

INTERNATIONAL TRADE IN LEGAL SERVICES

*Regulation of Lawyers and Firms
in Global Practice*



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Special Notice

Location of References to Source Materials

Citations to source materials and related references and commentary are found principally in the "Citations & Commentary" found at the end of the Introduction and at the end of each chapter.

Part **I**



**PLAYERS, MARKETS,
AND THE GATS**



International Trade in Legal Services

INTRODUCTION

This book deals with some of the more conspicuous cross-border activities of the legal profession. Largely thanks to the Uruguay Round of trade negotiations and one of the resulting agreements known as the GATS (General Agreement on Trade in Services), these activities are called "trade in legal services."¹

The expression trade in legal services could be taken literally only as long as lawyers stayed more or less put, not venturing out of their respective home jurisdictions except to engage in some occasional and incidental activity. The meaning of trade in legal services was thus suitably self-evident and uncomplicated when, for example, a Dallas law firm, having provided a Venezuelan oil company with advice on Texas law and assistance in dealing with

¹The Uruguay Round of multilateral trade negotiations among the parties to the GATT (General Agreement on Tariffs and Trade) began on September 20, 1986, ended on December 15, 1993, revised the contractual GATT, and transformed the institutional GATT into the World Trade Organization.

the Texas administrative authorities (advice and assistance that may or may not have required a brief trip or two to Caracas), would receive payment from the Venezuelan oil company for the firm's advice and assistance, thus carrying out a garden-variety cross-border exchange of professional services for cash payment.

Manifestly, the facts are not always so simple. To the extent they can figure out how to do so, lawyers tend to show up where there's legal business, real or prospective, and law firms like to keep close, geographically and otherwise, to their clients. Thus, law firms sometimes establish offices outside their home countries for the rendering of legal services; services supplied by those offices are of a type known as "establishment services." The concept of establishment services is not purely one of trade; it also necessarily embraces elements of foreign direct investment, of movement of persons, and of professional regulation.

If we go back to the example mentioned above, we can readily imagine a variant that illustrates establishment services: An enterprising Caracas law firm decides to follow its clients to Dallas, to open a branch office there, to hire Texas lawyers, and to develop a general practice of providing the types of advice and assistance that, theretofore, had been the preserve of native Dallas firms. While this second example is purely imaginary (and its attempted realization might evoke a lively reaction in some quarters of the Texas legal profession), it is, nevertheless, not terribly far-fetched.

In large part, this book is about legal-service trade in the form of cross-border establishment services and about a variety of reactions thereto by professional and regulatory bodies in different parts of the world. It is thus about the cross-border implantation of lawyers and law firms from a home jurisdiction (perhaps not Venezuela but, for example, Germany) into a host jurisdiction (perhaps not Texas but, for example, New York), and the range of professional activities that are thereafter undertaken in the host jurisdiction by the transplanted home-jurisdiction lawyers or firm.

This book is intended both as a commentary of general interest on bar, trade, and regulatory issues and as a potential guide for legal professionals. As a commentary, it strives to be analytical and historical. As a potential guide, it may suggest opportunities for establishing, maintaining, or expanding law offices in particular host jurisdictions, and it can be mined for "how to" information

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relevant to such opportunities. Even so, legal practitioners seriously seeking to learn how to become established to render legal services in some host jurisdiction might well supplement their mining by doing what they would probably advise a client to do under the circumstances, which is to consult a knowledgeable lawyer or law firm about getting established in the jurisdiction in question.

Although trade in legal services is international in scope and the GATS is therefore of great importance, no less important are local policies locally arrived at. Not infrequently, the local legal profession, in the name of protecting "the public," has done a mighty fine job of protecting itself. The principal obstacles that lawyers encounter in offering cross-border and establishment services are often erected by other lawyers.

The key obstacles relate to (1) cross-border rights of establishment in a host country for lawyers from outside that country, (2) rights of association between the latter and host-country lawyers, and (3) American efforts to proselytize the concept of legal consultant.

1. *Rights of establishment.* When law firms seek the right of establishment in a given international legal center, their doing so may reflect both the center's relative importance and the success of other law firms enjoying regular, organized access to it. In the world's major legal centers, these factors help explain the zeal with which access is sought by outsiders and, in many cases, resisted by insiders. The regulation of access on a regional (as opposed to national or global) basis may contribute to the intensity with which access is desired and opposed. Witness the prolonged struggle that has taken place within the European Union over its proposed Establishment Directive and, in the Directive's absence, the vigor with which cases on establishment have been pursued in the courts, including the European Court of Justice (see Chapter 8).
2. *Rights of association.* Even when it is available to a foreign law firm, the right of establishment can prove to be rather hollow if it is not accompanied by a right to associate with local lawyers. Some of the most challenging (and most rewarding) legal work in an international legal center, particularly work involving inward-bound

investment, as well as transactions and litigation governed by local law, may require the coordinated efforts of foreign and local lawyers working together in the same host-country establishment. Although not just any form of association will suffice to assure effective work of the highest quality, cross-border practitioners may have to contend with protectionist devices inhibiting the integration of local lawyers into the local establishments of foreign law firms. An optimistic reading of the history of cross-border practice suggests that, over time, these devices will erode under pressure from the demands and ingenuity of the marketplace and, conceivably, the dictates of common-sense multilateralism.

