

Legal Services and the Doha Round Dilemma

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INTRODUCTION

This article examines the nexus between two international topics, namely, trade negotiations, and regulation of the cross-border practice of law. Admittedly, this nexus is not found at a conventional crossroads. Legal services lie somewhat at the periphery of international trade measured in terms of the global value of goods, services and investment used to define major international economic relationships, or to define priorities in the formulation of national and transnational economic policies. Moreover, trade negotiators hardly figure among the principal regulators having responsibility for the professional conduct of individuals and firms engaged in the practice of law.

Notwithstanding the somewhat peripheral nature of legal services in the overall calculation of balances of trade, and notwithstanding the traditional disjunction between responsibility for formulating trade policy and responsibility for supervising legal practitioners, the interaction of trade and legal services, carefully examined, can provide a useful analysis of its two components: of efforts to advance international trade in legal services, and of proposals to develop rules designed to facilitate cross-border legal practice. Such an analysis can prove instructive for policy-makers and interested participants not only in these two areas, but also in the broader context of formulating global rules governing trade and investment generally.

More particularly, this analysis can prove highly relevant to the aspirational-political dilemma, discussed in section I, that has marked the Doha Round of multilateral trade negotiations. Indeed, as will be argued in section II, negotiations involving international trade in legal services can provide an intriguing picture of the Doha Round in microcosm.

As mentioned, the analysis is divided into two parts. The first part begins with the Doha Round's aspirational-political dilemma, by which is meant the dilemma between pursuing the aspirations that were announced in 2001 as the Doha Round's hoped-for agenda, and accommodating political necessity in order to bring the negotiations to a "successful" conclusion. Against the background thus provided, this part of the analysis will describe efforts that have been made not only to include legal services in international trade negotiations, but also to adapt local professional rules to the burgeoning activities that constitute cross-border legal practice.

The second part of the analysis will deal with certain consequences of the efforts described in the first part. These consequences will be investigated at the three levels of

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(1) trade policy, (2) the *de jure* regulation of legal practitioners offering their services outside their home countries, and (3) the *de facto* devolution of responsibility for policy-making and regulatory enforcement upon private firms and individuals engaged in cross-border legal practice.

I. LEGAL SERVICES AND THE ASPIRATIONAL-POLITICAL DILEMMA

The Doha Round has followed in the tradition of “rounds” of trade negotiations that, initially, launched the General Agreement on Tariffs and Trade (GATT) and, thereafter, took place from time to time during the half-century preceding the creation of the World Trade Organization (WTO)—itself the result of negotiations during a “round” of exceptional fecundity, the Uruguay Round. This history carries considerable freight for the Doha Round. It is the first “round” to take place after the creation of the WTO (and the first to take place in the twenty-first century). It includes negotiations relating to new agreements—agreements on, for example, services and investment—that were produced by the Uruguay Round.¹ In addition, its mandate includes the politically charged task of assuring that the WTO as an institution is hospitable to the developing world, and that industrialized countries, as WTO Members, recognize the goals of other WTO Members seeking to benefit from the global economy.²

The world’s trade negotiators have found themselves threatened with diplomatic stalemate in a number of key areas that have defined the aspirational character of the Doha Round’s agenda. Thus threatened, the negotiators of necessity have looked for compromises that would appease the political forces serving local or regional interests which could not be persuaded of—indeed, in many cases, which were simply indifferent to—the virtues claimed for achieving substantial multilateral progress along the lines of the aspirational agenda. This threat of stalemate and the search for compromise have informed the increasingly poignant dilemma confronting the Doha Round negotiations. The essence of the dilemma is whether the compromises required to achieve a “successful” conclusion are so deleterious as to rob the conclusion of the aspirational qualities that provided the original momentum for undertaking these negotiations.

How has this dilemma affected negotiations with respect to legal services? A brief historical summary may be in order. Services, including legal services, first figured in multilateral trade negotiations in the Uruguay Round, in which a new General Agreement on Trade in Services (GATS), patterned to a certain extent on the GATT, became one of the WTO Agreements.³ Unlike the GATT, however, which is statutory

¹ See Andreas F. Lowenfeld, *International Economic Law*, 67 (Oxford University Press 2002).

² See World Trade Organization Ministerial Declaration, 14 November 2001 (hereinafter “Doha Development Agenda”).

³ The GATS is Annex 1B to the Agreement Establishing the World Trade Organization as signed on 15 April 1994 in Marrakesh, Morocco.

in character and creates rights and obligations relating to physical products, the GATS, dealing with services, constitutes a framework for the submission of commitments by the individual WTO Members, service-area by service-area.⁴ Therefore, to determine the commitments by Members of the WTO in the area of legal services, it is necessary not only to understand the framework provided by the GATS itself, but also to do the following: (a) to look into the annexes to the GATS currently in effect; (b) there to consult the individual Schedules of Specific Commitments of each of the WTO Members; and (c) thereunder, to ascertain, member by member, whether any commitments were made as to legal services, and, if so, the exact nature of the commitments, including any pertinent reservations that given Members may have lodged.

The outcome of the Doha Round in the area of legal services will thus be found in the relevant specific commitments—or in the lack thereof, or in qualifications thereto—annexed to the GATS by the individual Members of the WTO. If the Doha Round dilemma pervades the GATS negotiations, either generally or in respect of those services that are especially susceptible to parochial or protectionist partisanship, it is conceivable that the specific commitments set out for legal services will not so much manifest the aspirations that were voiced at the outset of the Doha Round, as they will reflect concessions to local or regional political expediency deemed necessary to bring the negotiations to a conclusion, however distant that conclusion may be from a major multilateral mandate for trade in legal services.

Against this background, the question arises, what has been going on that might place the negotiations on legal services within the ambit of the Doha Round dilemma? Three developments stand out: (a) the vigorous assertion of jurisdiction over legal services by traditional regulatory authorities; (b) increasing recourse to the concept of the “foreign legal consultant”; and (c) the diversion of trade negotiations away from multilateral engagements administered by the WTO and into bilateral or regional arrangements.

A. THE TRADITIONAL REGULATORS OF LEGAL SERVICES

A widespread phenomenon is the cautious attitude of traditional regulators regarding the implications of the Doha Round in the area of legal services. In the United States, the Conference of Chief Justices of State Courts has resolved that the United States Trade Representative (USTR) should “recognize and support the sovereignty of state justice systems and the enforcement and finality of state court

⁴ Specific commitments and exemptions from most-favoured-nation treatment relating to legal services are set out under (1) Horizontal Commitments and (2) Sector-Specific Commitments annexed as schedules to the GATS for the respective WTO Members. The Sector-Specific Commitments for Legal Services are found under “Professional Services”, which in turn are found under “Business Services”, in the relevant schedules. Uruguay Round of Multilateral Trade Negotiations, Annex 1b, vols 28–30 (Geneva: GATT Secretariat, 1994). The classification of services is found in WTO Services Sectoral Classification List, Doc. MTN.GNS/W/120.

judgments”.⁵ (The reference to “state” is to the individual states of the United States.) This traditionalist approach was reflected in a resolution adopted by the House of Delegates of the American Bar Association (ABA) in August 2006, cautioning the USTR to be mindful of the essentially judicial nature of responsibility for overseeing the practice of law.⁶ The USTR, in fashioning US commitments on legal services under the GATS, thus may show considerable deference to the views of local regulators of legal services in the US states.

In not dissimilar fashion in the European Union (EU), it has become clear that EU commitments in respect of legal services under the GATS will leave broad discretion to the individual EU Member States to reserve to themselves the regulation of legal practice within their national territories by individuals and firms that do not qualify as EU legal practitioners. Although the EU has adopted Directives that encourage cross-border legal practice within the EU, these Directives are applicable only to cross-border practice by EU nationals within the EU.⁷ Accordingly, an EU Member State that wants to protect its legal practitioners from competition from outside the EU will be in a position to shape EU commitments on legal services under the GATS so that the commitments are conditioned on reservations deemed to serve the interests of that EU Member State. This possibility is more than theoretical, for a number of examples exist of resort to such reservations.⁸

Worldwide, there probably exists considerable political interplay and affinity between the local regulators of legal practice and the local practitioners. To the extent that the latter seek protection from foreign competition, they may have the political means to influence the regulators to provide that protection. If the local practitioners are divided in their views on cross-border legal practice, or if many of them are indifferent to the subject, or if users of legal services seek access to cross-border legal practitioners and exert political pressure to obtain that access, then the regulators may be under competing pressures, which could translate into less political pressure to adopt protectionist measures. Even in this situation, however, the regulators may be jealous of their traditional prerogatives as rule-makers for the legal profession, and, simply as a matter of preserving their authority over the practice of law, they may resist perceived

⁵ Resolution 26, Conference of Chief Justices, adopted as proposed by the International Agreements Committee on 29 July 2004.

