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John H. Barton
John.Barton@chicagounbound.edu

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Negotiation Patterns for Liberalizing International Trade in Professional Services

John H. Barton†

This paper examines possible institutional strategies for liberalizing trade in professional services. It begins by describing those characteristics of professional service trade that affect the shape and possibility of international agreements. It then examines experience under U.S. and European Communities formulations for freedom of trade in professional services. Finally, the paper explores the existing international law that governs the area and examines its liberalization—weighing a multilateral approach under the General Agreement on Tariffs and Trade (GATT) against a bilateral approach through the Friendship, Commerce and Navigation (FCN) network, and outlining plausible multilateral negotiating approaches. Although legal services are emphasized, consideration is given to other services for the sake of balance and comparison.

I. INTRODUCTION

A. The Professional Service Sector

Legal services, medicine, architecture, accounting, management consulting and some educational services are all traded in a similar economic pattern. As Table 1 demonstrates, legal services make up only a small portion of the service sector. In government statistics, for example, lawyers are aggregated with other business support services, and even then this category generates only about one-half of the revenue of either accounting or advertising, and one-fifth of that generated by engineering consultants.

† Professor of Law, Stanford Law School. I wish to thank Arthur Alexander, RAND; Arthur Osteen, American Medical Association; Emery Simons, Office of the United States Trade Representative; and Michael K. Young, Columbia University School of Law for providing assistance and materials. The errors, of course, are mine.
Table 1

Estimated Foreign Revenues of Selected Services Sector, 1980

<table>
<thead>
<tr>
<th>Service Industry</th>
<th>Foreign Revenues (billions of dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting</td>
<td>$2.35</td>
</tr>
<tr>
<td>Advertising</td>
<td>2.05</td>
</tr>
<tr>
<td>Business/Professional/Technical services (including law)</td>
<td>1.07</td>
</tr>
<tr>
<td>Construction and Engineering</td>
<td>5.36</td>
</tr>
<tr>
<td>Education</td>
<td>1.27</td>
</tr>
<tr>
<td>Health</td>
<td>0.27</td>
</tr>
<tr>
<td>Subtotal</td>
<td>12.37</td>
</tr>
<tr>
<td>Total Service Sector (of which almost half is banking, insurance, and transportation)</td>
<td>$60.00</td>
</tr>
</tbody>
</table>


1. Direct Relationship. Most professional services are provided through a direct working relationship, e.g. lawyer-client or doctor-patient.¹ Payment is based roughly on the time required for the professional to perform the service, and services are only rarely bundled with one another or with products (in contrast with the intellectual work embodied in a high-technology product or a literary product).²

This one-on-one service pattern is typical of many components of the service professions. Indeed, the need to protect individual consumers from unscrupulous practitioners underlies our view of the ethical obligations associated with professional services. But not all service markets are characterized by such a one-on-one relationship between provider and consumer. The legal, accounting and advertising firms which operate internationally have often moved abroad in order to service a client which is itself interna-

¹ See J. P. de Crayencour, The Professions in the European Community 22-23 (1981). For a discussion of training, professional ethics and the direct relationship as characteristics of trade in services see, id. at 18-29.
tional; an international law or accounting firm is valued in large part because it can serve an international corporate client.\(^3\) International engineering, architectural, and health-oriented firms, in contrast, are likely to operate internationally as a result of economies of scale; they provide a complex service requiring the assembly of a variety of expertise, which gives them a competitive advantage in international markets. In neither case is the need to protect unsophisticated consumers as great as in the paradigmatic face-to-face transaction.

Still, the one-on-one nature of the relationship persists to the degree that the client often trusts the professional to define what services are needed, and to make extremely important strategic decisions which the client is not in a position to evaluate. As a result, most nations regulate professionals, requiring a demonstration of ability and often of character, before permitting entry into the profession; they also surround the profession with a certain mystique and require special insurance and liability arrangements as a precondition to local practice.

2. **Local Content and the Scope of Professional Authority.** In some professions, such as law, the expertise required for practice differs sufficiently from nation to nation that it is reasonable to require a special demonstration of local expertise. Within the U.S. legal service sector, for example, a demonstration of expertise is required even at the state level.

Not only does the content of the professional’s expertise differ from nation to nation, the organization and scope of the professional’s authority and responsibility vary as well. The lawyer in the U.S. fulfills the roles of both the barrister and the solicitor in England.\(^4\) The French notaire has responsibilities different from both.\(^5\) These differences make it difficult to define balanced, common or reciprocal international arrangements, and severely complicate the conduct of negotiations on liberalization of trade in professional services.\(^6\)

3. **Autonomy and Self-Regulation.** Professional regulations

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\(^3\) See generally U.S. National Study on Trade in Services, A Submission by the United States Government to the General Agreement on Tariffs and Trade 146-50 (1984) ("U.S. Study") (describing trade in various professions).

\(^4\) See Sydney M. Cone, III, The Regulation of Foreign Lawyers 62-63 (1984) ("ABA Study"). This study was published by the Section on International Law and Practice of the American Bar Association.

\(^5\) Id. at 68-70.

\(^6\) See Note, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 Colum. L. Rev. 1767, 1771 (1983).
are often applied by the profession itself, as through bar or medical associations. Such autonomy can serve extremely important social and political functions, helping, for example, to protect the legal system from improper manipulation by the government or to provide a basis for the independence of the university. Self-regulation, however, also permits professional societies to limit entry solely to protect the incomes of their members. Moreover, it complicates international arrangements, because a government's ability to "deliver" on international commitments is limited by the need to respect this independence.

B. Trade in Professional Services

Professional expertise, like a factor of production in manufacturing, is available in different proportions in different societies. As a result, the economic principle of comparative advantage should apply to international trade in professional services. Liberalization of that trade should therefore provide the same mutual benefits that can be attributed to trade in products.

Nevertheless, trade in professional services has certain special characteristics that distinguish it from "regular" trade in commodities. Frequently, the movement of people is tied to the "movement" of the service; thus questions of emigration and immigration are posed. In other cases, because the international service is adapted to the needs of a multinational corporation, the economic issues of providing the service are shaped by those surrounding direct foreign investment by the multinational corporation itself. These issues are best clarified by breaking the abstract concept of "trade in professional services" into three more concrete forms of trade: migratory, transient and multinational.

1. Migratory Trade in Professional Services. Migratory trade in professional services is defined here as trade arising from the movement of individual professionals to find better practice opportunities in a new nation. There are many examples: the immigration of medical specialists into the U.S. during the 1970s; the emigration of medical expertise from Vienna during much of the early

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7 See also U.S. Study at 39 (cited in note 3).

twentieth century; and the emigration from Egypt of engineering and legal professionals to oil-wealthy nations during much of the 1970s. One can argue that this movement is migration rather than trade in services. Nevertheless, these movements have the economic effect of reducing the supply of services in one nation and increasing it in another.

The pressures that give rise to such movement are a combination of the relative accessibility and magnitude of the educational and research establishments in the sending and receiving nations, of the price of the service in the two nations, and of the relative attractiveness of general living conditions in the two nations. Because the movement is shaped by these other factors, and because it involves a movement of people that may have macroeconomic consequences and need not induce an economic counterflow of goods or services, one cannot automatically assume that this trade is Pareto-optimal; migratory trade may not always lead to efficiency gains.

Established professionals in the importing nation often see the freedom to migrate from a low-wage situation to a high-wage situation as a threat. More importantly, the exporting nation faces a "brain drain" problem—typically a poorer nation, it has probably used public funds to train a professional whose talents would be a particular benefit to its own society.