3. *Legal consultants.* The American legal profession, having initiated the introduction of legal services into the multilateral forum of the GATS (see Chapter 2), has also sought to achieve international institutional recognition for the concept of the foreign legal consultant ("FLC"). Although the acronym of FLC has entered the international vocabulary of trade in legal services (albeit sometimes pejoratively, especially in France, which has disowned the original FLC, the *conseil juridique étranger*), it is not an acronym that signifies agreement on functions and status. In many FLC jurisdictions, both within and without the United States, key FLC provisions have failed of adoption even in situations where sustained efforts were made to persuade the local authorities to adopt them (see Chapters 4, 5, and 6). As a consequence, acceptance of the FLC as a concept may often mask fundamental disagreements on the gut issues of trade in legal services, especially those involving the scope of practice to be permitted foreign lawyers established in a host country, and their proper status vis-à-vis the local bar and their own clients. All too possibly, the facile designation of these lawyers as FLCs, by giving the appearance of accomplishment, may obscure a lack of progress in the pursuit of global practice.

It seems safe to predict that many key battles for the advancement of global practice will be local battles fought on the ground

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by local troops. Cross-border practice has grown laboriously in untidy fits and starts, fashioned not by some supreme architect but by streetwise horse traders at various points on the globe. The deals thus struck, while often resembling one another, frequently depend on the mood and conditions of a given place at a given time. Important impetus may be given on occasion by trade negotiators; but after the diplomats have initialed their documents and gone into adjournment, the bar associations and bar committees, the law examiners and law societies, the administrators, bâtonniers, courts, and ministries—in short, all the professional and regulatory apparatus that deals with legal practitioners day-to-day—will remain very much in evidence. Moving this apparatus to accept specific measures that will advance trade in legal services is the unglamorous work of the advocates of global practice. It is their work, their mistakes, and their achievements that this book attempts to describe.

▬▬▬▬▬▬ Citations and Commentary ▬▬▬▬▬▬

For discussions of trade in services generally and trade in legal services in particular, see The University of Chicago Legal Forum, *Barriers to International Trade in Professional Services*, vol. 1986, esp. the articles by Geza Feketekuty, Jagdish N. Bhagwati, Thierry J. Noyelle, and Anna B. Dutka and John H. Barton (beginning at 1, 45, 57, and 97, respectively); Terrence G. Berg, *Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 *Harv. Intl. L.J.* 1 (Winter 1987); A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 *Stan. J. Intl. L.* 57 (1987); and Philip H. Gold, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 *Intl. Trade L.J.* 281 (1982-1983). See also the articles and book cited under §2.1.

In his article cited above, Bhagwati, at 48, points out that "service transactions" would be a more accurate term than "trade in services." But makers of trade policy had already been focusing on the importance of services rendered from establishments in

foreign countries. For example, in 1984, the U.S. National Study on Trade in Services (U.S. Govt. Printing Office 1984, 455 773 20145), submitted by the U.S. Government to the GATT, stated at 148 — as the first consequence of growing “demand for international legal services” — that “foreign lawyers have sought to establish themselves in major cities throughout the world.”

For the institutionalization of the term “trade in services” and for an analysis of the implications of “establishment services,” see William J. Drake and Kalypso Nikolaïdis, *Ideas, interests, and internationalization: “trade in services” and the Uruguay Round*, 46 Intl. Org. 37 (Winter 1992), at 38, 45-58, 62-63. See also the November 15, 1994, opinion of the European Court of Justice discussed in §8.2.2 of the text; Pierre Sauvé, *The Long and Winding Road: Canadian Perspectives . . .*, OECD Doc. DAFFE/INV/PROF(94) 12 (Sept. 8, 1994) at 4 (“Because a substantial amount of professional and business services involves the development and maintenance of a local presence . . . , much ‘trade’ in professional services takes place through an established presence, *i.e.*, through investment”).

In his article cited above, Gold, at 298-303 (building on an unpublished 1981 article by G. J. Cloney, II), develops the distinction between “‘across-the-border’ trade and ‘establishment’ trade” and (going further than did the later Bhagwati article cited above) questions the proposed inclusion of establishment trade in the Uruguay Round. His cautionary conclusion, at p.302, is as follows (citations omitted):

The American service industries apparently hold very strong views that establishment trade is properly includable within the meaning of international trade in services and that these establishment issues should be addressed by a trade in services code. These views have also become firmly embedded in U.S. government policies and initiatives. . . . Questions about whether a country should allow foreign individuals or companies to enter the country, to own or operate enterprises in the country in direct competition with domestic businesses, and to participate internally in the domestic economy touch and concern national sovereignty far more than free trade. To attempt to bring them all together into a single negotiation would appear to be an invitation to failure.

As a matter of optics, the GATS contrived “to bring them all together” by including, in its definition of “trade in services” (in its

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Article I(2)(c): "the supply of a service . . . by a service supplier of one Member [of the GATS] through commercial presence in the territory of any other Member." This definition is, however, subject to the submission of optional schedules by the Members and to the possible inclusion in the schedules of limitations on rights of establishment (see text, §2.4.2.2).

On the foreign legal consultant in North America, see Ch. 3 through 6.

For practical comments on global legal practice, see John E. Morris, *Capitalizing on Global Capitalism*, *Am. Lawyer*, 5 (April 1986); *Intl. Business Lawyer* (Dec. 1995), esp. Edwin Godfrey, *The Globalisation Debate* at 107, and William B. Matteson, *Building an International Practice* at 516.

Chapter **1**



An Imperial Game?