⁶ Report to the ABA House of Delegates on the Legal Services portion of the GATS, August 2006, available at <http://www.abanet.org/intlaw/policy/tradecustoms/gats0806.pdf> (last accessed 23 January 2007). See also Resolution 5, Conference of Chief Justices, adopted as proposed by the CCJ International Agreements Committee on 2 August 2006: “Whereas, the recommended solution as now worded supports the United States Trade Representative’s participation in the development of disciplines that “do not *unreasonably*” impinge upon the authority of the states’ highest courts of appellate jurisdiction to regulate the legal profession in the United States . . . Now, therefore, be it resolved that the Conference urges the ABA House of Delegates to strike the word ‘unreasonably’ before acting upon the resolution” (emphasis in original).

⁷ This results from the definition of lawyer in Article 1.2(a) of the EU Directive as one who is “a national of a Member State”.

⁸ See Draft EU Doha Round Offer on Legal Services (draft of February 6, 2003), available at <http://www.gatswatch.org/docs/offreq/EUoffer/EU-draftoffer-1.pdf> (last accessed 24 January 2007).

incursions into their domain that would arise by virtue of specific commitments under the GATS.

Beginning in the 1980s, Japan has undergone an interesting process in which conflicting political pressures have brought about an evolving approach to the domestic regulation of foreign lawyers and law firms, coupled with evolving attitudes toward the treatment of legal services in trade negotiations. This evolution has seen Japan cautiously become less protective of its legal practitioners. Perceptibly, although not without hesitation, Japan has been able to moderate or intermedicate between local political interests, and to factor into legal-service negotiations its paramount national interest in establishing good relations with countries that are its partners in international trade in areas that count for far more than legal services in terms of economic activity and achieving high levels of overseas investment and net exports. As a result, Japan has adopted both domestic measures and transnational positions in trade negotiations that, gradually, have proved more accommodating to the presence in Japan of lawyers and firms from abroad engaging in cross-border practice.⁹ This history of careful and deliberate accommodation suggests that, in the Doha Round, past Japanese commitments will be retained, and changes that took effect on 1 April 2005 will be included. They permit (1) non-Japanese lawyers registered in Japan to employ Japanese lawyers, and (2) partnerships between individual Japanese lawyers and non-Japanese lawyers registered in Japan.¹⁰

A recent and, for the moment, seemingly unambiguous illustration of the protectionist phenomenon has arisen in China. There, in April 2006, the Shanghai Lawyers Association, with the apparent backing of the Chinese Ministry of Justice and the municipal government of Shanghai, issued a memorandum asserting that certain American and British law firms use their offices in Shanghai (and, by implication, elsewhere in China) to violate regulations prohibiting foreign law firms in China from practising Chinese law.¹¹ Apparently, in the past, these regulations had not been strictly enforced, and a policy of toleration had prevailed under which the Chinese office of a foreign law firm could hire or associate itself with local lawyers and, by integrating the work of these local lawyers into its own work, effectively provide legal services involving Chinese law. The position taken by the Shanghai Lawyers' Association suggests that this policy of toleration may be coming to an end, and that foreign law firms in China may face official sanctions, even expulsion from China, if they are judged to have engaged in illegal activities by failing to confine their practice to non-Chinese law.

⁹ See Takeo Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 *Am. J. Comp. L.* 678 (1979).

¹⁰ See PricewaterhouseCoopers Newsletter, Japan (13 April 2005).

¹¹ See "Shanghai Bar Association Upset With Practices of Foreign Firms," *New York Law Journal* at 1 (17 May 2006) (indicating that these assertions are outlined in a "fiery" 17 April 2006 memorandum released by the Shanghai Lawyers Association).

The tenor of the April 2006 memorandum issued by the Shanghai Lawyers' Association leaves little doubt as to its protectionist motivation. It calls on governmental authorities to take action against foreign law firms to "put in order, regularize and purify the Shanghai foreign legal services market".¹² This language rather clearly conveys the objective of reserving to "pure" Chinese law firms certain areas of legal work being handled in part by law firms that have offices in China but are based in the United States or the United Kingdom. China may be a recent country to provide an example of anti-competitive domestic reaction against cross-border practice, but it is hardly the first or only country in which local practitioners have expressed sentiments of an anti-competitive character and, expressing those sentiments, have sought to have their governmental authorities rein in the foreign competitors. Indeed, a study of the regulation of foreign lawyers in many countries all over the world reveals comparable reactions by local legal practitioners and, at their behest, local governments.¹³ The rules governing foreign lawyers in jurisdictions in (for example) Europe, North America, Latin America and Asia have historically been rife with protectionism and, today, are far from free of protectionist restrictions.¹⁴ (As will be seen in the next section, the introduction of the relatively permissive licensing of "foreign legal consultants" has itself not been free of protectionist restrictions.)

The reason for focusing on China is not that that country is uniquely protectionist, but that its legal practitioners have given expression to their concerns in an era in which those concerns can be seen as part of a reaction against "globalization".¹⁵ Here, the term is commonly used to signify exploitation of the developing world by economic interests in industrialized nations. Thus, because China has yet to become a significant base for its own global law firms, it can, for present purposes, describe itself as part of the developing world—as a country that is barely beginning to develop law firms capable of engaging in cross-border practice of global dimensions. The reaction by local Chinese law firms against "globalization" becomes almost generic when the foreign law firms being scrutinized are said to be American and British, that is, firms from industrial nations closely identified with activities in which home-country enterprises extend their operations abroad into a variety of host-country settings.

A generic reaction to "globalization" may not be a rational approach for China to take to further its global economic ambitions, however. First, not unlike Japan (as discussed above), China has major trading and investment interests that, in general economic terms, may well outweigh the potential benefits of protecting a "purified" Chinese legal profession.¹⁶ In all likelihood, those interests might be best served by giving the users of legal services in China appropriate access to the experience and

¹² *Id.*

¹³ See Sydney M. Cone, III, *International Trade in Legal Services: Regulation of Lawyers and Firms in Global Practice* § 1.3.3 (Little, Brown 1996) [hereinafter "Trade in Legal Services"].

¹⁴ See *Trade in Legal Services*, Ch. 1.

¹⁵ See *The Economist*, "The Future of Globalization," (29 July 2006).

¹⁶ See John Edwards, "We Must Prepare for the March of China's Giants," *Financial Times* at 11 (17 January 2007).

expertise of cross-border law firms which can help advance China's business, commercial and financial undertakings. The balance to be struck is the conventional political one between protecting the local legal profession against foreign competition, and ensuring that national consumers of legal services will have the support of legal practice of the highest quality, be it domestic, foreign or a blend of the two.

A second reason why a generic reaction to "globalization" may not be a rational approach for China to take relates to the practice of law itself and its relevance to China's role in the world. Here, China might well take account not only of the interests of its consumers of legal services (as just discussed), but also of the role that Shanghai or Beijing (for example) might play as an international center for legal practice. Obsession with the nationality or ethnicity of the individuals who control the law firms established in a given location may not contribute constructively to its development as an international legal center. On the contrary, giving "purist" priority to national and ethnic concerns may simply serve to stifle competition and such healthy concomitants of competition as the introduction of new and creative ways of handling substantive legal problems, the training of young lawyers with the aid of current developments in legal education, the use by law offices of advanced information technology, and the adoption of state-of-the-art methods for managing a legal practice.

The record to date suggests that Chinese legal practitioners should be quite equal to dealing with the presence of cross-border competition in China, and that they will learn from and develop entrepreneurial skills assuring benefits from this competition. Chinese law students and lawyers are already impressively present on the international scene.¹⁷ The result to fear is not that Chinese lawyers will prove to be slow learners and incapable of adapting to the modern world of cross-border legal practice. Rather, the result to fear is that, once in the grasp of protectionist policies, the Chinese legal profession, as well as the regulators of legal practice in China, will be unable to free themselves from dependency on protectionism, and, thus enthralled, will fail to foster, indeed, will frustrate, the development of international centers of legal practice in China. Unhappily, it may turn out that the early adoption of protectionist policies will lead to indefinite dependency on them, and that the general benefits to China of attracting major centers of international practice will be needlessly diminished.

China is far from alone in facing protectionist temptations and debilitations. As mentioned above, there are states in the United States and EU Member States that seek to qualify commitments on legal services in the Doha Round in order to maintain measures adopted for the protection of their local legal professions. The prospects for multilateral progress thus seem rather limited. A common explanation is the local political power of regulators who find in protectionism an instrument both for preserving their own local jurisdictional dominions and for catering to their respective regulated constituencies.

¹⁷ See "Why China," Prof. William P. Alford, *Harvard Law Bulletin*, Summer 2006.

