

2016

Young Lawyers Network (YIN)

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Recommended Citation

Sara Blackwell et al., *Young Lawyers Network (YIN)*, 50 ABA/SIL YIR 351 (2016)
<https://scholar.smu.edu/til/vol50/iss0/25>

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Young Lawyers Interest Network (YIN)

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AND MANOJ KUMAR**

I. New York Adopts the Uniform Bar Exam

In May 2015, New York became the sixteenth state to adopt the Uniform Bar Exam (UBE).¹ Even though the three most populous states (California, Florida, and Texas) have not yet adopted the UBE, some practitioners expect New York's adoption to create a "domino effect."²

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1. The other fifteen states are Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Karen Sloan, *Uniform Bar Exam Gaithers Steam as New York Signs Up*, 37 THE NATIONAL LAW JOURNAL no. 39 (May 21, 2015). As of this publication, Iowa and New Mexico also adopted the UBE. *Announcements: New Mexico Adopts the Uniform Bar Examination (UBE)*, NATIONAL CONFERENCE OF BAR EXAMINERS (Nov. 3, 2015), <http://www.ncbex.org/news/new-mexico-adopts-the-uniform-bar-examination-ube/> (last visited Mar. 12, 2016); *Announcements: Iowa Adopts the Uniform Bar Examination (UBE)*, NATIONAL CONFERENCE OF BAR EXAMINERS (Aug. 18, 2015), <http://www.ncbex.org/news/iowa-adopts-the-uniform-bar-examination-ube/> (last visited Mar. 12, 2016).

2. California, Florida, and Texas are the most populous states; however, New York has the highest number of bar exam applicants each year (15,000 in New York compared to 13,000 in California). Sloan, *supra* note 1. Stephanie Clifford & James C. McKinley Jr., *New York to Adopt a Uniform Bar Exam Used in 15 Other States*, THE NEW YORK TIMES (May 5, 2015), available at http://www.nytimes.com/2015/05/06/nyregion/new-york-state-to-adopt-uniform-bar-exam.html?_r=0. Iowa and New Mexico adopted within six months of New York's adoption. *Announcements*, *supra* note 1.

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The UBE is a two-day bar exam that tests federal law and general legal principles.³ Depending on the score achieved, applicants can qualify for multiple bars in participating states.⁴

Proponents cite portability and consistency, and how the UBE enhances job prospects of recent graduates as reasons for the UBE's adoption.⁵ For example, Dean Chemerinsky of University of California Irvine Law School argues state-specific exams are "inefficient, burdensome and, frankly, unjustifiable."⁶ Moreover, Catholic University's dean advocates for UBE adoption because of the uniformity and portability of scores for students who have not yet secured a post-graduation job by the start of their third year (when many states require initial bar applications); the superior resources of the National Conference of Bar Examiners (NCBE) dedicated to writing the exam as compared to individual states; and, most importantly for lawyers practicing international law, the cross-border and multi-jurisdictional practice made possible through a uniform exam.⁷

Critics argue the UBE's adoption "sustains and reinforces an anachronistic over-emphasis on general subject matter knowledge."⁸ Some concede that the UBE solves "the portability problem," but that this "good result" will "be the enemy of the development of an 'excellent' bar admission process"⁹ because power over the exam will go from individual states to the NCBE, decreasing chances of meaningful bar exam reform.

Opponents are especially concerned with the emphasis on multiple-choice questions. The current bar exam and the UBE both emphasize rule memorization over problem-solving skills.¹⁰ But the Internet has shifted the need of subject-matter knowledge to efficient research skills.¹¹ Thus, opponents argue, the adoption of the UBE in some states would be a step backwards because it would increase the weight of multiple-choice questions over written answers.¹² Additionally, even though New York did not find evidence of bias towards any subgroups,¹³ critics cite the "possible adverse impact of multiple-choice tests on ethnic groups underrepresented in the legal profession" as reason to weight the multiple-choice section "as low as possible to achieve reliability of overall exam scores."¹⁴

3. Clifford, *supra* note 2; *Jurisdictions That Have Adopted the UBE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/exams/ube/>.