- §1.1 The Players — I
- §1.2 Comparative Advantage
- §1.3 The Stakes, or Market Access
- §1.4 Patterns of Conduct and Regulation
- §1.5 The Players — II
- Citations and Commentary

§1.1 The Players — I

By way of ungentle introduction to the subject, the reader might be asked to ponder whether, as some observers have claimed, trade in legal services is an imperial game, an exercise in colonial outreach, a disturbance of natural order fraught with problems caused by the colonizers for the colonized. Not surprisingly, the observers who espouse this imperial view tend to be lawyers who would protect “the public” (by which they usually mean their own local professions) against foreigners purveying legal services. Also

not surprisingly, this view tends not to be shared (at least openly) by those members of the profession who adopt a more *laissez-faire* attitude toward trade in legal services, either on their own behalf or on behalf of "the public" (by which they usually mean actual or prospective clients).

The language of imperialism is seductive because it is colorful, but its very colorfulness implies a nonprofessional species of exploitation that may occur only in atypical circumstances. Undeniably, traffickers in cross-border legal services bring a certain entrepreneurial flair to their profession as they go prospecting outside their own countries for clients to employ their talents, thereby encountering local lawyers concerned with protecting the position of their own profession. Given the essentially professional context of these encounters, however, it would seem less colorful and more accurate to call the initiatives being taken "entrepreneurial" rather than "imperial," the persons undertaking them "prospectors" rather than "colonizers," and their counterparts "protectors" rather than the "colonized." When these reasonably accurate and neutral terms are used, the activities of prospectors and protectors can be viewed as a merely entrepreneurial game, and the principal participants in that game can be lined up as follows:

- The Americans (especially the major law firms in New York, Los Angeles, Chicago), the British (read the principal firms of London solicitors), and the Dutch qualify as successful prospectors.
- The French and Germans are each seen as being, simultaneously, aspirants to become prospectors in the entrepreneurial game and guild-ridden, stay-at-home protectors.
- In somewhat similar fashion, Hong Kong and Japan each takes on the essential appearance of a protector.
- Brussels seems to be a protector bearing privileged wounds thrust upon it by being propelled into the center of the European Union.
- Australia (Sydney), Canada (Toronto), and Singapore play lesser, imitative roles.
- Other entrants evidencing various levels of attraction and enthusiasm include Beijing, Mexico City, Moscow, and Washington, D.C.

The Americans (especially the major, big-city law firms), the British, and the Dutch, in different ways, are internationally self-confident. A common reason is their comparative advantage in handling major transactions (discussed below in §1.2). For the moment, the following can be said about them:

Americans. The international self-confidence of the U.S. legal profession dates in large part from the early 1970s when the major New York firms that had, almost absentmindedly, become established in a number of foreign jurisdictions put themselves and the New York bar, courts, and legislature through a (typically American) public soul-searching and opted for free trade in legal services (see Chapter 3). Today, New York wears its heart on its sleeve as regards its reception of lawyers from abroad ("I love New York's Court of Appeals rules applicable to foreign lawyers"), while its own lawyers continue to multiply overseas. Law firms from other major U.S. jurisdictions have also established themselves abroad, but few of them have been as welcoming as has New York to foreign lawyers.

London. The large firms of solicitors based in London not only have exploited their substantial domination of English-law practice in England but also have successfully promoted the use of English law, and thus of English lawyers, in transactions arising in many other parts of the world (see Chapter 7). The major London law firms have created an image of English law and the English legal system as being reasonable and reliable. Building on this image, on widespread use of the English language, and on respect for their professional competence, these firms have successfully transported their activities to former corners of Empire, to current legal centers in other member states of the European Union, and elsewhere. Meanwhile, subject to the solicitors' own somewhat clubby rules, their home turf in London has been open to foreign law firms, who have arrived in large numbers without significantly loosening the solicitors' hold on matters governed by English law.

Dutch firms. In part through merger or through creating alliances with non-Dutch firms, a few Dutch law firms have become sufficiently large and diverse to be able effectively to

take advantage of their traditional entrepreneurial outlook on the world, as well as their linguistic and professional adeptness in handling major cross-border transactions.

The world's other legal centers, generally speaking, are in the camp of protectors, or else their homegrown law firms have yet to provide distinctive leadership in developing cross-border activity in the legal profession. Even so, in many cases these legal centers are of considerable significance to past and likely developments affecting trade in legal services, and they are treated, as appropriate, in Chapters 9 (France), 11 (Germany), 13 (Japan), 14 (Hong Kong), and 10 (Brussels). For the moment, the following comments seem in order:

France, true to its history, showed the civilized world the way in fostering trade in legal services (this was during the decades of the 1970s and 1980s), but then turned inward and rejected its own civilizing mission in favor of the populist protection of its home market. France's future in the world market for legal services — a market that it perceives as subject to Anglo-American hegemony (or, as the French would put it, *domination anglo-saxonne*) — may be unclear but almost certainly will not be uninteresting. It will probably turn on an internal struggle between populists, on the one hand, and, on the other, supporters of the GATS and, more importantly, supporters of efforts to agree on a European Establishment Directive in order to remove restrictions that inhibit the opening of cross-border law offices within the European Union.

Germany and *Japan* have not been prey to French inconstancy, for they started out and ended up with policies largely formulated by those elements in their respective domestic bar groups that have been far more interested in keeping their home markets to themselves than in the (perhaps, for them, exiguous) benefits of trade in legal services. This home-market orientation is, of course, rather different in each of them.