This protectionist picture has been moderated by measures taken in some international legal centers to facilitate cross-border practice. In London, it is often possible for a qualified foreign lawyer to "requalify" as an English solicitor on the basis of certain studies followed by an examination.¹⁸ In New York, admission to take the bar examination is often available after 20 semester hours of study in a US law school; success on this examination can provide access to full-fledged membership of the New York bar. Also in New York, a foreign lawyer who does not take the bar examination may be eligible for being licensed, without examination, as a legal consultant. Subject to limitations on scope of practice, the legal consultant in New York is entitled to many of the privileges available to full-fledged members of the New York bar.¹⁹

B. INCREASING RECOURSE TO THE CONCEPT OF THE "FOREIGN LEGAL CONSULTANT"

The profession of legal consultant (mentioned in the preceding paragraph) was created by the state of New York in June 1974, when the state's highest court (the Court of Appeals) adopted rules expressly for this purpose. These rules had just been authorized by a specific enabling statute adopted by the state legislature and signed by the governor.²⁰ In turn, the rules authorized the state's intermediate courts (the four Appellate Divisions of the Supreme Court), in their "discretion," to license as legal consultants, without examination, lawyers who were in good standing in foreign jurisdictions, who met certain criteria as to age and length of practice, and whose "character and fitness" were comparable to the same qualities required of members of the bar. Thus, New York came to have two parallel legal professions: the lawyer who is a member of the bar (called an "attorney and counsellor-at-law"); and, as from June 1974, the "legal consultant"—who, under the applicable rules, "shall be considered a lawyer affiliated with the [New York] bar". Members of the two professions are entitled to work together in the same law office, and to employ or be employed by members of the other profession. The purpose of authorizing the second profession of legal consultant, as reflected in the legislative history of the enabling statute, is to facilitate the establishment in New York of individuals and firms engaged in cross-border legal practice, and thereby to promote New York as an international legal center contributing to the state's economy.

In acting as just described, New York did not invent the concept or title of "legal consultant". In point of fact, New York deliberately drew its inspiration from a legal profession then existing in France, that of *conseil juridique*, and the term "legal

¹⁸ See Trade in Legal Services § 7.5.

¹⁹ Parts 520 and 521 of the Rules of the Court of Appeals of New York (Admission of Attorneys and Counselors at Law; Licensing of Legal Consultants). See also Trade in Legal Services, Ch. 3.

²⁰ Part 521 of the Rules of the Court of Appeals of New York (Licensing of Legal Consultants). The New York State Legislature passed an enabling statute authorizing the New York Court of Appeals to adopt "rules for the licensing, as a legal consultant, without examination and without regard to citizenship, of a person admitted to practice in a foreign country as an attorney or counselor or the equivalent." New York Judiciary Law § 53(6) (1974). See Trade in Legal Services, Ch. 3.

consultant” was borrowed from—was a conscious approximation of—the French title.²¹ In France at that time, the legal professions included those of *conseil juridique* and *avocat*, and, generally speaking, the parallel professions that came to exist in New York in 1974 were similar to those two professions as they then existed in France. There was this distinction, however: at the time in France, foreign (non-French) nationals, otherwise qualified, could become *conseils juridiques* but could not become *avocats*. As what may now be seen as a development of historic irony from the perspective of the ongoing New York profession of legal consultant, the profession of *conseil juridique* was merged into that of *avocat* in France in 1991, and no longer exists in France as a separate profession. Also, the profession of *avocat* has become accessible to non-EU nationals who can pass a French bar examination.²² Thus, unlike New York, where a qualified candidate can be licensed as a legal consultant without examination, a similar route to legal practice has ceased to be available to non-EU lawyers in France.

In August 1993, the House of Delegates of the American Bar Association (ABA), acting on a report by the ABA Section of International Law and Practice, decided to encourage all of the US states to adopt rules for the licensing of legal consultants. By then, several states had adopted rules that, in varying degrees, resembled New York’s rules, although the variations often contained protectionist alterations.²³ Eschewing the

²¹ See Sydney M. Cone III, *Foreign Lawyers in France and New York*, 9 *Int’l Lawyer* 465 (1975).

²² See Trade in Legal Services, Ch. 9.

²³ Five examples are as follows:

In California, a “registered foreign legal consultant” may not “render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction named in satisfying the requirements of (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.” Rule 9.44, California Rules of Court (amended 1 January 2007), available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_9.pdf (last accessed 23 January 2007).

In Florida, “foreign legal consultants” may not “render professional legal advice on the law of the State of Florida, the United States, or any other state, subdivision, commonwealth, or territory of the United States, or the District of Columbia (whether rendered incident to the preparation of a legal instrument or otherwise)”. Rule 16-1.3, Rules Regulating the Florida Bar, available at <http://www.floridabar.org/divexe/rrtffb.nsf/FV/BF5BC652D4B17E0185256BC0006D1A12> (last accessed 23 January 2007).

In Illinois, “foreign legal consultants” may not “render professional legal advice on or under the law of the State of Illinois or of the United States or of any state, territory or possession thereof or of the District of Columbia or of any other jurisdiction (domestic or foreign) in which such person is not authorized to practice law (whether rendered incident to the preparation of legal instruments or otherwise)”. Rule 712 of the Illinois Supreme Court Rules on Admission and Discipline of Attorneys, available at http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#Rule712 (last accessed January 23, 2007).

In Pennsylvania, “foreign legal consultants” may not “render professional legal advice on the law of [Pennsylvania], of any other jurisdiction in which he or she is not authorized to practice law or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise).” Chapter 71, Pennsylvania Bar Admission Rules, Rule 341: Foreign Legal Consultants, available at <http://www.courts.state.pa.us/opposing/supreme/out/361spet.1attach.pdf> (last accessed January 23, 2007). In Pennsylvania, an applicant may be licensed to practice in the state as a foreign legal consultant, without examination, if, *inter alia*, the applicant passes the Multistate Professional Responsibility Exam[ination] with a score required by the Supreme Court of Pennsylvania. See Rule 341(a)(6), Pennsylvania Bar Admission Rules, Foreign Legal Consultants.

In Texas, “foreign legal consultants” may render “professional legal advice on the law of Texas or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) . . . on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been certified under this Rule) to render professional legal advice in Texas on such law and with whom the Foreign Legal Consultant i) is co-counsel with a Texas lawyer that has been identified to the client, or ii) has an identified affiliation, employment, partnership, shareholder or other membership relationship in or with (A) the same law firm, (B) a company partnership, or other entity, or (C) a governmental agency or unit . . .”, available at <http://www.ble.state.tx.us/Rules/NewRules/rulexiv.htm> (last accessed 24 January 2007).

protectionist alterations that had arisen in other states, the ABA House of Delegates adopted a Model Rule that was substantially identical to New York's rules.²⁴ Like New York, the ABA in 1993 used the term "legal consultant". Even so, the practice has long become widespread of using the term "foreign legal consultant" and the acronym "FLC"—and these (foreign legal consultant and FLC) constitute today's conventional nomenclature for referring to the title, and the rules creating the title, under which a lawyer from a foreign home country may be authorized to practice in a host country without having to become a full-fledged member of an historically established legal profession in the host country. The omission of the word "foreign" in the New York and 1993 ABA title of "legal consultant" was more than cosmetic, however. It had the deliberate policy objective of signifying that, once licensed, the "legal consultant" was a local lawyer entitled to be recognized as such. In varying degrees, this policy may or may not be reflected in jurisdictions or commentaries that use the appellation of FLC.

To date, wherever it exists, the profession of "legal consultant" or "foreign legal consultant" (the "consultant") does not enjoy the right to conduct a legal practice having as broad a scope as that of an historically established legal profession in the host jurisdiction. The consultant may be licensed locally, but the license has a non-local connotation, and the licensing jurisdiction invariably clings to a territorial tradition when it comes to granting the privileges of full-fledged rights of legal practice. Only lawyers who are conventionally tied to the territory in question are granted the entirety of those privileges. Thus, in New York, the legal consultant, as such, has no rights of appearance for the purpose of representing clients before the courts, and is not authorized to engage in certain areas of practice that traditional practitioners have been able to preserve for themselves in respect of real property, decedents' estates, and marital or parental relations—areas of practice that traditional practitioners have persuaded the local regulators to treat as being rooted in the territory of the licensing jurisdiction.²⁵

In essence, then, the consultant is licensed to conduct a practice that comprises the giving of legal advice, the negotiation and preparation of transactional documentation, and the provision of assistance to other legal practitioners. Here, the critical question that arises is, may the consultant carry out these activities when they involve local law, or does the territorial bias also pervade the consultant's permitted domain of practice? What, that is, are the rights of practice of the consultant in respect of the law of the host jurisdiction, commonly called host-country law? Both New York and the ABA Model Rule dealt with this critical question by authorizing the consultant to render professional legal advice on US state or federal law, whether rendered in connection with the preparation of legal instruments or otherwise, but only if the advice is rendered "on the basis of" advice from a practitioner who is not a consultant and who, in the

²⁴ See ABA "Model Rule for the Licensing of Legal Consultants," August 1993. See also Trade in Legal Services Appendix II-A.