But there are counterarguments. First, when higher payments reflect the possibility of higher productivity in the importing nation, the movement will contribute to the aggregate supply of the professional service. Second, when those payments are high because of a professional cartel, the entry of new professionals will help lower the price of the service and thus help the importing society (although it will harm competitors). Third, as in the case of emigration from Egypt by engineers and lawyers, the exporting nation may receive a "payment" for the "export" in the form of hard currency sent back to families by expatriates. Finally, it should be remembered that the income shifts associated with this type of movement are not only beneficial for the participants, but also unavoidable for the societies. If migration is not allowed, higher service prices in the nation resisting immigration will render the

products of that nation less competitive in the world market. Incomes will shift anyway. Any effort to resist this effect by erecting barriers to trade in these products will encourage the movement of capital to more efficient areas.

2. **Transient Trade.** Transient trade in professional services involves the short-term supply of services across an international border. The form of expertise may be unusual—Red Adair’s team for fighting oil well fires, or a medical or legal specialist who flies off to consult on a specific complex case—or it can be one whose economies of scale transcend the national level such as application of a very expensive computer-based accounting program or medical diagnostic facility, or a team of engineering consultants which underbids a local firm on a specific construction project. Such transactions make up a substantial portion of service trade. For example, today “observation, consultation, [and] research” account for about four-fifths of temporary entries by physicians.10

Because these services are traded as a discrete unit, the analogy to trade in goods is almost perfect, and principles of comparative advantage should apply.11 There is generally a direct international payment, so the transaction is just as likely as any other transaction to induce a counterflow of goods or services. International competition should lead to the optimal allocation of a scarce, skilled resource.

3. **Multinational Trade.** Multinational trade in professional services is defined as trade carried out by the global legal, accounting, and management consulting firms. In contrast with the migratory pattern of trade, there is a sustained tie with a “home” or “global” firm. In contrast with the transient pattern, there is a long term investment or establishment in the host country.12 The service firm, which is permanently present in the host country, but retains a tie with its home office, is also itself a multinational,13

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10 AMA Proceedings at 196 (cited in note 8). Note that entry for the purpose of consulting is certainly a form of trade in services. Entry for the purpose of research, education, or scientific exchange is less likely to produce significant return payments and is probably not “economic enough” to be regarded as a form of trade in services. Nevertheless, it could be regarded as an export by the nation in which the education or research is conducted, and its scientific aspects are enormously important.


12 U.S. Study at 38 (cited in note 3) (distinguishing between service trade and service investment).

13 Id. at 128-29. For example, U.S. international health care firms build hospitals as well as provide health care services. See id. at 149 (noting an increase from sixteen overseas hospitals “owned, managed, or under construction by U.S. international health care firms”
NEGOTIATION PATTERNS

and its presence therefore raises some of the same concerns as direct multinational investment. But the critical issue is that the services provided by multinational service firms support direct investment by other multinational corporations.

International service firms often move abroad in order to help serve international clients. This is, in part, simply good marketing—to build on contacts and a relationship in one nation to obtain business with the same client in another nation. At the same time, it provides a genuine management efficiency: communications among the various national offices of the law or accounting firm may provide more efficient development and integration of certain kinds of information than can communications within the corporation after different branches have consulted separately with counsel or accountants in each nation. This is particularly the case where there are language barriers, or where the corporation is just beginning (or even considering) operations in the foreign nation. Thus, the multinational law or accounting firm can provide an efficient form of help to the multinational corporation.

Kindleberger has argued that unlike pure trade in goods and portfolio investment, direct investment is not always in the best interest of the receiving country. Direct investment across national boundaries is most common in oligopolistic industries; its very presence suggests that market imperfections such as high costs of entry, economies of scale, or a local monopoly have created an incentive to enter. Neither before nor after direct investment is there likely to be competitive equilibrium. Evaluation of the direct investment thus requires evaluation of two second-best situations. The direct investment will probably turn out to be beneficial, but one cannot be confident of this point as a matter of theory.

In order to evaluate multinational trade in professional services, it is then necessary to analyze the pro- and anti-competitive effects of investment by the multinational service firm, and the effects of the multinational direct investment which it supports. It is clear that multinational service firms can contribute to a given country’s economy by increasing efficiency. But if they do help

in 1978 to fifty-five at the time of the study).

15 One of the strong arguments for the freedom of U.S. law firms to operate in Japan is that the availability of such firms would help United States business to penetrate the Japanese market.
17 Id. at 13-14.
bring about efficiency gains it is primarily by increasing the efficiency with which other multinational firms operate. The value of a service firm’s contribution to national economies can therefore be measured accurately only by reference to the contributions made by the multinational corporations which purchase that firm’s services. Considering that those contributions are probably positive in most cases, liberalization of multinational trade in professional services will generally benefit the importing country. Moreover, as Geza Feketekuty ably points out in his article, the appropriate way for a host country to deal with antitrust issues created by direct investment is to regulate antitrust, rather than foreclosing the possibility of trade in services which is otherwise beneficial.18

4. Issues Common to Migratory, Transient and Multinational Trade. Finally, economics is not the end of the issue for any form of trade. The intellectual exchange associated with international trade in services is often much more important than the economic aspects. This is partly a matter of the role of communication in science and technology—such communication, eased by international freedom of trade in services, can speed the advancement of knowledge and thus benefit all. But there is also an important political benefit. It is hard to imagine that there can be much trade in legal services without professionals being forced to rethink the role of the legal system in each nation. The substance of the services and the ideas of the society are thus likely to evolve and improve as a result of international trade; in some nations, this may be an important step toward maintaining an independent legal system and perhaps even a force which will foster the development of democracy.19

C. Barriers to Trade in Professional Services

Although this paper cannot review the entire variety of barriers to trade in professional services, a very brief note and review is important as a prelude to discussion of possible liberalization strategies. Two kinds of barriers are most important: local control of the profession and regulation of immigration.

First, as already noted, to practice certain professions, individuals must satisfy a variety of formal requirements, frequently including membership in a national (or state) professional society. Sometimes, citizenship has been required by the professional soci-

19 See de Crayencour, The Professions at 9-10 (cited in note 1).
Negotiation Patterns

This type of regulation has its greatest impact on immigrants. Residency may also be required, or a particular balance among foreign and national partners or associates may be imposed. Such rules have their greatest effect on multinational firms. Second, visa requirements are a critical form of regulation, separate from the regulation imposed by the profession itself. For example, Japan requires U.S. lawyers applying for short-term commercial visas to swear that they will not take depositions in Japan. Similarly, during the 1970s, the U.S. regulated the inflow of foreign national medical graduates through a "Visa Qualifying Examination" that tested medical knowledge, and through a requirement of Department of Labor certification that would be issued only if U.S. citizens of equal ability were unavailable for the job and if the foreign national's employment would not adversely affect U.S. wages. Visa requirements are also a severe problem for accounting firms interested in transferring personnel for educational and training purposes.

These two types of restrictions are not the only barriers, but they are the most important ones. In addition, to the extent that foreign government contracts are involved, as with some engineering consultation services, there may be legal preferences for local contractors. Moreover, some nations may subsidize such consulting contracts in an effort to win the construction contracts for their nationals. There are also a variety of more conventional barriers such as currency exchange and business establishment restrictions.

II. Existing Formulations of Freedom of Trade in Services

The U.S. federal system and the European Communities have

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Footnotes:
1. For examples of these rules in the legal profession, see generally ABA Study at 41-107 (cited in note 4). For a discussion of these barriers in several service industries, see generally Arthur J. Alexander and Hong W. Tan, Case Studies of U.S. Service Trade in Japan (Rand Corporation Note) (1984).
2. Id. at 39.
5. U.S. Study at 129-130 (cited in note 3). See also Noyelle and Dutka, 1986 U. Chi. Legal F. at 82 (cited in note 2).
both developed legal principles oriented toward free trade in services. Although the various European concepts are not distinguished in the same way as those used in the U.S., experiences with liberalization in the two regions can help us understand the potential benefits and possible pitfalls of an international legal principle of freedom of trade in professional services. Because of the conceptual differences between the two systems, it is best to compare them in terms of the migratory, transient, and multinational freedom concepts presented above.