In *Germany*, notwithstanding an attitude of unwelcome toward non-German traders in legal services that seems to be shared by large law firms fearful of competition and asso-

ciations of ordinary practitioners fearful of foreigners, this attitude is subject to significant restraints under Germany's constitution and legislation and under regulations of the European Union.

In *Japan*, on the other hand, the bar enjoys unusual autonomy, was able for many years after the Occupation to turn its back on trade in legal services, and has only grudgingly accepted concessions favoring foreign lawyers that its government has made, almost as grudgingly, in trade negotiations.

Hong Kong obviously lacks the territorial scope or economic power of Germany or Japan; and its livelihood depends on *laissez-faire* trade policies. Thus, although the local bar (comprising mainly Chinese and English solicitors) has attempted to keep a firm grip on local practice and to delimit the activities, if not the ambitions, of lawyers who arrive from abroad, Hong Kong (on the eve of reversion to China) has become a redoubt of trade in legal services.

Brussels would seem to call for special early mention because of its role as the capital of the European Communities (now the European Union) and its consequent development as an international legal center. The entrepreneurial game in Brussels does not lack players. They include: major law firms from the United States, Britain, France, Germany, the Netherlands, other European countries, Canada, Latin America; neighboring bar associations (notably in France and Germany) hoping to avoid the creation of unwelcome precedent for the regulation of foreign lawyers in their own countries; American and British professional associations seeking to do just the opposite and to secure privileged treatment for their lawyers established in Brussels; promoters of a specifically *European* result; and, of course, the Brussels bar, intent on extracting as good a deal for itself as it can under the circumstances.

§1.2 *Comparative Advantage*

A degree of competition exists in the world of trade in legal services. To the extent that a market for legal services is open to competition, it can be expected to induce each supplier of those

services to try to create or maintain some form of advantage in relation to other suppliers. The effort to attain or retain comparative advantage typically involves the goal of effectively combining client relationships with legal talent in the form of knowledge shaped by know-how and experience, and state-of-the-art support services. When these competitive ingredients are viewed in the abstract, legal talent would seem to be of such paramount importance and to be so highly mobile (since it is essentially a form of brainpower) as to open every country's legal profession to competition.

Less abstractly, however, competition in the rendering of legal services is distorted by governmental and professional interests and policies, which affect the relative success of the professions of particular countries in projecting their cross-border reputations. One of the differences is historical. National and professional traditions have favored certain categories of legal work in some countries more than in others. A strong tradition — based, for example, on a nation's historic place in international commerce or on a country assigning to lawyers a leading role in its development — can help shape the capacity for competitive success.

Other differentiating factors may exist on their own or in the context of relevant traditions and may be found in the three Ls of language, law, and lore:

- *Language* refers to English and to fluency in handling major transactions that are negotiated and documented in English, which, willy-nilly, is today's *lingua franca* of private international law.
- *Law* refers to governing law — the law under which contracting parties enter into a transaction and the related documentation, and agree to settle any subsequent disputes. Not every legal system has won widespread acceptance as a suitable régime for cross-border transactions, nor do the legal professionals of every country enjoy equal facility in providing advice and assistance in the context of those legal systems that conventionally govern such transactions. As might be expected, these differences have their competitive consequences.
- *Lore* is inherent in (and varies according to) the type of

transaction that is being considered, negotiated, documented, or performed; it refers to that body of experience and know-how that has developed in the past in the context of similar or analogous transactions. Lawyers are often expected to know more than law, and the legal professional who has gained familiarity with the practical (the business, commercial, or financial) ins and outs of a given type of transaction will often have a competitive edge in attracting future assignments for similar work.

Comparative advantage is thus partially a matter of professional initiative and partially a matter of inherited privilege. Dynamic newcomers can hustle to acquire it, and established firms can cultivate their historic reputations. In either case, it is subject to the changing requirements of the market for legal services. It tends to be perishable. In a competitive market, if a law firm permits its skills to remain undeveloped beyond (for example) handling business transactions that are based on outmoded technology or documenting yesterday's methods of financing, it may find that some professional upstart has made off with its erstwhile comparative advantage.

Even so, the rewards of competitive acuity are highly uneven. Rare is the market for legal services that is freely competitive. Governments and professional groups are not always impartial in contests for comparative advantage and have been known to indulge in favoritism or otherwise to create (or to permit the creation of) barriers to market access.

§1.3 The Stakes, or Market Access

The interests at stake in the entrepreneurial game boil down to market access, comprising the right to enter geographical markets (geographical access), and the right there to engage in particular professional activities (functional access). Competing lawyers and law firms necessarily tend to view questions of market access from a professional perspective, but they are not the only players, and the reactions of a variety of governmental authorities also bear on the interests at stake.

§1.3.1 Geographical Access

One element in attracting a high order of remunerative legal work is geographical location. When the legal work involves the flow of large sums of money (for example, capital-market financings, corporate acquisitions, or commercial ventures), it tends to be located where the people controlling that flow (bankers or large corporations) want it to be located. When the legal work involves the approval of governmental or administrative authorities, it may be located near those authorities. As a consequence, certain cities have evolved as major centers of legal practice, which attract the best in legal staff and support facilities. Once a city has achieved a critical mass of recurring transactional work, it may simply continue to grow as a legal center through the inertial effect of its reputation.