²⁵ See § 521.3 of the Rules of the Court of Appeals of New York (Licensing of Legal Consultants).

jurisdiction in question, is “duly qualified and entitled” to render professional legal advice.²⁶

The “on the basis of” formulation is a political compromise negotiated in 1973–1974 in New York between proponents of an unqualified right to advise on local law patterned after the then French model of *conseil juridique* (as explained above), and proponents of a territorial approach that would have simply prevented the licensed consultant from giving any advice whatever on host-country law. With the passage of time, this formulation has proved quite permissive in New York, but has encountered territorial-based opposition in many jurisdictions other than New York. It has proved permissive in New York because licensed consultants have been given discretion to judge for themselves when they have an adequate “basis” for giving advice on local law. Also, where a firm includes both a licensed consultant and a member of the New York bar in its New York office, the consultant may have readily at hand a “basis” for advising on local law.²⁷ As mentioned, however, this permissive approach has not found favor in the many jurisdictions in which a consultant may be licensed to advise on the consultant’s home-country law, but is prohibited from advising on host-country law.

The prohibition forbidding consultants to advise on host-country law while in the host country has been overwhelmingly adopted in those jurisdictions that license consultants. The prohibition is, however, little more than an assertion of territorial power that is difficult to defend in terms of the realities of global legal practice. Whether a French *avocat* in Paris or a Japanese *bengoshi* in Tokyo is authorized to advise on Pennsylvania law is not a question of Pennsylvania law but a question of the law of, respectively, France or Japan. So long as each of those two lawyers is advising clients in the lawyer’s home country, the lawyer may be entitled to advise on the law of Pennsylvania irrespective of the scope of practice that Pennsylvania permits a consultant licensed and practicing in that state. While physically present in, respectively, France or Japan, each of those two lawyers looks to home-country law to determine whether the lawyer is entitled to advise on the law of Pennsylvania. (The converse is true as well: whether or not a Pennsylvania lawyer practicing in Pennsylvania is entitled to advise on, say, French or Japanese law, is a question of Pennsylvania law.) In contrast, under the rules in force in Pennsylvania, although a French *avocat* or a Japanese *bengoshi*, to be licensed as a consultant, must first pass a US examination on legal ethics, that lawyer, once licensed and practicing as a consultant in Pennsylvania, is prohibited from rendering legal advice on US state or federal law.²⁸

²⁶ Section 521.3, *supra* note 25, ABA Model Rule for the Licensing of Foreign Legal Consultants, revised August 2006. The revised rule used the phrase “Foreign Legal Consultant” in place of “Legal Consultant” in the title and text, in addition to making other minor substantive alterations. Available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/threehundredonea.doc> (last accessed January 23, 2007). See also Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 *Houston J. Int’l L.* 527 (2005).

²⁷ See Trade in Legal Services § 3.3.2.3.

²⁸ 204 Pa. Code Chs. 71 and 83, Pennsylvania Bar Admission Rules and Rules of Disciplinary Enforcement Relating to Foreign Legal Consultants.

In adopting its Model Rule for the licensing of consultants, the ABA had before it a report that argued against adopting a territorial approach to the issue of whether the consultant should be permitted to render advice on host-country law. The report asserted that lawyers advise on transactions and disputes, “not on laws in the abstract”; that the lawyer is expected to blend relevant national laws into a “seamless web”; and that rendering legal advice is “an inherently synthetic process” whenever the laws of two or more jurisdictions, including host-country law, are involved.²⁹ In addition, the report pointed out that, to be licensed as a consultant under the Model Rule, a foreign lawyer must comply with host-state rules of professional conduct that in all cases prohibit the giving of legal advice outside a lawyer’s area of professional competence. The report also alluded to the “powerful” deterrent effect of “considerations of professional liability”. These statements in the report have not proved to be widely persuasive, however. Although the report presumably influenced the approach taken by the Model Rule, it has failed to convince a large number of local authorities in US states to adopt the critical provision of the Model Rule intended to permit a licensed consultant to advise on local law “on the basis of” advice from a traditional local lawyer. Notwithstanding the 1993 report and Model Rule, the territorial approach remains very much alive.

The persistence of the territorial approach is manifest not only within but also outside the United States. Examples are the two other parties to the North American Free Trade Agreement (NAFTA)—Canada and Mexico. Although there is a NAFTA model rule on foreign legal consultants, it leaves to the host jurisdiction the question of whether a consultant may advise on the law of that jurisdiction.³⁰ It appears that, to date, no jurisdiction in Canada or Mexico has abandoned the territorial approach under which foreign lawyers are not authorized to practice host-jurisdiction law unless they become members of a traditional legal profession in the host jurisdiction. The provinces of Canada have rules for the licensing of foreign (meaning non-Canadian) legal consultants, but those rules do not seem to permit the licensed consultants to advise on Canadian provincial or federal law.³¹ An additional restriction in Mexico limits the ownership interests of FLCs in a law office in Mexico.³²

At the beginning of the Doha Round, two New York bar associations and a US service-industries coalition submitted to the USTR a draft of “reference paper” on legal services, which drew its inspiration in part from the provision in the ABA Model Rule (based on the precedential provision in New York’s rules on legal consultants) that permits a consultant to advise on host-country law if the advice is given “on the basis

²⁹ See Trade in Legal Services, Appendix II-B.

³⁰ See Trade in Legal Services § 6.5.3.

³¹ See, e.g., By-Law 39, Foreign Legal Consultants, Law Society of Upper Canada, available at <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw39/> (last accessed January 24, 2007). See also Trade in Legal Services, Ch. 5.

³² See Trade in Legal Services § 6.5.3.

of” advice by a traditional host-country lawyer.³³ The idea behind this proposed reference paper was rather ambitious; it was to serve as a medium for the submission of specific commitments on legal services under the GATS. Simply by making express reference to the reference paper, a WTO Member could incorporate the reference paper’s provisions into that Member’s commitments in respect of legal services. The provisions of the reference paper call for a number of specific commitments, including the following:

- reasonable and transparent rules permitting foreign lawyers and law firms to obtain and exercise rights of establishment in a host country;
- the right of foreign lawyers and law firms established in a host country to render the range of legal services that they are entitled to render in their home countries, subject to the requirement that, where appropriate, the services be based on services rendered by traditional host-country lawyers;
- the right of foreign lawyers to hire and be hired by local lawyers, to associate with local lawyers in the host-country office of a foreign lawyer or law firm, and to rely on local lawyers in that office when rendering legal services involving host-country law;
- extending to foreign lawyers and law firms established in a host country many of the rights and privileges (including attorney–client privilege) identified with host-country lawyers; and
- requiring such foreign lawyers and firms to observe the professional rules and standards applicable to host-country lawyers, thus not only subjecting them to host-country professional discipline, but also indicating that they are being treated on a par with traditional host-country lawyers.

The proposed reference paper was reportedly made available to Members of the WTO (to participants in the GATS Doha Round negotiations). Apparently, however, the paper was seen by many WTO Members as being overly ambitious. In any event, it produced little in the way of enthusiasm, that is, of expectations that the Doha Round would generate a substantial number of specific commitments on legal services patterned after the reference paper. In some US jurisdictions, it may have been viewed as an intrusion on the prerogatives of state authorities unwilling to adopt a rule resembling—indeed, broadening the scope of—the rule regarding advice on host-country law adopted by New York in 1974. Outside of the United States, it may have been viewed as another manifestation of a policy of “globalization” by an industrialized

³³ See Proposed Reference Paper relating to GATS Commitments on Legal Services, The Association of the Bar of the City of New York (ABCNY), February 21, 2002 (on file with ABCNY) (offered by the ABCNY to the USTR to “be considered as a basis for the United States position on Legal Services” in the Doha Round of multilateral trade negotiations). The ABA urged the USTR in its trade negotiations to seek permanent establishments consistent with the ABA’s Model Rule. See Report by the Section of International Law and Practice of the American Bar Association to the ABA House of Delegates, February 1, 2002.

country seeking to enable its providers of legal services to gain extensive rights of establishment in other countries.

The lack of enthusiasm for the legal-services reference paper just discussed suggests that the paradigm of the "foreign legal consultant" is not gathering momentum as a means for promoting either regulatory rules favoring cross-border legal practice, or robust legal-service commitments under the GATS. The effect seems to be cumulative, that is, the weakness of the FLC as a paradigm in one area seems to contribute to its weakness in the other. Because local regulators resist according the FLC the right to practice local law, trade negotiators may conclude that they are denied the authority to make specific commitments to protect that right. This phenomenon may cut two ways because, if trade negotiators conclude that they are precluded from promoting cross-border rights of establishment, trade negotiations may do little to reduce the protectionist proclivities of local regulators.

In summary, the "seamless web" reasoning of the 1993 report supporting the ABA Model Rule may have been vitiated by the realities of the circumscribed "foreign legal consultant" in many localities, and the ambitions for the legal-services reference paper proposed for the Doha Round may have been dashed by a fairly widespread lack of enthusiasm for ground-breaking legal-services commitments under the GATS. Thus, the GATS negotiations on legal services may be destined for compromise in the form of a lowest common denominator, if not retrograde, licensed consultant who, if permitted at all, will be excluded from practicing the law of the jurisdiction granting the license to act as a consultant. A result that seemingly ratifies the vitiation of the 1993 ABA report on legal consultants and that seemingly dashes early Doha Round ambitions for legal services leads to the question, can bilateral or regional trade negotiations not under the aegis of the WTO make more progress than the Doha Round in the area of legal services?