4. Each participating state has the authority to choose its own pass cut-off scores. Sloan, *supra* note 1.

5. Clifford, *supra* note 2.

6. Sloan, *supra* note 1.

7. Veryl Victoria Miles, *The Uniform Bar Examination: A Benefit to Law School Graduates*, 79 THE BAR EXAMINER 6, 8-9 (Aug. 2010).

8. See e.g. Ben Bratman, *Opinion: Why More States Should Not Jump on the Uniform Bar Exam Bandwagon*, JDJOURNAL.COM (June 17, 2015), <http://www.jdjournals.com/2015/06/17/opinion-why-more-states-should-not-jump-on-the-uniform-bar-exam-bandwagon/>.

9. See e.g., Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 THE PROFESSIONAL LAWYER 43, 51 (2014).

10. *Id.* at 47-48.

11. *Id.* at 48.

12. Bratman, *supra* note 8.

13. Chief Judge Lippman's committee did not find any evidence "to suspect, let alone assume" that the UBE would "disadvantage or advantage any subgroup." Joel Stashenko, *New York State to Adopt Uniform Bar Exam*, NEW YORK LAW JOURNAL (May 6, 2015), <http://www.newyorklawjournal.com/id=1202725538768/New-York-State-to-Adopt-Uniform-Bar-Exam?slreturn=20151006182056>.

14. Bratman, *supra* note 8.

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In light of these concerns, however, states are continuing to adopt the UBE. Among the reasons for New York's adoption was the handling of cases involving multiple states and/or countries.¹⁵ For example, Chief Judge Jonathan Lippman recognized that "the practice of law doesn't stop at state lines," and national adoption of the UBE is "not only desirable but necessary for the mobile, interconnected society in which we live."¹⁶

For domestically and foreign-trained attorneys engaged in transnational or cross-border transactions, the UBE as the new standard "will have a profound impact on lawyer mobility."¹⁷ Unlike the other seventeen states to adopt the UBE, New York is a "transnational legal practice 'powerhouse.'"¹⁸ Its adoption will change the landscape and legal possibilities of those interested in practicing in multiple United States jurisdictions.

II. The "Big Leagues" of International Trade Treaties

The signature and ratification of international trade treaties has been a practice long carried out by States. But 2015 is, and will continue to be, a very important year for international negotiations and the emergence of "new generation treaties."

Prior to 2015, the creation of the World Trade Organization (WTO), and even the signature of the General Agreement on Tariffs and Trade (GATT), gave young lawyers an opportunity to innovate and succeed in a field unknown to their predecessors.

Now, since the creation of GATT¹⁹ and WTO,²⁰ treaties such as the Trans-Pacific Partnership's (TPP) are called "new generation treaties,"²¹ as they are negotiated secretly and outside of the rules established with the creation of the WTO. Even though this scenario might seem as going against pre-established agreements, it is also an opportunity to innovate in how legal advice is performed regarding international trade matters.

The TPP was negotiated secretly between twelve States that share the Pacific basin: the United States, Canada, Mexico, Peru, Chile, New Zealand, Australia, Singapore, Malaysia, Brunei, Vietnam, and Japan.²² On October 5, 2015, the existence of a final deal was announced, thus covering forty percent of global trade.²³ If there is such a thing as

15. Clifford, *supra* note 2.

16. *Id.*

17. Laurel S. Terry, *Transnational Legal Practice*, 47 *THE YEAR IN REVIEW* 499, 504 (Spring 2013).

18. *Id.*

19. *Uruguay Round Agreement: General Agreement on Tariffs and Trade 1994*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm (The GATT was created in 1994).

20. *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (The WTO was created in 1995).

21. *Talking About Trans-Pacific Partnership (TPP): BBC World Business Report Interview*, TRADE PRACTITIONER (Oct. 8, 2015), available at <http://www.tradepractitioner.com/2015/10/talking-about-trans-pacific-partnership-tpp/>.