At any time, then, there will exist a number of recognized international legal centers, each serving as a market for legal services. A lawyer or firm's access to such a center (in addition to the not-unrelated factor of a requisite level of professional reputation) may help provide access to major transactional legal work. A successful legal practice in one major legal center may, in turn, provide substantive legal experience, contact with clients, and enhanced general reputation that assist in the development of a successful practice elsewhere.

§1.3.2 Functional Access

Achieving geographical access is not, of course, a guarantee of success. A market, once penetrated, may prove disappointing; and a law firm can easily overextend itself (in terms of overhead costs, administrative capability, interpersonal cohesiveness, quality control) through geographic proliferation.

These truisms of risk-taking to one side, the most important side of market access may turn out to be functional access — access not just to the geographical market but to profitable professional opportunities within that market as well. In each geographical market, two critical factors are: (1) the scope of legal practice there available to foreign lawyers, and (2) the requirements that must be fulfilled in order to attain access to the permitted scope of

practice. As will be seen in succeeding chapters, a given geographical market may be liberal or restrictive as regards either or both of those factors. The prevailing degree of liberality or restrictiveness is in part a function of professional attitudes and in part a function of governmental perspectives.

§1.3.3 Governmental Perspectives

A government is expected to care about the welfare of its nation's citizens and can be counted on to care about its own prestige. It may be asked at various times either to help its own lawyers at home resist foreign invasion of their domestic market, or to help them gain, maintain, or expand market access abroad.

Each government's presumed interest in its citizens may translate into a general, though not necessarily focused, interest in the nation's lawyers caught up in the entrepreneurial game. Any such focusing takes place (if at all) through governmental officials who have become informed about what their lawyers are up to and find the lawyers' activities to be both consonant with and worthy of support by governmental policy. Governmental reaction may frequently be one of indifference, however, especially as regards market access abroad in an area like trade in legal services where beneficial effects on the nation's welfare and finances may be difficult to measure.

In contrast, a government is rarely indifferent to its own prestige. Entrepreneurship, including that of legal professionals, whether or not profitable, is suggestive of prestige: of avoiding diminished prestige at home, and of attaining enhanced prestige when fostering market access for its lawyers abroad.

Prestige can attach to the international renown of a country's legal system, which may facilitate the use of that country's laws to govern major transactions; may enhance the reputation of its lawyers lusting to negotiate big deals, prepare key documentation, resolve celebrated disputes; may add to the esteem of its judges and law school faculties. These effects can in turn contribute to the system's mystique; and an internationally prestigious legal system, emitting and reflecting its own luster, may become a self-fulfilling myth.

Such a myth can be used in the entrepreneurial game by

lawyers and bar groups trying to influence their respective governments. As mentioned above, the London solicitors have adeptly touted the English legal system. As will be seen in §3.6, New York firms have engaged in similar efforts on behalf of their own legal system. In short, at times unconsciously and at times deliberately, efforts to assure the standing of a nation's legal system have influenced trade policy, for the players of the game are not obligated to eschew the intangible trappings of myth in their efforts to attain the tangible rewards of market access.

§1.4 Patterns of Conduct and Regulation

The pursuit of comparative advantage and market access and the reactions thereto by various governments have produced recognizable patterns of conduct on the part of both legal practitioners (be they cross-border purveyors of, or protectors of markets for, legal services) and their regulators. The reader may find it useful to consider these patterns before plunging, jurisdiction by jurisdiction, into an exegesis of regulatory details. But the reader is admonished not to lose sight of the truism that the devil is in the details. While patterns are comforting aids to inductive reasoning, they are no substitute for close attention to the relevant background, rules, and facts in concrete situations.

The discernible patterns of conduct and regulation seem to group themselves under five headings: requirements for practice, permitted scope of practice, permitted forms of practice, deontology and discipline, and reciprocity requirements. These five patterns are discussed below.

§1.4.1 Requirements for Practice

Of two general alternative approaches, one, both, or neither may be adopted by a host jurisdiction when it imposes requirements on purveyors of legal services who hail from some foreign place and who seek to set up practice in that host jurisdiction. One approach is to require the foreigners to become fully integrated into the local legal profession. The other approach is to adopt

rules for registering them to practice either as members of their respective home-country professions or as legal professionals in a special category, without making them full-fledged members of the local profession.

- When the host jurisdiction adopts neither approach, it denies both customary avenues of access to foreign practitioners seeking to become established in that jurisdiction.
- When the host jurisdiction requires full integration into the local profession, it usually imposes local educational requirements on the foreigners and subjects them to the local bar examination or, less frequently, treats the education or prior professional experience of certain foreigners as meeting local standards.
- When the host jurisdiction permits the foreign applicant to be registered or licensed without examination to render some less-than-full range of legal services, it lays down requirements that are of varying degrees of difficulty and appropriateness in different jurisdictions and that relate (for example) to the applicant's prior professional experience, professional good standing, and general character.
- When the host jurisdiction maintains both of the alternative approaches, it recognizes that there are different strokes for different folks and, in parallel, it accommodates (1) those foreign applicants desiring and qualified for full integration into the local legal profession and (2) those foreign applicants seeking not the attributes of full integration but the right to have a more limited scope of practice in that jurisdiction.