A. Formulations of the Freedom of Migratory Trade in Services

In both the U.S. and the European Communities (EC), the most straightforward question is whether a person from one jurisdiction should be entitled to come to another and, after satisfying appropriate tests, to practice his or her profession in the adopted state or nation. Both the U.S. and the EC have answered this question affirmatively. The U.S. has gone so far as to allow resident aliens (as well as citizens of another state) to practice law, while the EC has declared freedom of professional establishment for nationals of one EC nation in another to be a central element of its integration strategy. The key issues for both are concern about allegiance to the new nation as a condition of practice, maintenance of professional standards, and whether or not to overrule the autonomy of the local professional association.

There is freedom of movement within both the EC and the U.S., so questions of immigration are not separately posed. This greatly simplifies the legal issues and largely eliminates the issue of immigration control. But the two regions differ in their underlying levels of professional integration. In the U.S., legal and medical associations from different states cooperate closely. Educational requirements are essentially uniform and parts of the professional qualifying examinations are even prepared in common. In medicine, uniform examinations are accepted in most states. A student thus faces little difficulty in preparing in one state for practice in another.

This has not yet happened within the EC. The European effort has thus had to consider two parallel approaches to the liberalization of service trade, one based on an effort to harmonize edu-

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27 In re Griffiths, 413 U.S. 717 (1973).
28 American Medical Association, Future Directions for Medical Education 74-75 (1982).
cational standards, and the other on efforts to ensure that practitioners from one nation are able to practice in another.  

1. The U.S. Approach. In the U.S., freedom of migratory trade has developed under the Equal Protection Clause. The case of *In re Griffiths* involved a resident alien who passed the Connecticut bar examination but was refused permission to become a lawyer because she was not a citizen of the U.S. as Connecticut law required.

The Supreme Court used straightforward equal protection analysis to hold that alienage was a “quasi-suspect classification.” A state regulation discriminating against aliens could therefore be justified only if “its purpose or interest [was] both constitutionally permissible and substantial, and [only if] its use of the classification [was] ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.”

The proffered justification was that the lawyer’s role as an officer of the court required citizenship—that a resident alien lawyer might ignore his responsibilities in favor of the interests of a foreign power. The Court found that most of a lawyer’s duties, even when serving as an officer of the court, did not “involve matters of state policy or acts of such unique responsibility as to [require entrusting] them only to citizens;” nor was citizenship relevant to the “likelihood that a lawyer [would] fail to protect faithfully the interest of his clients.” States were therefore barred from requiring U.S. citizenship as a prerequisite for admission to their bars.

2. The European Approach. The EEC Treaty states, in Article 52, that

restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages . . . . Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons . . . .

This provision derives from a thrust toward economic unification,

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29 Id. at 721-22.
30 Id. at 724.
31 Id. at 724.
and is, in that sense, closer to the U.S. Privileges and Immunities Clause to be discussed below. Still, it provides much the same pressure toward allowing "outsiders"—i.e., nationals of other EEC Treaty nations—to practice as does the U.S. Equal Protection Clause.

Like the Equal Protection Clause, the EEC Treaty freedom of establishment provision can be defeated by adequate counter-vailing considerations. Article 56 states, in part:

The provisions of this Chapter . . . shall not prejudice the applicability of provisions laid down by law, regulation, or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.3

Thus, the substantive doctrine is quite similar to that of the U.S.; procedural arrangements, however, are radically different. Rather than being "self-executing," this EEC chapter is designed to be enforced primarily through special directives to be adopted through a Community legislative process:

In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, on a proposal from the Commission after consulting the Assembly . . . issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.4

The harmonization task has proven extremely difficult.5 Since ratification of the Treaty in 1957, directives have been issued for the recognition of diplomas and the coordination of training in only five medical areas, including veterinary surgery.6 This is much slower development than was expected.

The leading case, Vincent Auer v. Ministere Public,7 involves establishment of veterinarians. The case demonstrates the benefits of the harmonization procedure. The relevant directives8 had been issued in 1978. The first required each State to recognize diplomas and certificates from other member states, according to their spe-

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3 Id. at art. 56.
4 Id. at art. 57.
5 de Crayencour, The Professions at 12-14 (cited in note 1).
6 European Communities, Study on International Trade in Services 112 (undated) (copy on file with the University of Chicago Legal Forum).
pecific names in each nation. The second concerned the coordination of national regulatory provisions, and set uniform minimum requirements to be observed in granting the various diplomas and certificates.

Mr. Auer had received his training in Italy. He had become a French national, and wished to practice in France. Under French law, membership in the professional society was a prerequisite to the right to practice, and the local veterinary association denied him membership. In spite of the argument that Community law did not reach the professional rights of a national against his own government, the European Court of Justice had no difficulty holding for the veterinarian:

It is not permissible to refuse to enter a person on the register of the professional society on grounds which disregard the validity of a professional qualification obtained in another Member State, when that qualification is one of those which all the Member States, and their professional societies, as bodies entrusted with a public duty, are required to recognize under Community law.  

Thus, not only was the Court clearly ready to override the professional society; it also effectively accepted the Directives' implication that freedom of establishment included the right of a national to go to another member-state to obtain a professional education and qualification and then to return to practice in his or her home nation.  

Perhaps not unrelated to the delays in negotiating the harmonization of the educational standards, the European Court of Justice rather early gave direct effect to Article 52 (i.e., giving it force even before the directives had been issued). The case involved was Reyners v. Belgian State, a very close parallel to Griffiths. In Reyners, a Dutch citizen obtained his diploma in Belgium, but was prohibited from practicing there because of his foreign nationality.

The Court held that Article 52 was self-executing under these

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40 In an earlier case involving the same parties, Ministere Public v. Auer, 1979 Eur. Commun. Ct. J. Rptr. 437, [1979] 2 Comm. Mkt. L. Rep. 373, the Court held that Auer had no right under Community law to practice in France until the issuance of the directives described in text.
circumstances, even rejecting an argument, similar to the "officer of the court" argument rejected in Griffiths, that the practice of law was "connected with the exercise of official authority" and therefore exempt from any self-executing effect.\(^2\)

The European system has thus been very effective in protecting the rights of a foreign person who accepts all the costs of local qualification for practice of a profession. It has been less effective, however, in harmonizing the qualification requirements in such a way as to make it easier for professionals trained abroad to practice locally.

B. Formulations of the Freedom of Transient Trade in Professional Services

Both the U.S. and the Common Market recognize the freedom of transient trade in professional services, though both have also recognized the possibility that there may be countervailing considerations applicable in particular cases. This area, of course, is one dominated by special expertise and special short-term need: the need to arrange for an out-of-state lawyer to participate in a particular complex proceeding or for a foreign doctor to help during a short-term medical emergency. There are some specific arrangements for such short-term or foreign expert participation, exemplified by the New York rules for foreign legal consultants.\(^8\)

Some of the cases frame the issues in terms of the validity of a residency requirement which may be justified on a variety of grounds: convenience in the admissions process; ability to observe an applicant's character; ensuring that the applicant is familiar with local customs; and ensuring availability to respond to clients' concerns and to meet potential liabilities.\(^44\) There are also, however, cases going to the short-term forms of participation; here, Europe is more liberal than the U.S..

1. The U.S. Approach. In Supreme Court of New Hampshire v. Piper,\(^45\) the U.S. Supreme Court faced the residence issue under the Privileges and Immunities Clause (albeit with a doctrine quite similar to that already described under the equal protection

\(^{42}\) For background discussion of the same issue, see de Crayencour, The Professions at 97 (cited in note 1).


\(^{45}\) 105 S.Ct. 1272 (1985).
doctrine). In resolving it, the Supreme Court made little distinction between transient trade and multinational trade; the implications for possible multistate law firms were mentioned during the Court's discussion.