C. BILATERAL AND REGIONAL TRADE NEGOTIATIONS ON LEGAL SERVICES

It is difficult to discern a pattern of progress in the area of legal services when they are included in bilateral or regional trade negotiations. The record is spotty as regards bilateral trade agreements, and, outside the EU, rather unimpressive as regards regional arrangements.³⁴

Many bilateral trade agreements are asymmetrical in terms of the relative negotiating power of the two parties because, of the two, one party has more substantial economic resources than the other.³⁵ In the negotiation of such an

³⁴ See Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference,"* 26 Mich. J. Int'l L. 563 (2005).

³⁵ See Tom Wright, "Collapse of Global Trade Talks: Regional Deals Move to the Forefront," *International Herald Tribune* at 1 (July 26, 2006) (discussing that poor countries are disadvantaged with respect to bilateral and regional trade talks because "they have little to offer wealthy countries in return"); Edward Alden, "Bush is Right to Push For His Fast-Track Trade Policy," *Financial Times* at 11 (Jan. 31, 2007) (referring to a "hodge-podge of bilateral agreements with small countries"). See also Andreas F. Lowenfeld, *International Economic Law*, 473 (Oxford University Press 2002) (explaining generally that most bilateral agreements are between developed and developing countries).

agreement, the stronger party may be interested in obtaining rights pertaining to investment, intellectual property and services in fields such as finance, transportation and telecommunications, in relation to which legal services are, at best, a matter of secondary concern. As for the less strong party, it may simply lack any realistic hope of penetrating the legal-services market of the stronger party, and may be concerned almost exclusively with export markets for particular goods and particular extractive and agricultural products. While legal services may be covered in the negotiation of this type of agreement, the result often seems unlikely to be more rewarding for either party than specific commitments on legal services made in multilateral "rounds" such as the Doha Round.³⁶

On occasion, legal services will command special attention in bilateral trade relations. Perhaps the leading example occurred in the 1980s when, to accommodate US requests, Japan created a profession of "foreign law lawyer" (*gaikokuho-jimubengoshi*), thereby permitting certain foreign lawyers meeting particular requirements to establish themselves in Japan, but not to practice Japanese law.³⁷ Japan and the United States were seeking a diplomatic resolution of so-called "trade frictions" resulting from the high level of Japanese exports of goods to the United States, compared with a low level of corresponding US exports to Japan. As a matter of internal Japanese politics, it seemed feasible for the Japanese government to make a concession in the area of legal services, and thus to ease somewhat the diplomatic tensions being experienced with the United States. Subsequently, during the Uruguay Round, the earlier concessions on legal services took the form of specific commitments.

A comparable situation may involve South Korea, which has high levels of exports to, compared with imports from, the United States and the EU,³⁸ and trade discussions with countries constituting its major export markets may lead to concessions by South Korea permitting foreign lawyers and law firms to open offices in that country.³⁹ As with Japan, these concessions may ultimately take the form of specific commitments under the GATS.

As for regional trade agreements, their legal-service provisions tend to be laconic, neither forbidding nor encouraging the licensing of foreign legal consultants—a subject that may have been covered in the negotiation of a regional trade agreement, but that, generally, has not served as a principal focal point except, perhaps, in the notional

³⁶ See Sydney M. Cone, III, *supra* note 34.

³⁷ See Trade in Legal Services § 13.2.4. For a recent development, see *supra* at note 10.

³⁸ For example, in 2005, Korea exported \$43.779 billion in commodities to the U.S. compared to imports from the U.S. of \$27.670 billion. Further, Korea's trade-balance advantage with the U.S. has increased approximately 5% increase since 2002. United States Department of Commerce and the U.S. International Trade Commission.

³⁹ In fact, "the Korean government has agreed to liberalise its legal services market after extensive lobbying from the Law Society and the British government." See Press Release, Law Society of England and Wales (23 November 2006). However, under the draft bill, the British foreign legal consultants will not be able to advise on Korean law. *Id.*

reckoning-up of overall bargaining positions and results. Somewhat exceptionally, the NAFTA sets out detailed provisions on foreign legal consultants.⁴⁰ Even so, as briefly mentioned above, it leaves to the individual licensing jurisdictions of its three parties—to the Canadian provinces and the Mexican and US states—the decision as to whether an FLC from the other two parties will be entitled to advise on host-country law. In Canada and Mexico, under the FLC rules of every province and state that has adopted such rules, the FLC from a NAFTA party seems to lack authorisation to advise on host-country law. Although (as also mentioned above) the ABA Model Rule would permit the FLC to advise on host-country law, a substantial number of US states with FLC rules have departed from the Model Rule and prohibit the FLC from providing such advice. Thus, efforts by the ABA to use the NAFTA to promote the Model Rule have not proved very fruitful.

A likely explanation for the second-class treatment of legal services in regional trade agreements is that the parties thereto have tended to give priority to economic interests other than legal services—economic interests whose impact on national employment and income and on fiscal and monetary policy is deemed to be of paramount importance. Another possible explanation is that it takes more than a trade agreement to mobilize political institutions to persevere successfully in this area where entrenched regulatory authorities and a territorial and protectionist mentality must be overcome in order to promote a global approach to cross-border legal practice.

The leading example of regional success in promoting cross-border legal practice is the European Union. Strikingly, the EU is more than a free-trade area based on a trade agreement. The EU is a group of States that share not only a common customs union and a common market but, most importantly, common political institutions that can reach policy decisions and legislate on legal services (among, of course, a great many other subjects).⁴¹ Moreover, in the event of disagreement concerning policy or legislation or its implementation, the disputants can have resort to a single EU-wide court system and, ultimately, the European Court of Justice. The success of the EU regarding cross-border legal practice within the EU suggests that common legislative and judicial institutions and a common supporting infrastructure may be needed to remove barriers to lawyers and law firms seeking to establish themselves in host countries and to provide services relating to host-country law when it is relevant to the transactions, disputes or other matters being dealt with. To a considerable extent, then, the EU has been in a position to realize, and has realized, the ABA's 1993 goal of fostering rules pursuant to which cross-border practitioners can provide a "seamless web" of legal advice.

⁴⁰ See Trade in Legal Services § 6.5.

⁴¹ See, e.g., EU Directive 77/249/EEC, which facilitates the effective exercise by lawyers of freedom to provide services; EU Directive 98/5/EC, which facilitates practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. European Union Website, "Europa," available at http://ec.europa.eu/internal_market/qualifications/specific-sectors_en.htm#lawyers (last accessed 22 January 2007).

Even so, the European Union has fallen short of giving global effect to its rules on cross-border legal practice. The primary EU legislation is its Establishment Directive, under which a lawyer or law firm in one EU country can become established in other EU countries, and under which the lawyer can enjoy favorable treatment when seeking to become a member of another EU country's traditional legal profession.⁴² The benefits of the Establishment Directive are restricted, however, to nationals of EU Member States.⁴³ Thus, a lawyer who is not an EU national or a law firm that is not controlled by EU nationals, when established in the EU, is not entitled to the benefits of the Establishment Directive—even if the non-EU lawyer has become a member of an EU legal profession. Notwithstanding this shortcoming, the availability of the “seamless web” approach on an intra-EU basis represents far more of an achievement than has been realized elsewhere.

Even if the EU's legal-services regime did not discriminate against non-EU nationals, this regime would of necessity remain an achievement limited to the EU's constituent jurisdictions. At their best, their rare and exceptional best, then, regionally negotiated agreements on cross-border legal practice cannot rival the global potential of a multilateral agreement. Like bilateral agreements, regional agreements exist in parallel with each other and with the GATS. Accordingly, regional and bilateral agreements are no substitute for a successful Doha Round were it, somehow, to achieve its global aspirations. In light of indications that many of these aspirations may be out of reach, the next part will examine how the resulting dilemma can affect cross-border legal services.

II. TRANSCENDING THE DOHA ROUND DILEMMA

As has been seen, some regulators of the legal profession and parts of the profession itself have at times shown a proclivity for protectionism, and the paradigm of the foreign legal consultant has produced mixed results lacking widespread adherence to the original “seamless web” rationale as had been found in the concept of *conseil juridique* and in the 1993 report underlying the ABA Model Rule. As has also been seen, bilateral and regional trade agreements paralleling the GATS often fail to achieve the potential offered by multilateral agreements, and the GATS itself is dependent on specific commitments by WTO Members—commitments that sometimes reflect the protectionism and the mixed results just mentioned. Despite these auguries, however, cross-border legal practice not only exists, it seems to grow globally in a dynamic way. Apparently, because this area of trade benefits from certain elements of dynamism, disappointing trade negotiations do not present an impassable barrier to trade in legal services. What are these elements of dynamism? This question will be examined below

⁴² Directive 98/5/EC of the European Parliament and of the Council, 15 February 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which qualification was obtained, OJ L077 (14 March 1988), at 0036-0047.

⁴³ See *supra* note 7.

in terms of (a) trade policy, (b) the positive rules governing legal practice, and, (c) the perceived conduct of lawyers and law firms engaged in cross-border activity.