§1.4.2 Scope of Practice

When a foreign practitioner has been allowed to become established in a host country for the purpose of rendering legal services there, the foreigner's permitted scope of practice will encompass one or more of the following areas of activity:

- Advising on the practitioner's home-country law; this is invariably a level of activity permitted such a practitioner in the host country, and it customarily subsumes the negotiation and drafting of documents governed by home-country law.
- Advising on "international law"; this is often permitted at the same level as advising on home-country law, but is something of a low-value throw-away in the real world of professional practice.
- Advising on host-country law
 - is more often forbidden than permitted unless the practitioner has become a full-fledged member of the local bar;
 - when permitted a practitioner who has not become a full-fledged member of the local bar, (1) is likely to be hedged in with conditions making for varying degrees of restrictiveness in different jurisdictions, and (2) to the extent that it subsumes the negotiation and drafting of documents governed by host-country law, is invariably subject to prohibitions that reserve specified areas of practice to members of the local profession.
- Representing clients in dispute-settlement proceedings
 - in the context of international arbitrations, is permitted when the practitioner is a full-fledged member of the host-country bar and is generally (but not universally) permitted even when he or she is not;
 - in the context of domestic arbitrations, is generally reserved to the host-country bar;
 - before administrative agencies, is permitted when the practitioner is a full-fledged member of the host-country bar, and is sometimes permitted even when he or she is not;
 - before the courts, is universally reserved to full-fledged members of the host-country bar, although in some (but not all) jurisdictions the licensed or registered foreign practitioner who is not a member of the host-country bar may render various types of legal services that relate to, but do not include, appearances before the host-country courts.

§1.4.3 Form of Practice

Form of practice is of considerable importance to the international law firm. When established in a host jurisdiction outside its country of origin, the firm will normally want to enjoy the first three freedoms mentioned below and in many cases will also want to enjoy one or more of the other three freedoms as well.

1. The freedom of the firm to use in the host country the same name that it uses in the country of origin — a freedom frequently but not universally respected in host jurisdictions and the non-respect of which often signifies the imposition of arbitrary and inhospitable local rules.
2. The freedom of the firm to establish itself in the host jurisdiction in the form of a branch or wholly owned subsidiary — a freedom, again, frequently but not universally respected in host jurisdictions and the non-respect of which, again, often signifies the imposition of arbitrary and inhospitable local rules.
3. The freedom to have the firm's partners and associates from outside the host country establish themselves therein — a freedom subject to requirements of varying degrees of difficulty and appropriateness in different jurisdictions.
4. The freedom of the firm to employ local lawyers as associates — a freedom granted by some host jurisdictions but denied by others.
5. The freedom of the firm to admit local lawyers as partners of the firm — a freedom granted by some jurisdictions but denied by others.
6. The freedom for the firm itself to achieve meaningful status within the local bar — a freedom accorded by only relatively few host jurisdictions.

§1.4.4 Deontology and Discipline

Deontology in a host country, meaning its applicable code of professional conduct, usually takes the same form for foreign lawyers as for members of the local legal profession. Occasionally,

however, policies that have been ostensibly adopted to assure the proper professional conduct of foreign lawyers are used as a pretext for subjecting them to arbitrary measures involving (1) procedures (including the payment of high fees) for obtaining or renewing licenses, or (2) information to be supplied to (prospective) clients, or (3) requirements for professional liability insurance. The rules under which foreign lawyers are subject to disciplinary sanctions, like suspension from practice, are, on paper in any event, rarely more onerous than those applicable to local lawyers.

§1.4.5 *Reciprocity*

The extended discussion of reciprocity and related topics found at §§2.5.2-2.5.3 will not be duplicated here. For present purposes, suffice it to say that most host jurisdictions do not condition the admission or licensing of foreign lawyers on a requirement that host-jurisdiction lawyers be afforded reciprocal treatment in the home countries of the foreign lawyers, but that a number of host jurisdictions do impose such a requirement or reserve the right to do so on a discretionary basis.

§1.5 *The Players — II*

In the beginning the main players were private lawyers and law firms setting out on their own to cultivate attractive foreign markets that seemed susceptible of exploitation, markets where, more often than not, the native professionals were docile or poorly organized. The early settlers, while necessarily ambitious, were usually modest in number and demeanor, and not all of them survived. Typically, those settlers who did survive and, in some cases, flourish were rather matter-of-factly plying their profession, simply doing the sort of lawyering they knew how to do, and probably unsuspecting that, in the future, governments would categorize them as traders — as traders in and of a synthetic commodity called “legal services.”

Perhaps inevitably troubles arose. Some local and national bar associations became restless at seeing “their” potential clients being served by nonindigenous talent or (maybe worse) by indige-

nous talent in the employ of alien purveyors. Occasionally, a local legal profession would prevail on the local authorities responsible for regulating the profession to step in and restrain the interlopers. National governments might then be called in to intercede on behalf of their respective citizens, and private interests might unfurl into national interests.

Even with the arrival of governmental players, the entrepreneurial game was a long time beginning in earnest. For many years, there was little sustained governmental interest in cross-border lawyering. The problems lawyers got themselves into outside their home jurisdictions — obscure problems of questionable commercial interest — were not tailor-made for the career path of a talented public servant and were too complicated to be handled properly by the less talented. For a long time, then, a given government's intervention on behalf of its overseas legal profession was infrequent in time and uneven in quality, and the overseas lawyers themselves, given a choice between unpredictable results and no governmental intervention at all, occasionally preferred the latter.