*Piper* had appealing facts: Ms. Piper lived in Vermont, just across the border from New Hampshire. She had passed the New Hampshire bar, and hoped to practice there. New Hampshire would not admit her to its bar because she did not reside in the state. The Court resolved the issue under the Privileges and Immunities Clause, which it described as having been “intended to create a national economic union.” This was inferred from the fact that the clause derived from the same part of the Articles of Confederation as the Commerce Clause.46 The Court found that, historically, the clause had given “citizens of State A . . . [the privilege] of doing business in State B on terms of substantial equality with the citizens of that State.”47 As traditionally interpreted, however, the clause guaranteed only those rights ‘‘fundamental’ to the promotion of interstate harmony,’’ and did not include recreational rights such as that of hunting elk.48

It was very clear to the Court, however, that, as an occupation, the practice of law should be viewed as a privilege under the Privileges and Immunities Clause. Moreover, the Court argued that

the legal profession has a noncommercial role and duty that reinforce[s] the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights.49

Here, as in *Griffiths*, the state made an “officer of the court” argument; again the Court rejected it. This time the argument was premised on the contention that such an officer, like an elected official, should be a resident and able to participate in the full political life of the community. The Court responded simply that it had already concluded in *Griffiths* that a lawyer is not an officer in such a political sense.50

46 Id. at 1276.
49 Id. at 1277, citing *Leis v. Flynt*, 439 U.S. 438, 450 (1979) (Stevens, J., dissenting).
50 Id. at 1278.
But, just as with the equal protection doctrine, there may be exceptions, if there is a substantial reason for treating non-residents differently and a substantial relation between the discrimination and the state’s objectives. The state consequently argued that “nonresident members would be less likely: (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do pro bono and other volunteer work in the State.” All of these arguments were rejected as insubstantial. The first two were rejected most easily. A person seeking to practice in a particular jurisdiction would have an incentive to keep up to date. And the incentives to maintain a good reputation as well as the possibility of being disciplined would be as significant for a non-resident as for a resident. In regard to the other two arguments, the Court noted the possibility of less restrictive alternatives, such as requiring “any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and proceedings,” or requiring a “nonresident bar member, like the resident member, . . . to represent indigents and perhaps to participate in formal legal-aid work.”

Although the Court has thus come down very sharply against residence restrictions, it does permit states to restrict pro hac vice appearances, a form of transient practice involving ad hoc participation in specific cases with the leave of the court. In 1979, over a strong dissent, the Court rejected any argument for a constitutional right to appear in litigation in another state. There would almost certainly be no constitutional problem should a state create a special set of “reasonable” standards and procedures for foreign lawyers, such as the New York rules for the licensing of legal consultants. Moreover, it should be noted that the Canons of Ethics support the concept of special appearances:

EC 3-9. The demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the

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81 Id. at 1279.
82 Id. at 1280.

The nonresident who seeks to join a bar, unlike the pro hac vice applicant, must have the same professional and personal qualifications required of resident lawyers. Furthermore, the nonresident member of the bar is subject to the full force of New Hampshire’s disciplinary rules.

105 S.Ct. at 1278 n. 16.
legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.54

2. The European Approach. The European law is similar to that of the U.S., and derives from a provision for free trade in services that has many similarities to the Privileges and Immunities Clause. Nevertheless, the European rule goes further toward guaranteeing access for short-term transient practice. Article 59 states that

restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.55

Article 60 adds:

Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons [which includes the special medical provisions discussed above].

“Services” shall in particular include:

. . . .

(d) activities of the professions.

[T]he person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.56

Subsequent articles include authority for enforcement through directives comparable to those issued under the establishment provisions. A general program for the abolition of restrictions on freedom to provide services has been issued,57 as well as a directive

55 EEC Treaty at art. 59 (cited in note 32).
56 Id. at art. 60.
57 Programme generale pour la suppression des restrictions a la liberte d'etablissement,
detailing freedom of trade in services with respect to lawyers.\textsuperscript{58}

In addition, in \textit{Van Binsbergen v. Bedrijfsvereniging},\textsuperscript{60} the Court declared that the provisions are, at least in part, self-enforcing:

\ldots the first paragraph of Article 59 and the third paragraph of Article 60 [both quoted above] have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided.\textsuperscript{60}

As suggested in the preceding case, the case law under Article 60 prohibits both (1) national regulations or restrictions that discriminate against nationals of other nations in the community, and (2) non-discriminatory measures that obstruct the cross-frontier supply of services.\textsuperscript{61} The first implication is roughly parallel to the Privileges and Immunities Clause; the second to the Commerce Clause.\textsuperscript{62} The European Court of Justice dealt with the need for this second thrust in a case in which the complaint was the burden of multiple licensing in several nations—the requirement for a license in each state was imposed in a non-discriminatory fashion, but the combination was arguably a burden.\textsuperscript{63}

A critical exception has evolved, which contains a substantial portion of the content of the law. This exception, the "judicial exception," allows a state to regulate foreign professionals in order to guard against the problems created by a foreign service supplier who does not have a continuing presence in the jurisdiction. This exception was first defined in \textit{Van Binsbergen}, where the court said:

\textsuperscript{58} 20 Off. J. Eur. Commun. (No. L. 78) 17 (1977). Note that this is a different type of directive from that issued for the medical professions. The medical directive concerns the harmonization of diploma requirements and mutual recognition of diplomas; the legal directive governs the provision of services across national boundaries. For further discussion of these provisions, see de Crayencour, The Professions at 96-100 (cited in note 1).
\textsuperscript{64} Compare Piper, 105 S.Ct. at 1276 n.7.
However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good—in particular rules relating to organization, qualifications, professional ethics, supervision and liability—which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.

Likewise a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom [to provide services within the Common Market] guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.\footnote{1974 Eur. Commun. Ct. J. Rptr. at 1309, [1975] 1 Comm. Mkt. L. Rep. at 312.}

The Court thus permitted restrictions under certain conditions: (1) where the rules, exemplified by the ethical rules of the legal profession, serve the general interest; (2) where they are applied to professionals within the nation as well as to "foreign" professionals; (3) where the supplier of services is not subject to equivalent regulation in his or her home state; and (4) where there is no less restrictive alternative approach to providing the services.\footnote{See Chappatte, 9 Eur. L. Rev at 11 (cited in note 61).}

tions rested on reasonable state interests and that the regulatory approaches in the various states were so different that local regulation was required.

In three major cases, the European Court of Justice struck down regulations that did not fall within the exception. Van Binsbergen dealt with residence requirements for legal representation before certain Dutch tribunals. Coenen v. Sociaal-Economische Raad dealt with another Dutch regulation, this one requiring certain insurance intermediaries to maintain both residence and an office in the Netherlands. Ministere Public v. Van Wesemael dealt with a requirement that cross-frontier employment agencies for entertainers obtain a license in the state where they were working, when they were already subject to home-state licenses and supervision of all their activities. Had such regulations been at issue in the U.S., they might have been struck down under the Commerce Clause or have been found not to satisfy the substantiality standard under the Privileges and Immunities Clause.

C. Formulations of the Freedom of Multinational Trade in Services

When a host or importing state considers multinational trade in services, the concerns are quite similar to those raised by transient trade—with two major differences. There is the additional possibility that the multinational firm will present a monopolistic threat to the profession. At the same time, such firms are less likely to be dealing with consumers than are the small firms; there is therefore less need for regulatory supervision.

The closest U.S. case deals with multinational trade in services under the Privileges and Immunities Clause, the doctrine otherwise applicable to transient trade; the leading European case handles the issue under the provision for freedom of establishment, the doctrine otherwise applicable to migratory trade.