22. Eric Bradner, *How Secretive is the Trans-Pacific Partnership?* CNN (June 12, 2015), <http://www.cnn.com/2015/06/11/politics/trade-deal-secrecy-tpp/>.

23. *Talking About Trans-Pacific Partnership*, *supra* note 22. For a summary of the main point agreed upon according to some media sources and the Office of the U.S. Trade Representative, see *TPP Negotiations Conclude with a Final Deal*, TRADE PRACTITIONER (Oct. 5, 2015), <http://www.tradepractitioner.com/2015/10/tpp-negotiations-conclude-with-a-final-deal/>. For a summary of the main points of the TPP, see Baker & Hostetler LLP, *The Trans-Pacific Partnership Agreement Reached: What Does it Mean for You?* LEXOLOGY (Oct. 19, 2015), http://www.lexology.com/library/detail.aspx?g=36edfffd-ba3b-4636-9f1e-5d6ad0f28906&utm_

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“new generation treaties,” and the TPP is one of them, a great amount of the global trade is going to be ruled by it; therefore, lawyers all around the world, especially those practicing within the Pacific Basin, must know its rules, its players, and the logic behind it, which does not seem to be the same as the WTO’s.

Nevertheless, almost half of global trade is still not ruled by such a “next generation treaty” and instead maintains the WTO rules and standards. As such, lawyers should also be aware of and develop a full understanding of treaties made under the WTO framework. This is the case of the Pacific Alliance. On July 20, 2015, the Pacific Alliance’s Framework Agreement entered into force.²⁴ The agreement was signed on June 6, 2012, between Chile, Colombia, México, and Peru, and it contained mainly the objectives and structure of the Alliance.²⁵ Its entry into force in 2015 consolidated the agreements that have already been signed within the Alliance regarding free movement on goods and services,²⁶ cooperation on embassies and consulate matters, movement of individuals, cooperation on tourism,²⁷ free movement of capital, cooperation and exchange of tax related information,²⁸ environment, science, technology, and education, among others.²⁹

The Pacific Alliance’s rules will have a key role in any trade transaction involving its Member States, and also in cases such as South-to-South cooperation. These rules will definitely influence the legal counsel to start-up companies or existing companies looking to expand within this region, which actually shares a regional presence with the TPP. Even though this Alliance might not be a “next generation treaty,” it does have special rules, such as the agreements signed between representatives of Member State business sectors³⁰ and congresses or parliaments,³¹ which are not a common practice within international treaties.

Moreover, national rules cannot be disregarded, particularly in the case of countries such as Colombia or Israel that may apply commercial treaties on a provisional basis. In the case of Colombia, most of the Free Trade Agreements (FTAs) it has signed but that

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24. *Pacific Alliance Framework Agreement Entered Into Force*, EMBASSY OF PERU (July 21, 2015), <http://www.embassyofperu.org/headlines/2015/pacific-alliance-framework-agreement-entered-into-force>.

25. *Id.*

26. See Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico, Colom.-Chile-Mex.-Peru, June 6, 2012, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32651>.<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2940> (For the Additional Protocol to the Pacific Alliance’s Framework Agreement, signed between Colombia, Chile, Mexico and Peru).

27. There have been several bilateral agreements signed on the matter. See *Libre Movimiento de Personas*, MINCOMERCIO INDUSTRIA Y TURISMO, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32653>.

28. See Adenda al Memorando, Peru-Colom.-Chile, Jan. 15, 2010, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32652>. (For the Addendum to the Memorandum of Understanding dated January 15th, 2010, signed between Peru, Colombia and Chile’s national regulatory entities).

29. For other available text, see *Cooperación*, MINCOMERCIO INDUSTRIA Y TURISMO, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32650>.

30. For all texts available on business, see *Acuerdos Entre Representantes del Sector Empresarial*, MINCOMERCIO INDUSTRIA Y TURISMO, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32648>.