The inclusion of "trade in legal services" in the Uruguay Round of GATT negotiations obligated governments to assign the subject to responsible officials, who in turn could not ignore legal services once they seemed irretrievably lodged in the GATS and the GATS seemed destined to be approved. These officials were new in every sense. They were not the authorities who had traditionally supervised, regulated, and disciplined practicing lawyers. Not at all. They were *trade negotiators*, who necessarily brought to the game not an intimate familiarity with or concern for the substance of lawyering, but the quite different perspective of furthering national interests by negotiating agreements on behalf of industries whose results of operations showed up in the nation's balance of trade.

From the perspective of the GATS and the officials charged with negotiating it, the legal profession was a service industry, much as air transport was a service industry. Did legal services contribute favorably to a particular nation's balance of trade? Or unfavorably? Were any meaningful trade statistics even available in respect of legal services? Never mind, legal services were in the GATS, and the accounting witch doctors (who in turn had become another service industry swept up in the GATS) would, in all likelihood and in due course, produce trade data on the legal profession.

A number of bar leaders, especially in Europe, affected indignation that their calling had been demeaned as a business, that their ancient and honorable profession was being included in the GATT negotiations. "Lawyers are not tomatoes" or, adding a degree of processing, "lawyers are not bottles of ketchup," they said. Much ink was spilled over the proprieties — over claims that "professional services" constituted a less dishonorable category than "business services." (See §2.4.2.4.)

In terms of the entrepreneurial game, the fuss over nomenclature was largely beside the point. By the time the Uruguay Round came along the game was almost certain to begin, sooner or later and for better or worse, since by that time many of the potential players (law firms, bar groups, regulators, national governments) were no longer untried initiates in the machinations over market access. Putting legal services into the GATS served essentially not to equate the legal profession with (processed) vegetables but to crystallize a not unhealthy way in which to view lawyers — as plying their *trade* and thereby performing a *service*. Admittedly, it also served to bring trade negotiators into the picture. Their sympathies would now have to be cultivated, their sometimes deficient knowledge of and respect for the profession would now have to be remedied. But surely a profession that had long been accustomed to dealing with judges and legislators, bankers and businessmen, criminals and juries could take a few trade negotiators in stride?

▣▣▣▣▣▣ Citations and Commentary ▣▣▣▣▣▣

§1.1 Examples of the colorful language of imperialism appear in the November 1991 cover story (by Davis Barrager) of the Journal of the American Chamber of Commerce in Japan, which is devoted to the practice of law in Japan by American lawyers. The article begins:

"All American lawyers are like Saddam Hussein: they are all imperialists." This provocative assessment of America's legal practitioners is not the wild-eyed ranting of some reactionary in litigation, but rather a comment made last November by a leading Japanese law-

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yer to an audience of American lawyers and businessmen. Indeed, this Japanese lawyer's firm even has a branch in London. . . .

A more restrained but not totally dissimilar commentary is found in the speech given on November 17, 1994, to the annual congress of a French association of business lawyers by its president — as reported in *La Revue de l'Avocat Conseil d'Entreprises*, No. 53, 9 at 10 (Paris, 1995):

The Uruguay Round negotiations have brought out two opposite approaches to the regulated liberal professions:

The Anglo-Saxons [English and Americans] preach deregulation, leaving reward and punishment to the market itself. This position is mainly beneficial to the large firms of lawyers that are found in those countries. Their manpower and financial means enable them to be present everywhere, to impose their methods, their systems, and consequently to perpetuate the need to have recourse to their services.

France has countered this position with the logic of regulation, having as its premise that the sole purpose of regulation is to protect the public. This position has been unanimously supported by our professional organizations, and we can today congratulate ourselves that we have held fast despite the attacks of certain [EU] bureaucrats in Brussels and despite the efforts at destabilization made by our American colleagues.

The vocabulary of empire has also been directed by the American legal profession against the British. The cover story of the April 1993 *ABA Journal*, Stephanie B. Goldberg, *The British Go Global*, begins (p.51):

Anyone who thinks the British have lost their flair for empire building has never heard of Clifford Chance — the largest law firm in the United Kingdom and the second largest in the world. . . . [I]t's picked up a reputation for focused, aggressive marketing that any American firm might envy. . . . To a far greater extent than their American counterparts, British lawyers are forming alliances, opening offices, and racking up mileage points in their quest for new markets.

See also Sarah Marks, *Foreign lawyers poised to exploit New York market*, *Intl. Fin. L. Rev.* 22-23 (Aug. 1995); the French refer-

ence to "colonization" cited under §9.8.4.8; and the references to "empires" and "invaders" in Frankfurt under §11.1.4.

For the rather different comments by an American and an English lawyer on the nature of the problem, see the contributions by Steven C. Nelson of the ABA and John Toulmin of the CCBE to *The Internationalization of Law Practice: Issues of Access and Education*, presented at the ABA Annual Meeting in New York, August 8, 1993 (Occasional Papers 8, at 14 and 25). In summary, their position was that the essence of trade in legal services is the proper regulation of foreign lawyers, which in turn is a matter of balancing the legitimate interests of local regulators with the dynamics of cross-border practice and the substantive areas of law in which cross-border practitioners are especially competent. Nelson developed his views further in *Lawyers and Legal Services*, a paper presented to the OECD in Paris on October 16, 1995. See also *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 *Colum. L. Rev.* 1767, 1788-1812 ("Defusing the Fears . . .") (Nov. 1983).

§1.2 On comparative advantage, see Terrence G. Berg, *Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 *Harv. Intl. L.J.* 1 (Winter 1987), at 13.