A. TRADE POLICY AND THE CROSS-BORDER PRACTICE OF LAW

The practice of law is competitive, and legal practitioners have been known to attempt to influence trade policy to their competitive advantage. Here, they have much in common with (for example) manufacturers who want trade barriers lowered where doing so will promote their exports, and raised where doing so will protect them from competition. Legal services are not “traded”, however, in the same fashion as manufactured goods.⁴⁴ Legal services emanate from professionals who can be rather mobile, and who tend to favor locations that provide simultaneous access both to clients and to the human and technical resources needed for the efficient practice of law.⁴⁵ Thus, for legal services, “trade” rights often translate into rights of establishment—rights to provide legal services at locations that facilitate dealing with clients and that permit the services to be appropriately responsive to the clients’ needs.

The concept of comparative advantage—a classical concept in the economics of trade—therefore has a special meaning in the area of legal services. The lawyer or law firm enjoying comparative advantage is in a position to exploit rights of establishment more effectively than other lawyers or firms. This comparative advantage may exist for historical, cultural or geographic reasons, or by virtue of an individual or firm’s recent innovative prowess, or because professional success has brought with it a positive reputation that attracts additional professional activity. Whatever the explanation, it lies behind the readiness or reluctance of particular legal practitioners to look to trade policy to facilitate their development of rights of establishment.

Not surprisingly, comparative advantage is unevenly distributed, and there are wide differences of attitude by legal practitioners toward the development of rights of establishment. As mentioned, history, culture and geography can be important. A city with major business, commercial and financial resources in a country enjoying prominence and independence is likely to engender legal practitioners who look to trade policy to promote their access to rights of establishment elsewhere. In contrast, isolation from major resources of this type may lead to a parochial and inward-looking approach to trade policy. More complicated is the global trading partner that combines the attitudes just mentioned. Thus, in each of the European Union and the United States, one can find, in different places, markedly different attitudes toward the use of trade policy to promote rights of establishment for legal practitioners.⁴⁶ The result within each of these large trading partners can be tensions between the institutions

⁴⁴ See generally, Laurel Terry, *GATS’ Applicability to Transnational Lawyers and its Potential Impact on Domestic Regulation of U.S. Lawyers*, 34 Vand. J. Transnat’l L. 989 (2001); see also Trade in Legal Services, Introduction.

⁴⁵ See Trade in Legal Services § 1.3.1.

⁴⁶ See generally Trade in Legal Services, Chs. 3,4; Part III.

formulating EU or US trade policy, on the one hand, and the trade policy of individual EU Member States or individual US states, on the other.

A prominent example of outward-looking trade policy is the United Kingdom, where conscious efforts have been made by private and public bodies alike to develop London as an international legal center, and to enhance the overseas presence of London-based legal practitioners.⁴⁷ At times, these efforts have been well coordinated as between the pertinent domestic organizations and authorities. These efforts have occasionally also drawn on connections resulting from UK membership in the EU, from Commonwealth relationships, and to a certain extent from the English common law tradition in the United States and elsewhere. In addition, the primacy of London law firms in various markets has been advanced by encouraging the use of English law to govern contractual and other relationships. A common denominator in attaining these goals has been the interplay of private entrepreneurship and official trade policy in the United Kingdom.

As mentioned above, however, the EU is a global trading partner comprising diverse Member States. Not every legal profession in the EU shares the goal of assuring the primacy of London law firms. Enhancing the overseas presence of those firms may be driven more by single-minded UK ambitions than by multilateral, mutually agreed precepts for the development of legal-services markets that are open to all would-be global participants. In short, the formulation of EU trade policy may here be complicated somewhat by the single-mindedness of UK policy.

Even so, the success of the London firms at home and abroad provides an instructive illustration of the competitive dynamics of global legal practice. For present purposes in considering the Doha Round dilemma, it is critical to note that this success has provided a vital stimulus mitigating the inertial shortcomings of that dilemma. The need to compete with the London firms has given a fillip to trade policy in countries other than the United Kingdom. The co-ordination of private and public institutions exists in a number of countries, perhaps in conscious or unconscious imitation of the United Kingdom, with the result that these countries may seek to harness trade policy to the ambitions of their own cross-border legal practitioners. One characteristic of comparative advantage is that it is not immutable, and today's leaders could set an example that will evoke healthy competition to develop more varieties of competitive advantage tomorrow.

The UK example has not been lost on the United States—or, more accurately, on those parts of the United States, such as New York City, where legal practitioners acting on a global scale are based. Predictably, these practitioners often aspire to maintain or expand their establishments abroad. From the perspective of the US federal government, however, New York City (for example) is not the United States, and ambitions in one city for an outward-looking trade policy can be diluted by the rather different character of legal practice in other parts of the country—or even in other parts

⁴⁷ See generally *Trade in Legal Services*, Ch. 7; see also "UK Lawyers Set to Be Allowed to Work in Korea," Press Release, Law Society of England and Wales (23 November 2006).

of New York State. The formulation of trade policy here becomes somewhat complicated, and may involve two features: the first is narrowing the outward-looking policy to the point where it can avoid opposition, or even gain support, in many localities; the second is devising an overall trade policy that includes enough diverse benefits for enough constituencies to overcome any opposition to an outward-looking trade policy in respect of legal services.

An example of both of these features was US policy toward Japan in respect of legal services, beginning in the 1980s. First, there were law firms in legal centers across the United States that were interested in opening offices in Japan—a booming market in the 1980s, and one not easily served other than by an establishment in Japan. Second, many US industries and service providers, other than legal practitioners, sought changes in trade relations with Japan.⁴⁸ It was thus politically feasible for the USTR to gain support for bilateral negotiations with Japan over legal services and thereby to facilitate developments that led to a productive combination of trade policy and entrepreneurship.

The examples just presented—of the UK promotion of London-based law firms, and of the USTR engaging in legal services negotiations with Japan—can serve as an introduction to the broader thesis that the treatment of legal services in the Doha Round can provide a picture of the Doha Round dilemma in microcosm. The essence of the argument is that, in both cases, the difference between reaching, and not reaching, a satisfactory result turns on the ability of the interested parties to harmonize diplomatic and entrepreneurial resources.

Trade policy on legal services may have conceptual origins, but it is unlikely to emerge on the basis of abstract conceptualization. It invariably is driven by a combination of governmental policy-makers and entrepreneurial private practitioners, making it susceptible to being shaped and re-shaped over time by political give-and-take reflecting the economic stakes of groups and entities likely to be affected by, or seeking to influence, specific outcomes. Thus, as in countless other areas touched by trade negotiations, the formulation of trade policy is here the shared province of diplomats and interested stakeholders. When the diplomats and the stakeholders act in harmony, the result can be effective both as an expression of common ambitions and as a means of attaining specific goals.

In an area such as legal services, it would be unusual for the diplomats to substitute their judgment for the views (if any) expressed by legal practitioners as to the desired direction for trade negotiations to take. Proverbially cautious, the diplomats may seek to conserve their political capital and to steer clear of any risk of displeasing potent constituencies. Accordingly, the effective manifestation of entrepreneurship by legal practitioners in the arena of trade negotiations will include more than defining goals. Most importantly, it will also include a careful and prudent analysis of the means for achieving those goals, and an effective plan for putting that analysis into action at the

⁴⁸ See Trade in Legal Services, Ch. 13.

critical point where trade negotiations and cross-border legal practice intersect. In a sense, the legal practitioners must do for themselves what they often do for their clients, and think through the related problems of formulating desired goals, devising a feasible way for attaining the goals, and effectively communicating the resulting hoped-for process to all relevant parties, one of which of course here comprises the diplomats.

This description of the role of entrepreneurial stakeholders in trade negotiations is not peculiar to the area of legal services. The requisite entrepreneurial content may vary considerably from area to area, but the importance of providing that content is common to many areas. For this reason, the area of legal services can be said to present the Doha Round dilemma in microcosm. At the level of macro-economics, a major objective of this "round" is to carry out the Doha Development Agenda, which embodies the goal of enabling developing countries to receive increased benefits from global trade, meaning, in particular, increased access to the markets of developed countries.⁴⁹ Increased market access does not automatically result from setting an ambitious agenda, however, and generally has a variety of prerequisites in addition to setting goals for the diplomats. Thus, in the context of the Doha Development Agenda, there has been considerable commentary on the need for financial and technical assistance from developed countries, either directly or by way of the International Monetary Fund, World Bank institutions, and regional development banks.⁵⁰

The Doha Development Agenda has also attracted a certain amount of commentary on the entrepreneurial gap between those developing countries that lack familiarity with the intermediation required for moving products into markets, and major industrialized nations with substantial experience in achieving and maintaining their presence in world markets. The essence of this gap is that it is not enough to have products to sell—that there must also exist the know-how required to gain market access for those products.⁵¹ While there is no doubt that reducing or eliminating conventional trade barriers—such as tariffs, subsidized competition, and anti-dumping proceedings—is of fundamental importance, the entrepreneurship needed actually to move products into markets may not always follow. As discussed above in respect of legal services, entrepreneurial skills may be required to harmonize cross-border practice with trade negotiations. The analogy in respect of the macro-economics of the Doha Development Agenda is that entrepreneurial skills may be needed to assure that developing countries, having been accorded certain trade concessions and, possibly, related financial and technical assistance, actually achieve the market access required to reap substantial benefits from those concessions and the related assistance.