1. The U.S. Approach. In the U.S., there is very little law on this issue. The clearest indications are those of Supreme Court of New Hampshire v. Piper, discussed above. A dissenting judge in the lower court noted that abolition of the residency requirement might permit “large law firms in distant states” to exert significant influence over the state bar. The dissent in Piper picked up the

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* Piper v. Supreme Court of New Hampshire, 723 F.2d 110, 119 (1st Cir. 1983). The
same point, noting that Boston lawyers might end up playing a major role in New Hampshire. The Court's only direct response was a footnote saying that the desire to protect local lawyers from competition was not "substantial" and that the Privileges and Immunities Clause was "designed primarily to prevent such economic protectionism." It thus seems unlikely that the Court will resist multistate law practice on any grounds short of explicit antitrust policy.

2. The European Approach. The issue, however, has been posed quite explicitly in Europe, through a case testing a French regulation prohibiting French avocats from having foreign offices. In *Ordre des Avocats au Barreau de Paris v. Rechtsanwalt Onno Klopp*, a Dusseldorf lawyer with a doctorate from the University of Paris wished to maintain his Dusseldorf office while opening an office in Paris. He was refused admission to the Paris bar on the basis of a Paris bar rule permitting a member to maintain chambers only within the Paris area. This rule was justified as a way to ensure that the court and clients would have ready access to the lawyer, a factor said to be particularly important in the French procedural system. Concern was also expressed about the possibility of inconsistent ethical obligations.

For the European Court of Justice, this was a freedom of establishment, not a freedom of trade in services, issue. Although it mentioned directives governing the freedom of legal establishment the Court relied for its decision on Article 52. The Court struck down the Paris Bar rule rather easily, saying that Article 52 directly envisioned the "right to set up and maintain, in compliance with professional rules, more than one centre of activity in Community territory." The European Court noted that:

In view of the special nature of the legal profession, however, the second Member State must have the right, in the interests of the due administration of justice, to require that lawyers enrolled at a Bar in its territory should practise in such a way as to maintain sufficient contact with their clients and the judicial authorities and abide by the rules of the profession. Nevertheless such requirements must not prevent the nationals of other Member States from exercising properly the right

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Supreme Court discussed this issue at 105 S.Ct. at 1275-76.

72 105 S.Ct. at 1283 n. 3.
73 105 S.Ct. at 1279 n. 18.
of establishment guaranteed them by the Treaty.\textsuperscript{76}

It added that "modern means of transportation and telecommunications make it possible to maintain the appropriate contact with the judicial authorities and clients."\textsuperscript{77}

D. Implications for International Negotiations

This review of U.S. and EC experiences with the liberalization of trade in professional services suggests several lessons which must be taken into account in any new international negotiations.

First, although a principle of non-discrimination between national and foreign professionals is essential, it is not a strong enough basis to build effective freedom for either transient or multinational practice. Specific rights beyond non-discrimination will have to be defined.\textsuperscript{78}

Second, any international agreement will have to face a variety of specific and difficult technical problems: (1) the desire of the professional associations for autonomy; (2) the desire of each nation to maintain reasonable professional standards (sometimes in the face of radically different national traditions); and (3) the need to balance other substantive arguments for parochialism (local ethical traditions, availability to clients, etc.) against the desire for openness.

Third, the approach of defining conditions under which foreign nationals can practice a profession is far more likely to succeed in the short run than is the approach of harmonizing educational requirements for the professions.\textsuperscript{79}

Fourth, progress (especially toward harmonization) will be strongly favored by the existence of an international association of the relevant professional associations (even if these associations do not initially favor freedom of trade).\textsuperscript{80}

Fifth, any but the most narrow formulation of freedom of trade in services is likely to reach more than one of the forms of trade discussed in this paper. It will be very difficult to improve the opportunities for multinational law firms, for example, without raising issues of migratory practice.


\textsuperscript{77} Id.

\textsuperscript{78} See Arthur J. Alexander and Hong W. Tan, Barriers to U.S. Service Trade in Japan 37 (Rand Corporation Note) (1984) ("national treatment is not the solution, it is the problem").

\textsuperscript{79} See de Crayencour, The Professions at 13-14, 20 (cited in note 1).

\textsuperscript{80} See Id. at 59-60.
III. CURRENT INTERNATIONAL MODELS FOR FREEDOM OF TRADE IN SERVICES

For some time, the U.S. has been pressing for a global approach to trade in services. This presumably includes professional services and might lead to a separate code negotiated within the GATT framework, which would cover professional services either alone or with some other group of services.

Nevertheless, debate with respect to efforts to open the Japanese market for U.S. law firms has focused primarily on the Friendship, Commerce and Navigation Treaty (FCN) between the two nations. It therefore makes sense to discuss the contributions of the GATT approach and of the FCN network separately. Together with the previous analysis, the lessons learned provide the basis for outlining an international agreement structure appropriate to trade in services.

A. The GATT Approach

Although GATT is intended to govern trade in goods, not services, its existing concepts could fairly readily be extended to apply to professional services. There have previously been GATT side-agreements in other areas, there is no reason that one could

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81 See, for example, Trade and Tariff Act of 1984, 19 U.S.C. § 2114a(a)(1) (1984), setting out negotiating objectives:

"(A) to reduce or to eliminate barriers to, or other distortions of, international trade in services (particularly United States service sector trade in foreign markets), including barriers that deny national treatment and restrictions on the establishment and operation in such markets; and

(B) to develop internationally agreed rules, including dispute settlement procedures, which —

(i) are consistent with the commercial policies of the United States, and

(ii) will reduce or eliminate such barriers or distortions and help ensure open international trade in services.

This is supplemented by authorization to the President to restrict foreign access to the United States service market, 19 U.S.C. § 2411 (1984), and by requirements for a series of studies and of services to help service exporters. 19 U.S.C. §§ 2114b, 2114c, 2114d (1984).


84 In addition, Article 13 of the OECD Code of Liberalisation requires the elimination of barriers to transfers of funds and to transactions with respect to invisible transactions. Annex B explains that these provisions also cover technical assistance. See Organisation for European Economic Co-Operation and Development, Code of Liberalisation of Current Invisible Operations, Annex B (1973). See also U.S. Study at 45-47 (cited in note 3).

85 Agreement on Government Procurement, reprinted in Contracting Parties to the
not be developed for services. And the GATT structure already includes a side-agreement dealing with technical standards, as well as arrangements for dispute settlement.

1. The Principle of Non-discrimination. The GATT provision closest to the necessary statement of basic obligation is Article III(2):

   The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.\(^6\)

This provision derives from the underlying GATT concept that all trade barriers should be assimilated to tariffs, which can then be negotiated down. Many products can be stopped at the border under a variety of GATT rules; the point of Article III(2) is to ensure that the barriers to imported goods end at the border.

This statement could be applied to services \textit{mutatis mutandis}, and would at least produce an obligation of non-discrimination with respect to trade in professional services. Such a principle could be stated on a multilateral basis; it is analogous to the Equal Protection Clause's hostility to discrimination against aliens.

As the preceding discussion makes clear, however, more is needed. With respect to any form of professional trade, there is no guarantee that those who seek to practice will be allowed to enter the country; they can be barred by immigration rules, which would work in a manner analogous to tariffs or import quotas. Moreover, the review of previous experience shows a variety of circumstances in which obligations beyond non-discrimination are necessary. The requirement of residence, for example, is non-discriminatory but would effectively bar transient practice. Neither is the provision, as it stands, very helpful in resolving the problems of evaluating qualifications standards as possible barriers to trade. Thus, although the GATT side-agreements concept could be adapted for professional services, there would have to be a new and relatively detailed set of obligations, stating a duty of non-discrimination, and


going further to require or prohibit a variety of specific practices. Some of these may be developed from other GATT areas; others will need to be developed afresh, or brought in from sources like the European and U.S. provisions described above.

2. Technical Standards. At the Tokyo Round, an Agreement on Technical Barriers to Trade was negotiated, the relevant concepts of which could readily be extended to govern national (and state) professional entry standards. Article 2.1 of this agreement includes a general statement of obligation:

Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards.