31. See *Acuerdos Parlamentarios*, MINCOMERCIO INDUSTRIA Y TURISMO, *available at* <http://www.tlc.gov.co/publicaciones.php?id=32649>.

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are not currently in force³² explicitly include the possibility of being applied provisionally, if necessary, by Colombia. Accordingly, the FTAs with South Korea,³³ Costa Rica,³⁴ Israel,³⁵ and Panamá³⁶ include this provision for Colombia's provisional application. Moreover, the FTA of Israel and Colombia explicitly includes such provision for Israel's provisional application.

In this scenario, what should young lawyers reach for? All legal counsel must aim to stay up-to-date with both bilateral and multilateral treaty negotiations. Above all, young lawyers should reach for the big leagues of international trade, whether this means "new" or "old" generation negotiations.

III. On the Liberalization of the Legal Profession in India Enabling the Growth of Corporate Social Responsibility

Given the transformation in India's economic fortunes since it liberalized its regulatory systems in 1991, it is interesting to note that the legal services market in India remains reluctant to adapt to similar change. Such intransigence on the part of regulating authorities is particularly bewildering when one considers the increasing number of foreign and multinational companies entering the market in India, with many Indian companies entering into cross-border transactions with such companies.

Paramount among barriers to foreign establishments is the Advocates Act of 1961. Section 29 of the Act states that only "advocates," meaning Indian citizens, are entitled to practice law in India,³⁷ unless a practitioner is from a country that permits Indian lawyers to practice in its jurisdiction³⁸ and/ or with special permission of the Bar Council of India (BCI), which is the supreme regulatory body of the legal profession in India.³⁹ Lead by the BCI, India's regulatory bodies contend that, among other consequences, liberalization might put Indian lawyers at a disadvantage compared to foreign enterprises because of their inability to compete financially with international firms.⁴⁰ Such bodies also argue that international firms might recruit the best local talent, leaving the domestic market bereft.

32. This includes the Free Trade Agreements signed bilaterally with South Korea, Costa Rica, Israel and Panamá. See *Acuerdos Suscritos*, MINCOMERCIO INDUSTRIA Y TURISMO, available at <http://www.tlc.gov.co/publicaciones.php?id=5399>.

33. Free Trade Agreement, Colom.-S. Kor. art. 22.6, Feb. 21, 2013, available at http://www.sice.oas.org/Trade/COL_KOR_FTA_e/Index19.11.2013_e.asp.

34. Acuerdo de Libre Comercio, Colom.-Costa Rica, art. 22.6, May. 22, 2013, available at http://www.sice.oas.org/TPD/COL_CRI/Draft_Text_July13_s/July_2013_Index_PDF_s.asp.

35. Tratado de Libre Comercio, Colom.-Isr., art. 15.3, Sept. 30, 2013, available at http://www.sice.oas.org/TPD/COL_ISR/Text_September2013_s/September_2013_Index_s.asp.

36. Tratado de Libre Comercio, Colom.-Pan., art. 25.8, Oct. 2013, available at http://www.sice.oas.org/TPD/COL_PAN/Text_September2013_s/September_2013_Index_PDF_s.asp.

37. The Advocates Act, No. 25 of 1961, ch. 3 §24, ch. 4 §29, INDIA CODE (1961), available at <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf>.

38. *Id.* at ch. 3 §24; see *Trade in Services: Opportunities and Constraints*, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS 21-23, n. 11, available at <http://www.icrier.org/pdf/NLMitra.pdf>.

39. See Katie Feuer, *Opening India's Legal Market: the Madras High Court Cracks the Door for Foreign Lawyers*, 37 B.C. INT'L & COMP. L. REV. 16, 18 (Nov. 3, 2014), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1729&context=LR>.

40. *Id.* at 23.