⁴⁹ See Doha Development Agenda, *supra* note 2.

⁵⁰ See, e.g., Jagdish Bhagwati & Arvind Panagariya, "World Bank and IMF Show Welcome Revisions to Stance on Developing Countries and Trade," *Financial Times* at 10, December 24, 2003; Rob Portman, USTR, Letter to Editor, "Once-In-a-Generation Opportunity to Improve Global Economy," *Financial Times* at 12, 6 April 2006.

⁵¹ See, e.g., Ian Limbach, "Building Bridges Over the Skills Gap," *Financial Times* at 4, March 29, 2006.

Closing entrepreneurial gaps may prove to be a less than rapid process, in many cases requiring more time than that allotted by deadlines set for the negotiation of trade "rounds". Structural change may be required in many different countries, and may encounter considerable resistance, or at least a need for phase-in periods devoted to training and education. Structural change may proceed at an incremental pace, the pace being dictated by the circumstances of different countries as well as by the types of goods or services in question. The prospect of change can produce reactions from disparate political movements and from various groups seeking to retain or attain power. It may often require the reconciliation, or at least the acknowledgement, of cultural differences amongst the nations involved, and accommodating cultural differences may touch on a variety of attitudes toward the exigencies of markets and entrepreneurship.

Legal services in the Doha Round provide an illustration of the strictures of incremental change. Frequently the practice of law is a statutory or quasi-statutory monopoly, conferred by society only on individuals who are deemed qualified to meet basic professional standards. The guardians of those standards must thus be considered in an analysis of attitudes toward markets and entrepreneurship. Are these guardians open to, or do they resist, changes (incremental or otherwise) affecting the nexus between trade negotiations and cross-border legal practice? In response to this question, the next section will discuss the relevance of the *de jure* regulation of legal practice to the Doha Round dilemma in the area of legal services.

B. THE PERTINENCE OF FORMAL RULES APPLICABLE TO CROSS-BORDER LEGAL PRACTICE

The "foreign legal consultant" (FLC) is a product of formal rulemaking, and the content of the resulting rules is replete with examples of how regulators view the subject of cross-border legal practice. Briefly recapitulated, these examples show that, in the respective territories of host jurisdictions, the regulators of legal practice have tended to guard their allotted territories rather strictly when it comes to the right of lawyers located in a host jurisdiction to practice the law of that jurisdiction. Thus, New York in 1974, while influenced by the then French profession of *conseil juridique*, did not create rights for legal consultants that were as extensive as those of *conseils juridiques*. France in turn (in 1991), when eliminating the profession of *conseil juridique*, made it more difficult for non-EU lawyers in France to practice French law. As for US states other than New York, most of them do not have FLC rules, and most of the FLC rules that have been adopted contain limitations on the practice of host-state law that are not found in the original New York rules or in the ABA Model Rule. Similarly, Japan in adopting its own version of FLC rules carefully restricted the right to practice Japanese law. More recently, there are indications that China may enforce strictly its rules forbidding non-Chinese lawyers in China to practice the law of China.

At the level of formal rulemaking, then, the territorial approach retains considerable vigor. That it remains so persistent in an age of instant global

communications is an indication of the tenacity with which local regulators, in formulating rules for foreign practitioners physically present on the territory of the regulators, adhere to a policy of denying or limiting the right of foreign practitioners to practice local law.

The European Union is something of an exception, but solely for purposes of intra-EU practice by EU nationals; by virtue of EU-wide Directives, the relevant territory for EU nationals has to a substantial extent become the entire European Union. The state regulators of the United States, on the other hand, retain considerable attachment to that country's divisibility along state lines for purposes of authorizing the practice of law. Formally authorized multistate practice (called "multijurisdictional" practice) among the US states has made some progress, but it has been limited to the "temporary" presence in a host state of a lawyer from another state whose activities do not include the practice of host-state law. In a number of states, however, including, surprisingly, New York, even this modest relaxation of the formal rules has encountered resistance.

Other federal nations, notably, Australia and Canada, have removed many formal restrictions on cross-border practice within their respective nations, but these internal measures do not apply to lawyers from other countries.⁵² Elsewhere, the general picture is that countries reserve the practice of their own law in their own territories to members of their own traditional local legal professions. Even in exceptional cases such as the United Kingdom, where the formal rules are relatively favorable to the establishment of foreign lawyers and firms, the rules are inspired by a national objective of attaining transnational comparative advantage, and are not fashioned to move forward a multilateral process such as the Doha Round. In summary, at the level of formal rules governing cross-border legal practice, the territorial approach is likely to continue to weigh against progressive multilateral negotiations, thereby contributing to the Doha Round dilemma.

Why does *de jure* regulation of legal practice tend to contribute to the Doha Round dilemma? A probable answer is that the regulators exist to fulfill local regulatory objectives and, while often quite aware of multilateral initiatives, are generally not charged with any responsibility for synthesizing local and multilateral policies. More importantly, perhaps, the regulators, lacking a mandate to achieve such a synthesis, may

⁵² For example, in Ontario, Canada, a person who is not a member of the Ontario bar "may, without permission of the Society, practice law in Ontario on an occasional basis if, and so long as, the person, (a) is authorized to practice law in a province or territory of Canada outside Ontario; . . ." By-Law 33, Inter-provincial Practice of Law, The Law Society of Upper Canada, available at <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw33/> (last accessed January 24, 2007). However, by contrast, "foreign legal consultants" may not provide legal advice or services based on Ontario law under any circumstances. See By-Law 39, Foreign Legal Consultants, The Law Society of Upper Canada, available at <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw39/> (last accessed January 24, 2007). In New South Wales, Australia, a "registered foreign lawyer may advise on the effect of Australian law if: (a) the giving of advice is necessarily incidental to the practice of foreign law, and (b) the advice is expressly based on advice given on the Australian law by an Australian legal practitioner who is not an employee of the foreign lawyer." Legal Profession Act 2004 § 188, N.S.W. Acts, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s188.html (last accessed January 29, 2007).

often lack the tools for doing so. Their traditional mission has been to ensure compliance by local professionals with local professional standards, not to foster cross-border rights of establishment for variously credentialed professionals from a multiplicity of foreign jurisdictions. It is not that regulators could not learn to handle practitioners with diverse training and experience; in many cases, regulators have in fact done just that. The problem is that, to achieve the synthesis just mentioned and to continue to act in a regulatory capacity, regulators need effective means for looking into the constituent elements of cross-border practice in order to appraise the behavior of the relevant professionals and to assure their compliance with appropriate standards.

Another possibility is that intervention by regulators is not deemed necessary to the extent that cross-border legal practice takes place by virtue of *de facto* regulatory tolerance. For example, in respect of multijurisdictional practice in the United States, mentioned above, questions can be raised as to the need for novel rules in this area. Do lawyers not enter and leave host-state jurisdictions as a matter of course with considerable frequency? Are they not deemed capable of observing the essential standards of their profession when they act in this way? In the event of professional misconduct, do not existing disciplinary authorities, as well as the possibility of civil litigation, suffice to remedy any wrongdoing? Similarly, it seems possible that lawyers and law firms established outside their home jurisdictions will be tolerated as long as they, as a practical matter, observe proper standards of professional conduct.

Also, as a practical matter, as between the home jurisdiction and the relevant host jurisdiction, effective means for enforcement may in fact often be in place. A foreign lawyer or firm in a host jurisdiction can be rather conspicuous when having entered the host jurisdiction after complying with regulations relating to (for example) immigration, customs and taxation, thus announcing the foreigner's presence to the local authorities. Disciplinary action or civil litigation involving the foreigner could take place in a home as well as a host jurisdiction, and would be likely to attract attention throughout the global community—a risk that, by itself, could serve to assure a low occurrence of improper conduct. Aware of these factors and of the legal establishments on their territories, the local regulators of legal practice may be content to follow *de facto* rules of reason, and to assume an attitude of tolerance toward activities that appear both to meet essential professional standards and to make a positive contribution to the provision of professional services in the host jurisdiction. Such an attitude of watchful passivity on the part of the *de jure* regulators could serve to confer on cross-border legal practitioners substantial responsibility for coping with the Doha Round dilemma.

C. ACTIVITIES OF LEGAL PRACTITIONERS AND THE DOHA ROUND DILEMMA

As has been seen, neither trade policy nor the *de jure* regulation of legal practice is a likely source for solving the Doha Round dilemma in the area of cross-border legal practice. Trade policy has in effect been shackled to the territorial concepts that define the “foreign legal consultant” in many jurisdictions, and the proposed reference paper,

designed to further the right of establishment in cross-border practice, has not elicited much enthusiasm. As for *de jure* regulation, it is inherently a product of local politics. The nexus of trade policy and domestic regulation has therefore failed to provide a propitious place for the promotion of cross-border practice, and, cast as the Doha Round dilemma in microcosm, constitutes the dilemma between pursuing the paradigm of ensuring broad rights of establishment and conceding that, realistically, the attainable in this sphere will be less than paradigmatic.