The statement goes on to call for the use of international standards where possible, but it also notes the right of parties to reject these standards on grounds such as “national security requirements; the prevention of deceptive practices; [and] protection for human health or safety.” The agreement also includes a series of subsidiary obligations governing testing and certification procedures and setting up specific dispute settlement approaches. It further requires governments to “take reasonable measures to ensure” that non-governmental bodies do not undercut the concept of the agreement.

This agreement thus provides a model for a global approach to ensure that professional qualification requirements do not create unnecessary barriers to migratory or multinational entry. It includes positive obligations beyond non-discrimination. A residency requirement, for example, could, by analogy, be rejected if it had “the effect of creating unnecessary obstacles to international trade,” and was not justified on public interest grounds analogous

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* Agreement on Technical Barriers to Trade (cited in note 85).
* Id. at art. 2.1.
* Id. at art. 2.2. Note that the Trade and Tariff Act of 1984 includes a similar list of factors to be taken into account in negotiating liberalized trade in services: “domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests.” 19 U.S.C. § 2114a(a)(2).
to those of preventing “deceptive practices” or protecting “human
health.” Moreover, the approach could be combined with efforts to
harmonize educational standards and qualifications. The Agree-
ment does not, however, help in dealing with freedom of transient
trade, where what is at issue are precisely qualifications that are
different from those normally required of a local professional.

3. Other Substantive Codes. The Tokyo Round also resulted
in the promulgation of a Subsidies/Countervailing Measures Code,
which prohibits export subsidies on products other than certain
primary products. Such an obligation could be extended to reach
the various governmental practices of subsidizing consulting and
engineering export services in an effort to obtain the follow-on
heavy export contracts.

It should be noted, however, that an effort to extend the entire
paraphernalia of countervailing duties and anti-dumping provi-
sions to professional services would produce enormous and unnec-
essary confusion. Many service firms charge different prices to dif-
ferent clients, either out of a sense of professional obligation or out
of a hope of obtaining follow-on business. This price discrimination
(or internal cross-subsidy) would cause widespread allegations of
dumping; it would also make it very difficult to define a subsidy
amount accurately.

Finally, to the extent that governments are sometimes buyers
of professional services, the Agreement on Government Procure-
ment could also be extended to cover professional services. With
a number of exceptions, this code prohibits discrimination against
foreign firms in the procurement of products and of “services inci-
dental to the supply of products if the value of these incidental
services does not exceed that of the products themselves.”

4. Dispute Settlement. The GATT dispute settlement proce-
dures, including the specific procedures associated with the Agree-
ment on Technical Barriers to Trade, are very weak. The funda-
mental approach is to seek resolution through diplomatic
consultation, followed, if there is no settlement, by appeal to a
panel which evaluates the alleged violation. Should the panel find
a violation, the injured nation may be authorized to retaliate by

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90 Agreement on Interpretation and Application of Articles VI, XVI and XXIII, 31
91 Agreement on Government Procurement, art. 1.1 (cited in note 85). See also U.S.
Study at 52 (cited in note 3).
92 Agreement on Government Procurement, art. 1.1(a) (cited in note 85).
93 General Agreement on Tariffs and Trade, art. XXIII (cited in note 86).
restricting exports from the offending nation to the offended nation. The Technical Barriers agreement adds to this panoply of consultations the possibility of a panel of technical experts able to evaluate scientific arguments in a particular case.\footnote{Agreement on Technical Barriers to Trade, art. 14.9, Annex 2 (cited in note 85).}

Experience, particularly that associated with the U.S.-Japanese dispute over multinational access to Japan's legal market, suggests the inadequacy of this procedure. U.S. law firms believe that they can work on certain foreign and international legal issues in Japan without, under Japanese law, engaging in the unauthorized practice of law. They have not, however, been able to obtain visas, because the Japanese government argued that it must first work out delicate negotiations with the Japanese Federation of Bar Associations. Those negotiations now appear to have produced a settlement of some kind, although American law firms have voiced some dissatisfaction with the new Japanese rules.\footnote{See Alexander and Tan, Case Studies at 39-62 (cited in note 20). See also Shapiro and Young, 1985 Mich. Y.B. Int'l Legal Stud. at 36-42 (cited in note 82); Sydney M. Cone III, Government Trade Policy and the Professional Regulation of Foreign Lawyers, 1986 U. Chi. Legal F. 169, 183-88.} More important, however, is the fact that U.S. law firms had no procedure in Japan for bringing these issues to a head—and they were left out during the period of delay. Additional rights to hasten a legal resolution within Japan would clearly have been useful.

The GATT dispute settlement approach has other relevant limitations. First, it depends in significant part on political access in the petitioning nation. American multinational law firms can reach the U.S. government with their concerns—but what about the migrant who has left his or her home nation behind? Or even the U.S.-based anti-establishment law group seeking to vindicate a human rights interest abroad? The latter case is precisely the international analogue of the enforcement of federal rights noted in \textit{Piper} as such an important attribute of the nonresident lawyer.

The problem with the GATT approach is not simply one of diplomatic priorities; it is also one of the suitability of the obvious GATT sanctions of terminating an import. The GATT structure leaves a nation little choice but to use this sanction of cutting off an import—but there are serious questions whether it is ever wise to retaliate against the reverse flow of professional services. Although the political and retaliatory aspects of the GATT procedure may ultimately offer the only approach available on the international level, it would be wise to supplement them as far as
possible.

B. The FCN Approach

As demonstrated by the visa issue in the U.S.-Japan dispute, the GATT approach fails to resolve the difficult problem of gaining access to the nation. Without a major change in formulation (more than an application by analogy), it cannot help the migratory or transient professional enter the nation. Within the European Community or the U.S., both of which look to a common labor market, there is no problem gaining access. In nearly all other contexts, however, freedom of professional trade requires modification of fundamental assumptions of immigration policy. Such modification has been achieved in limited fashion within the context of FCN treaties.

Because it is typical of a number of treaties, and is relevant to the U.S.-Japan conflict, the FCN treaty with Japan will be used as a model. The most directly relevant section is Article VIII:

1. Nationals and companies of either Party shall be permitted to engage within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals of either party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.**

There is a controversy concerning the implications of paragraph 1 for lawyers. The first sentence mentions lawyers; the sec-

** U.S.-Japan FCN, art. VIII (cited in note 83).
ond omits them. Thus, it can be argued that this paragraph permits a U.S. firm practicing in Japan to have counsel of its choice, but its choice would have to be limited to those qualified to practice in Japan. The legislative history, which has been partially declassified, contains arguments supporting both interpretations.97 There is no controversy, however, concerning the second paragraph. At the insistence of the U.S. Senate, in the pre-Griffiths era, the U.S. made a reservation whose effect was to exclude lawyers:

Article VIII, Paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said Treaty shall apply to such professions.98

The reservation was accepted by Japan on an understandably reciprocal basis:

Japan reserves the right to impose prohibitions or restrictions on nationals of the U.S. of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States . . . to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions.99

There is an argument that Japan's reciprocity condition has now been met—but the history, and the U.S. reservation, place the U.S. in a weak position for arguing that the legal profession is covered by the Treaty.

In addition, it should be noted that Article I provides the international basis for a "treaty trader" or "treaty investor" visa:

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97 See Note, 83 Colum. L. Rev. at 1814-15 (cited in note 6). There has been significant recent litigation with respect to this provision. In Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982), the provision was held not to confer rights on a local subsidiary. This will have implications for the organization of a multinational firm of almost any type. More recently, the Civil Rights Acts were held to prevail in an arguable conflict with the analogous provisions in the FCN treaty with Greece. Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).


1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purposes of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested . . . a substantial amount of capital.\textsuperscript{100}

It is very difficult to rely on these provisions in the specific case—the Senate's position on specific language in the 1950s makes it hard to present a contrary interpretation of general language in the 1980s. Nevertheless, these provisions do show the possibility of requiring that a visa be granted—which is exactly what the FCN treaty does in a situation similar to that of multinational practice.