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An explanation for the *status quo* might be that, at present, regulatory authorities wield an inordinate amount of control over the profession. But this reality seems to be taking a turn towards deregulation. For example, the Society for Indian Law firms (SILF) and the BCI were until recently opposed to liberalization of the legal sector in India.⁴¹ But these bodies reversed their stand in the light of, first, reports of a commerce ministry proposal to allow phased entry of foreign firms;⁴² and second, the Madras High Court judgment in *A. K. Balaji v. Government of India and Others*,⁴³ which permitted foreign lawyers to enter India on a temporary basis to conduct arbitrations or advise clients.⁴⁴ This is important news for the sector in order for it to be able to develop on par with its international counterparts.

The progression towards a more open profession might yield another result—that of increased involvement with corporate social responsibility (CSR). There is the undeniable fact that liberalizing the market will improve employment opportunities, overall productivity, and work ethic. Both novice and experienced lawyers will gain niche expertise in areas of developing law by working with established international law practices. The availability of new services will mutually benefit legal professionals and their clientele, and free transfer of skills and knowledge between foreign and domestic firms will mean clients will have a wider choice of services available to them.

There is also, however, the equally or more important fact of the prominent role of the legal profession as a pillar of society. Thus, lawyers inevitably play an important role in addressing the social costs of globalization and, although India's corporate law firms do not, for the most part, have dedicated pro bono or CSR practices,⁴⁵ these have started growing in scope. Globalization of knowledge achieved through liberalization-enabled interaction with international legal practices is only likely to increase this trend of Indian lawyers assuming an important role in addressing social dimensions of the law. To this end, CSR has received more prominent stature in the new Companies Act of 2013, which states that every company with a net worth of Rs. 500 crore or a turnover of Rs. 1000 crore or net profit of Rs. 5 crore is to spend at least 2 percent of its average net profit for the immediately preceding three financial years on CSR activities (as mentioned in Schedule VII of the Act).⁴⁶

Here, the principal consideration must be of the position of law students and newly qualified Indian lawyers. Currently, the overwhelming majority of such individuals take

41. Manoj Kumar, *Liberalisation of Legal Services in India*, GOVERNANCE NOW (July 27, 2015), <http://www.governancenow.com/news/blogs/liberalisation-of-legal-services-in-india>.

42. See Amiti Sen, *Centre to Open up Legal Sector in Phases*, THE HINDU BUSINESS LINE (Dec. 3, 2014), <http://www.thehindubusinessline.com/economy/policy/centre-to-open-up-legal-sector-in-phases/article6658988.ece>.

43. “[N]o bar under the Advocates Act, 1961, or the BCI Rules, for foreign lawyers or law firms to visit India for temporary periods on a ‘fly in and fly out’ basis to advise clients on diverse legal issues.” A.K. Balaji v. the Gov’t of India, *W.P. No. 5614 of 2010* (Madras H.C. Feb. 21, 2012) (India), available at http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=35290.

44. See Sudipto Dey, *Liberalising Legal Services*, BUSINESS STANDARD (April 26, 2015), http://www.business-standard.com/article/opinion/liberalising-legal-services-115042600776_1.html.

45. Lubna Kably, *Legal Fees Are on the House*, THE TIMES OF INDIA (Jul. 24, 2013), <http://timesofindia.indiatimes.com/business/india-business/Legal-fees-are-on-the-house/articleshow/21293375.cms>.

46. See Ministry of Corporate Affairs Notification, 2014, Gazette of India (Feb. 27, 2014), available at http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification3_2014.pdf. The Companies Act, 2013, Gazette of India, section 135 (Aug. 29, 2013), available at <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>.

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PUBLISHED IN COOPERATION WITH
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up careers in either corporate law firms or in legal and business positions in large companies, with very few choosing to work with NGOs or public interest organizations. Liberalization will enable legal professionals, especially those just entering the market, to engage in social pursuits more actively. Firms, once they are allowed to do so, will be able to evolve individual rules according to how they might best make their resources available to which causes they choose to espouse. Getting young lawyers accustomed to such ideas at the initial stages of their careers would go some way in entrenching the cause of CSR in corporate culture and in making legal professionals more amenable to the idea.

SPRING 2016

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THE YEAR IN REVIEW
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