De facto responsibility for shaping cross-border practice has fallen in great part to the practitioners themselves, and they are often adept at discerning and developing their activities on the basis of reality and the attainable. They need not be, and frequently are not, resigned to a passive view of reality and the attainable. Indeed, it is misleading to say that responsibility "has fallen to" them. They have been known to seize responsibility for defining the growth of cross-border practice—in effect, for defining and redefining the very reality of their attainable activities.

Cross-border legal practice can be viewed as just another, although somewhat complex, form of domestic legal practice, blending the elements of professionalism and entrepreneurship. Professionalism suggests aptitude for and experience with the solving of problems. Entrepreneurship suggests the skills and resources needed to take on new areas of practice and to establish new client relationships. For many practitioners, then, particularly those practising together in law firms, the challenges of cross-border practice resemble the types of challenges with which they are, *perforce*, already familiar.

Here, it is useful to revert to the 1993 report that accompanied what became the ABA Model Rule.⁵³ The report emphasized that legal advice is client-oriented and, accordingly, is cast not in terms of abstract territorial laws but as a "seamless web" directed to analyzing a transactional problem or a dispute or some other matter, as such. If there is a demand for a particular type of "seamless web" cross-border legal practice, it seems likely as a matter of basic economics that a corresponding supply will materialize to furnish the legal practice in demand. The goal of a cross-border legal establishment, then, is to synthesize the elements required for a useful, client-oriented response to given situations. If various types of expertise are relevant, the lawyer's (or frequently the firm's) task is to marshal the diverse sources and resources that are pertinent, to engage in the necessary analysis thereof, and to assemble the results into a usable plan for immediate or future action.

Thus viewed, the task for the cross-border establishment, confronted with questions involving host country law, is to find an efficient means of answering those questions. Perhaps the answers will have to be obtained from host-country lawyers located in the host country—within the establishment itself, where that is permitted, or outside the establishment, if feasible. These may not be the only possibilities, however. Host-country lawyers may be established cross-border, that is, outside the host country

⁵³ See *supra* note 29.

itself, but may nonetheless be accessible to the establishment in the host country. Indeed, a firm with establishments in several countries may have lawyers from a given country in more than one of its establishments, and all of its lawyers may be available firm-wide by various means of communication, or may be physically available by means of intra-firm, inter-establishment visits by the relevant lawyers. As suitable to the occasion, such a visit might be brief or extensive in duration, and might be somewhat formal or informal in character. The firm, looking at problems involving the laws of diverse jurisdictions, could assess them in entrepreneurial as well as purely professional terms, and could organize its practice both to address the legal substance of the problems and to serve its clients as effectively as its resources permit.

To a significant extent, then, cross-border practice can become a matter of how a particular law firm organizes its practice both generally and to cope with individual situations. The firm can be expected to develop and manage its professional resources in order to achieve comparative advantage in competing for legal work involving specific areas of practice or specific types of clients. When this phenomenon becomes generalized, the picture is one of numerous law firms with transnational interests competing with each other in a world in which cross-border practice is commonplace. Spurred by competition, these firms can be expected to overcome the Doha Round dilemma through resourceful and, at times, selective decision-making. Thus, the making of judgments determining the dimensions and content of cross-border practice will have devolved upon competing practitioners, who will be making these judgments in the process of organizing their responses to perceived opportunities in various markets for legal services. In global terms, the overall result may be an ever-increasing volume of cross-border practice.

While the global volume of cross-border practice may be increasing, access to this practice is necessarily restricted to firms and practitioners enjoying, or capable of developing, the resources required to participate therein. It can be argued that, to become a viable participant in the race for comparative advantage, a firm must be of a certain "critical mass" in the legal market, or a firm or practitioner must be able to fill a special professional niche. Even so, these factors hardly distinguish cross-border from domestic practice. Wherever the search occurs for comparative advantage, the market at any given time is likely to favor the established over the unknown reputation.

In contrast to a purely domestic market, however, in the transnational market one encounters the controversy over "globalization". It arises from the claim that having a base in a recognized center of international legal practice confers a competitive advantage in the race for comparative advantage, and that the number of such centers is both limited and skewed in favor of industrialized, as contrasted with developing, countries. The argument against "globalization" is that practitioners and firms from developed centers of international practice have an advantage in the world's markets for legal services; and that a market-based response to the Doha Round dilemma contains elements of competitive unfairness, tending to confer rights of establishment on a pre-

selected category of legal practitioners.⁵⁴ The counter-arguments are essentially two. First, the alternatives to allegedly unfair markets may be territorial rules that are themselves arbitrary and protectionist. Second, markets have a tendency to evolve over time on the basis of real-life judgments as to the quality of the legal services being offered, thus permitting today's perceived unfairness to be offset as markets become more open to wider participation by new beneficiaries of comparative advantage.

III. CONCLUSION

In the microcosm of legal services, the Doha Round dilemma might not have arisen if a broad spectrum of countries had indicated a willingness to make specific commitments based on the proposed reference paper for legal services. In so doing, these countries would have effectively adopted common rules to govern cross-border rights of establishment. In the event, however, the proposed reference paper remained a mere proposal and did not achieve formal adoption.

Even so, in actuality, the *de facto* market-based approach may have accomplished much that was sought in the proposed reference paper for legal services. Notwithstanding the absence of widespread multilateral agreement on written rules, market participants seem to have provided a viable means for facilitating and developing transnational activity. Thus, the Doha Round dilemma may have been resolved in microcosm.

In view of the foregoing, the proposed legal-services reference paper and the *de facto* market-based approach have much in common. Both are rooted in the ability of an individual practitioner or law firm to conduct a legal practice from establishments in more than one jurisdiction. The reference paper would formally create cross-border rights of establishment to facilitate this type of practice. The market provides an operative context where this type of practice in fact takes place. Obviously, there are advantages to rights stemming from an agreed written text, as contrasted with the often-unpredictable give-and-take of the marketplace. Among other things, GATS commitments would provide for the resolution of disputes under existing WTO procedures. Moreover, from their perspective, the providers of legal services might find it comforting to have "safe harbors" of agreed commitments to guide their conduct.

Less obviously, the flexibility of the market may have advantages over formal written commitments set out in an agreed reference paper. Over time, commitments may prove to be in less than complete harmony with currently accepted standards for protecting and serving the interests of transnational clients, and may become unresponsive to the dynamic conduct of legal practice. Given satisfactory observance of high standards of professionalism as well as work-product of reliable and good quality, the users as well as the providers of legal services may be best served by the judgments of

⁵⁴ See, e.g., articles posted on http://www.prospect.org/issue_pages/globalization/ esp. Joseph E. Stiglitz, *Globalism's Discontents*. See also Center for Research on Globalization: <http://www.globalresearch.ca/>.

the market. Efforts to fashion commitments to correct the perceived imperfections of the market may or may not prove beneficial. From the perspective of assuring the provision of responsive, reliable and reasonably priced legal work, market-dictated levels and modes of professional activity may offer advantages difficult to achieve otherwise.

From the point of view, however, of critics of "globalization", the advantages of the market may seem to carry unacceptable disadvantages in the form of undue benefits accruing to firms and practitioners from industrialized countries. Therefore, in the end, it may be worthwhile to try to fashion a document—be it a reference paper for GATS commitments or an annex to the GATS—that will satisfy the many interests at stake in organizing a multilateral approach to trade in legal services. Obviously, such a document would reflect a number of negotiated compromises.

Among the points of view to be taken into account are those of the regulators of the world's legal professions. For this reason, the existing proposed reference paper includes provisions under which a cross-border establishment is subjected both to the professional rules of the host jurisdiction and to that jurisdiction's authorities responsible for enforcing those rules. Perhaps, in a future proposal, this feature might be supplemented by provisions under which the authorities in all relevant jurisdictions would share information and cooperate as appropriate—provisions of a type that are found in other areas of international concern involving national supervisory bodies.

Another possibility for shaping a future proposal would be to adopt an approach used in certain WTO agreements to accommodate the perceived need to provide periods during which a category of countries can adjust to certain requirements. Thus, a future reference paper might become effective immediately for many countries, but, in certain respects, might be phased in over an agreed period of time for other countries. The purpose of the phasing-in would be to ease adjustment to those provisions that are thought to lead too quickly to particular features of "globalization".

In conclusion, it is not only possible for a nexus to exist, a nexus does exist, between trade policy and cross-border legal practice. The nexus having been identified, the challenge is to assure its growing good health and development to the mutual benefit of both areas of international activity. Trade policy can benefit when, even in microcosm, a viable process is forged for solving the Doha Round dilemma. As for cross-border practice, it stands to become yet more vigorous over time as it both contributes and responds to policies supportive of multilateral trade.