Although the FCN treaty is typically bilateral, there seems to be no reason not to include the equivalent of a treaty trader or treaty investor provision in a multilateral treaty so that, at least, the transient and multinational professionals would be able to provide services under circumstances that are professionally significant, but do not threaten the recipient nation's immigration policy. It may be hard to extend the concept further to define a global duty to permit migratory freedom of trade in professional services, but even this is conceivable, under some appropriate limits.\textsuperscript{101}

IV. Possible Agreement Patterns

The above analysis provides a range of background models that can help in designing approaches to encouraging freedom of trade in professional services. This final section will first explore the possible contents of international agreements for freedom of trade in professional services; it will then turn briefly to the choice of negotiating frameworks.

\textsuperscript{100} U.S.-Japan FCN at art. 1 (cited in note 83). For United States implementation, see 8 U.S.C. § 1101(a)(15)(E); 22 CFR §§ 41.40, 41.41.

\textsuperscript{101} The new bilateral investment treaties are exemplified by the (Draft) U.S.-Panama Treaty Concerning the Treatment and Protection of Investments (signed October 27, 1982), reprinted in 21 Int'l Legal Mat. at 1227 (1982). It includes a provision (similar to U.S.-Japan FCN Article VIII) permitting investors:

to engage, within the territory of the other party, professional, technical and managerial personnel of their choice, regardless of nationality, for the particular purpose of rendering professional, technical and managerial assistance necessary for planning and operation of their investment.

Id. at art. 3.2, 21 Int'l Legal Mat. at 1231. It should be noted, however, that one of the areas in which Panama reserved "the right to make or to maintain limited exceptions" is the "practice of liberal professions." 21 Int'l Legal Mat. at 1240.
NEGOTIATION PATTERNS

A. Shaping Assumptions

Two important and interrelated questions must first be considered, because they shape the rest of the approach. First, precisely which forms of freedom of trade in professional services should be sought? Second, how should a negotiating effort respond to national government desires to protect the autonomy of immigration policy, an autonomy that may conflict with freedom of trade in professional services?

1. **Choice of Forms of Trade.** The form of trade of greatest interest to the U.S. is multinational trade. The beneficiaries of the liberalization of such trade would be the major international professional firms, which are mainly U.S. firms. Within the developed world, freedom of trade in this area would thus appear as a concession granted to the U.S., primarily by Europe and Japan, but also by the rest of the world.

Some development economists argue that such freedom of trade in professional services is bad, because the U.S. multinational service firms are likely to increase their power.\(^{102}\) This argument rings false, however: it is far more important to the developing nations that their governments, their citizens, and local and foreign firms receive the best advice they can get. Freedom of professional trade may threaten some governments, but it is much more likely than not to further the development of national societies. Any risk of domination by a few U.S. firms is better faced by antitrust limitations on those firms than by blanket limits on trade in professional services.

Transient trade is even more important. It is, as noted above,\(^{103}\) probably the most unequivocally beneficial form of trade from an economic or intellectual viewpoint. Migratory trade is the most difficult kind of trade to assess. It is likely to be economically efficient and difficult to distinguish from multinational trade—but it raises serious immigration policy and “brain drain” questions.

The benefits of migratory trade are probably greater for a number of developing nations to whom the remittances are important. This form of migration is also beneficial in human terms for the people involved and may offer highly effective educational and scientific values as well. Although the point is likely to raise political questions, the right answer here is probably to include this

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\(^{103}\) See text at notes 10-11.
form of trade, but to recognize that it will necessarily be subject to some restrictions, such as limits on the number of people that may be involved. Such an approach would permit the communication and intellectual benefits of the trade, as well as some market adjustment benefits, but would reduce the serious political risks.

2. The Visa Issue. The state laws of the U.S. and the national laws of EC members were structured for regions in which there is freedom of movement without serious immigration or visa control. For most of the world, this is unrealistic; in general, nations are willing to give up control over immigration policy only in the bilateral context of FCN treaties governing the relatively limited flow of treaty investors and treaty traders. Perhaps this pattern is still the only option, implying that any new multilateral arrangements would have to be implemented through supplementary bilateral arrangements, and that the freeing of migratory trade in services is essentially unrealistic.

The GATT-based model, an Article XIX safeguards approach, is clearly inappropriate, because economic harm to a particular industry, the focus of that provision, is only one of the concerns behind a nation's immigration policy. One could also conceive of more specific limitations designed to ensure that any agreement concessions are not illusory. There might be, for example, a right to impose a numerical limitation or quota (which would provide protection for services produced by domestic professionals). This could be more or less explicitly based on population or GNP or on economic conditions within the profession; it could even be defined in a way that takes into account the international market share of an incoming professional firm in order to meet the fear of foreign or multinational monopoly.

Such arrangements, however, seem unlikely. It is not only likely to be difficult to negotiate any arrangements affecting visas, but also likely to appear imprudent and elitist to negotiate

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104 General Agreement on Tariffs and Trade, art. XIX (cited in note 83). Entitled "Emergency Action on Import of Particular Products," this article authorizes trade restrictions when necessary to prevent "serious injury to domestic producers."

105 Except in some specific narrow contexts, the European Communities' concept of "public policy" or "ordre public" is equally inadequate. This principle, as interpreted by the European Court, provides a basis to deny freedom of movement in individual cases where, for example, there is concern of subversion or drug addiction. See, e.g., Regina v. Boucher-eau, 1977 Eur. Commun. Ct. J. Rptr. 1999, [1977] 2 Comm. Mkt. L. Rep. 800. It does not, however, provide the broader restrictions that may be politically crucial to achieving any widespread increase in professional mobility.

106 The U.S. Study strongly resisted any suggestion that immigration issues should be considered in GATT. U.S. Study at 39 (cited in note 3).
such arrangements with respect to professionals when there are so
many other employed and unemployed persons with a stronger
claim on the opportunity to migrate.

Yet, if the issue is ignored, concessions with respect to trade in
professional services are likely to prove illusory for their benefi-
ciaries. Hence, the most plausible and feasible approach is proba-
bly to include general language that provides a basis for diplomatic
(and perhaps legal) representation that greater freedom to obtain
visas is warranted in a specific case. This risks encouraging a bilat-
eral reciprocity-based approach—which favors more powerful na-
tions. It is probably, however, the best that is available for migrat-
ory and multinational trade in services. Stronger language might
be feasible in the transient trade context, where the economics are
stronger and the countervailing political concerns are generally
weaker. 107

B. Important Agreement Provisions

The less difficult points can now be spelled out in terms of
specific negotiating goals:

1. Basic Freedoms. As suggested by the analysis above and
by European experience, freedom of migratory and multinational
trade should rest initially on non-discrimination and foreign rights
of access, as opposed to harmonization of professional entry re-
quirements. Thus, for these purposes, any agreement should in-
clude at least the following as requirements for the government it-
self or for the government to impose on the relevant professional
associations: 108

• Non-discrimination against foreign party nationals in rights
of access to the market for professional services, including the
right to join professional societies or to establish a firm; trans-
parency of membership provisions; and the right to use one’s
own firm name when appropriate (upon satisfying various
requirements).

107 Alternatively, one could envision a new convention oriented toward simplifying the
visa process for the entire variety of transient professionals, including athletes and enter-
tainers as well as the other bodies of professionals discussed in the text. There has been
some parallel effort in the tourist area and in particular bilateral and regional contexts. See,
e.g., Marjorie M. Whiteman, 8 Dig. Int’l L., ch. 22 § 15 (abolition of passports), 9 Dig. Int’l
L., ch. 27 § 34 (simplification of frontier formalities).