§1.5 On some of these trends, see Robert Rice, *Business and the Law: In search of new frontiers — setting up overseas bases is costly and difficult*, *Fin. Times*, June 27, 1995, at 13; *A Survey of the Legal Profession*, *The Economist*, July 18, 1992, at 52-70, esp. under the curious caption of "Courts go global" at 6-8 of the Survey. For the picture as it appeared some 25 years earlier, see *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 *Harv. L. Rev.* 1284 (1967). See also the 1983 *Colum. L. Rev.* Note cited under §1.1 above.

According to Gary Taylor, *U.S. Firms Are Export Machines*, *Natl. L.J.*, May 30, 1994, at A6-A7, the U.S. Dept. of Commerce has quantified "the export value of U.S. legal services":

American [law] firms collected a total of \$1.4 billion from foreign clients in 1992, the most recent year for statistics from the Commerce Department. . . .

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Europe accounted for \$728 million — or about half — of the \$1.4 billion worth of legal service exports in 1992, with the United Kingdom alone buying \$324 million. Japan generated \$354 million, Canada \$99 million and Latin America \$56 million.

Although revenues from foreign operations appear to be rising there is no guarantee that U.S. firms will open that many more offices. Mr. [Charles J.] Conroy [of Baker & McKenzie, the world's largest law firm] estimates that it costs between \$1 million and \$3 million to launch a new outpost.

But Mr. [Christopher] Zach [of Intl. Fin. L. Rev.] says the financial burdens do not appear to be stopping the growth.

The basis for this article probably was U.S. Dept. of Commerce, Economics and Statistics Admin., Bureau of Economic Analysis, Survey of Current Business, vol. 74, no. 9 (Sept. 1994), at 132-133, showing that the United States provided \$1,453 million of legal services to other countries (including among others \$765 million to Europe, \$335 million to Japan) in 1993, against \$326 million of legal services purchased by the United States from other countries in 1993.

The \$1,453 million figure seems to combine gross fees and reimbursed expenses and to lump together all such revenues that were received in respect of "foreign clients" whether generated domestically or abroad. Being a gross-revenue number, it also does not reveal the net effect, either on revenues generally or on revenues generated abroad, of operating expenses and capital outlays abroad, including the outpost-launching costs and "financial burdens" reportedly mentioned by Messrs. Conroy and Zach.

In retrospect, the brouhaha that arose over putting legal services in the GATS sector of "business services" makes strange reading. The alarm seems to have been initially raised by a leader of the Paris bar who was destined to become the first President of the CNB. In a speech at La Baule on October 19, 1991 (reporting on a July 1991 meeting with representatives of the French government concerning the Uruguay Round negotiations), he said that he had learned "with stupefaction" that legal services were a subcategory of business services in the GATS negotiations, and he observed:

Every legal profession is regulated, not in the interest of the profession itself but in the sole interest of the public. . . . [I]t is patent that

the legal profession has a purpose that naturally distinguishes it from the sale of tomatoes or other food products, and that forbids the taking of unduly extensive liberalization measures.

At another point the same leader of the Paris bar had reportedly protested that the Uruguay Round would assimilate the lawyer with a "seller of carrots." (Despite the recurring greengrocer motif, no record has been found of a protest to the effect that French avocats were being treated as though they were avocados.) There followed a formal resolution by the Assembly of Leaders of the French Bar, at a meeting in Paris on November 15, 1991, in which it reacted with "stupor and indignation" to the GATS negotiations, in large part over the classification of legal services under business services. A month later, a protest was raised in the French Senate that this classification "would prove severely prejudicial" to the French legal profession. See the *Gazette du Palais* (Paris) for Oct. 23-24, 1991, at 38-40, and for Nov. 29-30, 1991, at 15; and the *French Journal Officiel* (Sénat) for Dec. 12, 1991 at 5274-5275.

This concern over classification acquired a European dimension in a formal address on the Uruguay Round negotiations delivered in Vienna on February 11, 1994, to the Conference of Presidents of European Bars by the President of the CCBE (a Danish lawyer), in which he said:

[T]he CCBE delegations were appalled to learn that the GATT negotiators had indeed included "legal services" in the Uruguay Round, our noble profession being put—horror of horrors—in the category of "business services." This could only be a mistake, we said to ourselves. To be a lawyer is to have a calling, to render professional services involving noble judicial obligations and special social responsibilities. Our honorable profession may not be assimilated to the selling of containers of detergent or bottles of ketchup. Many of us, therefore, revolted by this idea, call for firm action and maintain that legal services must be expressly excluded from the GATS negotiations.

For a more dispassionate analysis of including legal services in the GATS, which had been discussed three years earlier (February 7, 1991) in Vienna at the Conference of Presidents of European Bars, see John Young, *Liberalisation and Expansion of International*

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Trade in Legal Services — The GATT Proposal and Its Implementation, Intl. B. News (May/June 1991), at 3-5. In light of the text at §§8.5, 9.8.4.3, 9.9.2.2, and 11.2.3, note that the participants in that conference seem to have been aware of the implications of the proposed GATS for reciprocity requirements:

The EC paper [presented at the conference on the proposed GATS] made the point that at present the EC and its Member States maintain certain reciprocity measures. The fact that GATS would be based on an obligation of unconditional "most favoured nation" treatment would imply that recourse to reciprocity measures would have to be dropped. *Id.* at 4.