal consultant; a few mirror the Model Rule and require that the FLC have practiced the law of that home country, regardless of where he or she was located when doing so.

## 2. *ABA Model Rule for Temporary Practice*

The proposed Model Rule for Temporary Practice by Foreign Lawyers takes the same approach as the FLC Rule, but covers foreign lawyers who temporarily advise outside their home jurisdictions. The Rule is analogous to the MJP Commission's approach to the scope of activities permitted for lawyers admitted in another U.S. state. It allows temporary, occasional, FIFO practice by foreign lawyers engaged in matters with a limited nexus to their jurisdiction of admission.<sup>20</sup>

## 3. *Foreign Lawyer Admission to the Bar*

The final set of rules governing the rights of foreign lawyers to practice in the United States is those governing general admission to the bar. The MJP Report did not recommend a regulatory approach for foreign lawyers seeking to take a state bar examination in light of the absence of a U.S. citizenship requirement for bar admission.<sup>21</sup> Foreigners, as U.S. residents, generally may apply for admission to the bar if they have completed at least three years of legal education in the United States or the functional equivalent through foreign education or U.S. legal education in an ABA-approved law school.<sup>22</sup> Several states require some period of U.S. legal education short of the three years needed for a J.D. degree.<sup>23</sup> Still others distinguish between those foreign lawyers from English-speaking common law jurisdictions on one hand and those from civil law jurisdictions on the other, granting access

19. Michigan and New York require only three years (three of the last five years); most of the others require five of the last seven years (but this is not uniform; for example, some require four years, and Missouri requires five of the last ten years).

20. See AMERICAN BAR ASSOCIATION, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 2002).

21. *Application of Griffiths*, 413 U.S. 717 (1973) (holding citizenship requirements unconstitutional).

22. Kentucky, for example, requires foreign-educated lawyers to show that their education is "the substantial equivalent of the legal education provided by approved law schools located in Kentucky." KENTUCKY OFFICE OF BAR ADMISSIONS, RULE 2.014(3)(a), available at <http://www.kyoba.org/rules/sct/2.014.html> (last visited Aug. 25, 2003). Maine requires foreign-educated lawyers to provide evidence that they graduated "from a foreign law school with a legal education which, in the Board's opinion pursuant to regulations adopted by the Board, is equivalent to that provided in those law schools accredited by the American Bar Association." MAINE BOARD OF BAR EXAMINERS, MAINE BAR ADMISSION RULE 10(c)(4), available at [www.mainebarexaminers.org/rules.html](http://www.mainebarexaminers.org/rules.html) (last visited Aug. 25, 2003).

to the bar only to individuals in the former group.<sup>24</sup> In certain cases a practice experience condition applies,<sup>25</sup> as in Illinois, which adopted a new rule, effective January 1, 2003, to permit foreign lawyers to sit for the bar exam based upon a combination of practice experience and similarity of the foreign system to U.S. law and education.<sup>26</sup>

### C. OTHER DEVELOPMENTS

#### 1. FTAs

A number of other important events occurred during 2002 relating to cross-border legal services. Free Trade Agreements (FTAs) with Singapore and Chile were initiated by the parties prior to the end of 2002, and strides were made in the direction of liberalizing rules relating to the access to the market by professionals, including lawyers. Although easier access to the legal services markets of our FTA counterparts is promised, Singapore continued to insist on limits on professional association of local and foreign lawyers based on the Japanese model to which the ABA and others unsuccessfully objected.

#### 2. *Scope of Professional Association*

With respect to Japan, a complex joint enterprise form of association was put forward as the only concession to United States' demands that U.S. and Japanese lawyers be permitted to employ, be employed by, and enter into partnerships or professional corporations with each other. These limits on professional association were also adopted by China. On the other hand, some progress was achieved in China through its relaxation of its "one office" rule, which had prohibited U.S. and other foreign lawyers or firms from maintaining multiple offices and limited the total number of foreign offices allowed to locate in China.

#### 3. *Sarbanes-Oxley*<sup>27</sup>

Replacing former SEC Rules of Professional Conduct and implementing section 307 of the Sarbanes-Oxley Act of 2002,<sup>28</sup> new SEC rules will partially preempt state ethics rules regarding confidentiality and attorney-client privilege. Employing an expansive view of who is an attorney under the new rules, which includes in-house and foreign lawyers,<sup>29</sup> a lawyer—

23. D.C. Court of Appeals Rule 46(b)(4) requires applicants who completed their legal education in a school not approved by the ABA to complete twenty-six credit hours of courses on subjects covered on the bar examination at an ABA-approved law school.

24. Rule 3.05(3) of the Supreme Court of Oregon Rules Regulating Admission to Practice Law in Oregon permits foreign-educated lawyers to take its bar examination if they show, among other things, that they are "admitted to practice before the highest tribunal of a foreign country where the common law of England exists as the basis of its jurisprudence." OREGON STATE BAR, SUPREME COURT OF THE STATE OF OREGON RULES: REGULATING ADMISSION TO PRACTICE LAW IN OREGON, RULE 3.05(3), available at [http://www.osbar.org/2practice/rulesregs/adm\\_rules.html](http://www.osbar.org/2practice/rulesregs/adm_rules.html) (last visited Aug. 25, 2003).

25. Colorado Rules Governing Admission to the Bar Rule 201.5(b)(iii) provides that foreign-educated lawyers must have "a first professional law degree from a law school in a common law, English-speaking nation other than the United States provided that such applicant shall have been admitted to the bar of the nation where he/she received his/her first professional law degree and shall have been actively and substantially engaged in the practice of law, as defined by Rule 201.3(2), for five of the seven years immediately preceding application for admission to the bar of Colorado." COLORADO SUPREME COURT, RULES GOVERNING ADMISSION TO THE BAR, RULE 201.5(b)(iii), available at <http://www.coloradosupremecourt.com/BLE/Forms/Rules.htm>.

26. ILLINOIS COURT DOCUMENTS, RULES ON ADMISSION AND DISCIPLINE OF ATTORNEYS, RULE 715, available at [http://www.state.il.us/court/SupremeCourt/Rules/Art\\_VII/default.asp](http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/default.asp) (last visited Aug. 25, 2003).

27. See Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201 (2002).

28. *Id.*

who “reasonably believes” that a company has committed a “material violation” of the securities laws – must report the violation up the corporate ladder. After protests from many foreign lawyers, the final version of the rule was amended to include within its scope fewer foreign lawyers.<sup>30</sup>

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29. *Id.*

30. See, e.g., *European lawyers welcome the foreign lawyer provisions in the new SEC rule on attorney conduct*, available at [http://www.cbbe.org/doc/Archives/pr\\_0103\\_en.pdf](http://www.cbbe.org/doc/Archives/pr_0103_en.pdf) (last visited Oct. 28, 2003).