108 For other lists of specific points to consider in defining freedom of trade in profes-
sional services, see de Crayencour, The Professions at 81-88 (cited in note 1); Note, 83
Colum. L. Rev. at 1795-1812 (cited in note 6).
• Good-faith commitments by each nation to issue visas as reasonably needed for foreign nationals wishing to practice a profession in accordance with the remainder of the agreement.
• Stronger commitments, such as those nations make under FCN treaties, to grant temporary visas as necessary for transient practice in accordance with the rest of the agreement.

2. Profession-by-Profession Provisions. The above provisions amount to a non-discrimination “umbrella,” and must, as exemplified by the U.S. and European experience, be supplemented by specific provisions that go beyond non-discrimination. These are probably best drafted on a profession-by-profession basis. They include:

• Affirmative obligations to shape domestic rules (including certification procedures and educational arrangements, and possibly including financial support during training periods)\[^{109}\] to allow foreigners realistic access to the domestic service market and to avoid constituting de facto barriers.\[^{110}\] It is possible that for some professions, such as law, the affirmative obligations might be satisfied by creating a category of foreign expert, with the authorities and rights needed to help international firms and work on international issues.\[^{111}\]
• It may also be necessary for each nation to shape rules for transient practice of each profession, under which entry would be based on a certification that the expert had met homenation standards, and under which practice might be limited to specific short periods, specific types of controversies or emergencies, or specific areas of expertise (e.g., knowledge of foreign law). This could perhaps be integrated with the foreign

\[^{109}\] This question of financial support is important in many contexts, including, for example, during preparation for Japanese legal practice, Note, 83 Colum. L. Rev. at 1775 (cited in note 6), and during the residency component of United States medical training, John K. Inglehart, Health Policy Report: Reducing Residency Opportunities for Graduates of Foreign Medical Schools, 313 New Eng. J. Med. 831 (1985).

\[^{110}\] One of the hard practical negotiating questions is whether to resist protection systems (like those for Japanese lawyers) said to rest, at least in part, on sociological rather than economic goals. But see Shapiro and Young, 1985 Mich. Y.B. Legal Stud. at 31 (cited in note 82) (arguing that the portions of the legal profession being protected in Japan represent only a small component of what is considered the legal profession in the U.S.). See also Arthur J. Alexander and Hong W. Tan, Barriers to Entry and Income of Lawyers in International Practice in Japan (Rand Corporation Note) (1986), for analysis of the economics of the current Japanese situation.

expert-type provision already described.
- In some cases the special rules would take quite different forms (e.g., third-party export subsidies might be prohibited in areas like initial engineering consultation).

3. **Supporting Arrangements.** Although it is still difficult to imagine a global version of the European Communities’ effort to coordinate educational structures and professional admissions standards, it is important for the parties to any professional services trade agreement to encourage international coordination among the relevant professional groups. This could help move toward harmonization; it could also help in efforts to define specific procedures for providing transient services or even to establish safeguards. Most of all, it could increase the non-economic benefits of international professional trade and could strengthen professional autonomy at a time when that autonomy would otherwise be under attack.

4. **Dispute Settlement.** Finally, as noted above, the GATT dispute settlement procedures are not strong enough to meet the requirements of this area. A GATT-type pattern might wisely begin with the use of international committees built from the global professional associations—as being more sensitive to professional concerns, and ultimately more neutral and global, than government officials. But it is also important to strengthen the national remedies available before an issue becomes international. Thus, each nation might guarantee to all foreign nationals (and, if it prefers, to its own citizens as well) that it will provide a due-process based approach by which such foreign nationals can test their right to obtain access to the profession. This type of right would have helped immensely in a situation like that described above for Japan; it might also be a useful model for the world.

C. **Negotiating Frameworks**

The most important question on the structure of negotiations is whether to work multilaterally or bilaterally. The strongest argument for a bilateral approach is that the sensitive visa issues have typically been handled bilaterally in FCN contexts. Moreover, in the bilateral context, each party to an agreement encouraging trade in professional services can more readily ensure that its partners are those whose professionals provide high-quality services.

Nevertheless, these arguments do not carry the day. There is great virtue to a multilateral agreement maintaining freedom of trade in professional services. First of all, the wisest negotiating
goals may turn out to be extremely broad. The political issue may currently be legal services in Japan, but there may soon be many more examples of restrictions on the importation of legal services, even in Europe.\footnote{For background on the role of the OECD, see Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Finance and Urban Affairs, Service Industries: The Changing Shape of the American Economy, 98th Cong., 1st Sess., 60-62 (Comm. Print 98-16) (Statement of J. Roslanowick); Steven F. Benz, Trade Liberalization and the Global Service Economy, 19 J. World Trade L. 95, 107-113 (1985).} And the importance of trade in other service areas is increasing; in areas such as engineering services, the question of third-party subsidies makes a multilateral approach almost essential.

Most importantly, however, freedom of trade in professional services really does provide multilateral benefits. It amounts to a form of human right. It is critical to commit as many nations as possible to integrating their professions into an international professional community. The issue begs for a multilateral convention. The ability to have access to the best medical or legal ideas is a form of political freedom that could be developed from an economic source.

The second question concerns the choice of negotiating forum. There are alternatives to GATT: the Organisation for Economic Co-Operation and Development (OECD) could be used to approach other developed nations, or various UN fora could be employed to include the developing nations. Immediate economic interest, together with likely ease of negotiation, favor the OECD approach. The OECD has already dealt with related areas and, more recently, has been considering service issues.\footnote{This question of inclusion of developing nations is politically related to the inclusion or exclusion of a freedom of migratory trade in services. The “beneficiaries” of freedom of migratory trade are the “exporters” of professionals, typically nations such as Egypt and Sri Lanka. Those who view themselves as making concessions—the U.S. and Great Britain—are the likely “importers,” because of their economic attractiveness and their (relatively) open immigration policy. Thus, this form of free trade might appear as a concession}  

Nevertheless, it is crucial to include the developing nations. They are major importers—and, in some cases, exporters—of engineering, management, and medical services. Leaving this market regulated only by third-party and bilateral agreements may well favor foreign exporters with more interventionist government strategies. Moreover, many of the developing countries are growth areas for legal and accounting practice—and this is also the locus of the greatest non-economic benefits of international professional solidarity.\footnote{Note, 83 Colum. L. Rev. at 1773-74 (cited in note 6).}
It follows from this that GATT is the correct framework. Although services are not currently covered by GATT, the substantive issues are quite similar to those traditionally treated in GATT. And, in comparison with United Nations fora, GATT offers much wider scope for the complex multi-sector tradeoffs that will be essential for progress in such a sensitive area.

The final question is how to approach the issue within GATT. Separate negotiations could be held on professional services; alternatively, special professional service provisions could be negotiated in a variety of different contexts. For example, professional access rules could be negotiated in the area of technical standards and special export subsidy provisions could be defined in the area of subsidies. This latter course would decrease the visibility of the negotiations, a goal which may be desirable to the extent that the U.S. is more interested in the negotiating result than are its partners. It would also allow the use of other contexts to face the sensitive questions of immigration and visas.

A direct approach is preferable, however. The different negotiating topics associated with trade in professional services are so complex and so interrelated that they can more practically be faced together. Moreover, visibility and the creation of a political focal point may be desirable, because they will be critical as a way to encourage and build ties with global professional organizations. These communities may resist at first, but solicitation of their ideas is the way to begin negotiations, the way to build a constituency, and the way to achieve directly many of the non-economic benefits sought indirectly through trade negotiations.118

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118 Consider the role of the Secretariat European des Professions Libérales, Intellec-
tuelles et Sociales in assisting European negotiations described in de Crayencour, The Pro-
fessions at 88 (cited in note 1). For a broader confirmation of the sense that negotiations will
require political action beyond the technical level, see the discussion of the role of the Lib-
eral Democratic Party in Japan in Alexander and Tan, U.S. Service Trade at 43-47 (cited in
note 78).