
AN OVERVIEW OF THE HISTORY OF FOREIGN LEGAL CONSULTANTS BETWEEN THE UNITED STATES AND MEXICO

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This article reviews the history of the development of foreign legal consultant systems and the continuing evolution of these systems as a means for law firms to keep up with global trade patterns and advocates, particularly between Mexico and the United States. However, this is a difficult and controversial topic that can be viewed from many perspectives, not just an international commerce perspective.¹

The role of lawyers in societies is much broader than only facilitating international commerce. As a result, not all lawyers or judges believe that a foreign legal consultant program is desirable. In federal systems such as the

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1. For those interested in up-to-date issues affecting foreign legal consultant systems, the American Bar Association's website on professional responsibility at <http://www.abanet.org/cpr/home.html> tracks current debates in the field.

United States, the states, not the federal government, license the practice of law. This makes implementing a United States national foreign legal system very challenging. Other nations are reluctant to negotiate reciprocal foreign legal consultant system agreements with the United States because the United States cannot operate on a national level, but only on a state-by-state level.

Twenty-six states, however, do have foreign legal consultant programs. Foreign lawyers interested in international trade could relocate to these twenty-six states to practice law in the United States. Arguably, although imperfect, the participation of twenty-six states is close enough to a practical solution for bilateral arrangements between the United States and major trading partners. The balance of this article presents the international trade argument for foreign legal consultants, looking at New York as an example for the United States, Texas, and Mexico.

I. INTRODUCTION

Where the business community goes, the legal community will dutifully follow.² Today's increasingly global economy exerts pressure for free trade in all services,³ including legal services, which are essential for

2. See, e.g., Morton Moskin, *As the world shrinks don't let globalization leave you behind*, 9 BUS. L. TODAY 38, 45 (2000) ("As we go forward into the 21st century, business lawyers who do not keep pace with the dynamic changes wrought by the era of globalization will be left behind."); cf. *Rapture Shipping, Ltd. v. Allround Fuel Trading B.V.*, 350 F. Supp. 2d 369, 373 (S.D.N.Y. 2004) (recognizing that foreign judgments are traditionally given great deference by the courts of the United States because "our economy has become increasingly global and dependent upon international commerce"); Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135, 1138 (2001).

Businesses in today's markets both want and fear transnational involvement. On the one hand, they want the extra profits and economies of scale that can come from global markets. At the same time they seek to avoid the increased uncertainty and risk resulting from the additional sets of rules that may apply to their conduct in those markets. Competent legal counsel is thus even more important in a cross-border transaction than in its domestic counterpart.

Id.

3. See Steven C. Nelson, *Law Practice of U.S. Attorneys in Mexico and Mexican Attorneys in the United States: A Status Report*, 6 U.S.-MEX. L.J. 71, 71 (1998) ("The relative growth in the services sector as a percentage of gross national product is among the more dramatic economic developments in the United States and other industrialized countries over the last quarter-century."); see also Michael J. Chrusch, *The North American Free Trade Agreement: Reasons for Passage and Requirements to be a Foreign Legal Consultant in a NAFTA Country*, 3 ILSA J. INT'L & COMP. L. 177, 177 (1996) ("Under a global economy, countries around the world trade with each other. International trade is essential to achieving a global economy. As the world moves toward a global economy, the need for international trade of goods and services is increasing.").

effective operation of transnational commerce.⁴ To succeed in the global marketplace, international businesses mandate efficient legal services.⁵ Consequently, a fundamental system allowing attorneys to practice transnationally is vital to the fluid operation of our global economy.⁶

This article concentrates on the transnational practice of law between Texas and Mexico and the development of compatible licensing systems for foreign legal consultants in both jurisdictions. Part II broadly addresses the transnational practice of law and potential benefits of an international legal community. Part II also examines the need to practice law across borders; the benefits of a uniform foreign legal consultant program; the obstacles

4. See Larry B. Pascal, *Modernizing the Foreign Legal Consultant Rule in Texas*, 67 TEX. B.J. 792, 792 (2004) ("In fact, globalization has had a large impact on the legal field As a large exporter of legal services, the United States is currently negotiating to liberalize global rules relating to legal services."); Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 995 (2001) ("In 1999, legal services were the third largest U.S. export in the business services sector."); see also Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447 (1989).

Even more important, and perhaps not stressed often enough, the ability of clients to call upon sophisticated legal assistance provided by experienced transnational lawyers and law firms definitely facilitates overall capital movements, foreign investment, and international trade transactions. The international banking and finance service industry would be severely handicapped without the creative development of new financial instruments, sophisticated and prudent drafting techniques, and negotiation and deal-making capacities offered by major transnational law firms.

Id. (footnote omitted); cf. Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193, 204 n.39 (1995) ("According to the Department of Commerce, U.S. law firms collected \$1.4 billion from foreign clients in 1992 alone. Legal services ranked fourth on the Department's list of highest grossing export businesses and professional services.").

5. See Louis F. Del Duca & Vanessa P. Sciarra, *Developing Cross-Border Practice Rules: Challenges and Opportunities for Legal Education*, 21 FORDHAM INT'L L.J. 1109, 1109 (1998) (recognizing the need for uniform cross-border practice to facilitate the "massive increase in the potential for exchange of goods, services, and communication" in the global economy); Neil Boyden Tanner, *The Failure of International Law to Internationalize the Legal Profession*, 17 J.L. & COM. 131, 131 (1997) ("The nature of business is changing. As business becomes international, the demand for lawyers trained in more than one jurisdiction has skyrocketed. To be successful in this changing environment, modern law firms must be able to provide the multijurisdictional services required by the modern client.").

6. Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 HOUS. J. INT'L L. 95, 96-97 (1996).

As recently as thirty years ago, the market for legal services was almost an exclusively local and national commodity. Currently, internationalization of the legal profession is occurring rapidly. The global expansion of legal services has been remarkable. With the advent of constantly improving technology and communication, the world is becoming a global marketplace, allowing attorneys to both travel and communicate with local counsel and foreign clientele.

Id. (footnotes omitted).

that stand in the way of such a system; and finally, the impact that current international trade agreements could have on a foreign legal consultant licensing system. Part III traces the history of foreign legal consultants, highlighting New York's judicial and legislative attempts as well as those made by the American Bar Association ("ABA") to resolve issues posed by foreign legal consultants. Finally, Part IV concludes by stressing the importance of adopting an agreement on foreign legal consultant practice.

II. TRANSNATIONAL PRACTICE

The transnational practice of law ebbs and flows with the demands of international business, but in this increasingly global economy, transnational practice is growing every day.⁷ Although the law pervades virtually every corner of the international business community, seven types of transnational legal practice that compose a significant part of international commerce and trade can be easily identified: (1) contractual and transactional; (2) foreign investment and local law counseling; (3) international banking and finance; (4) international antitrust; (5) international arbitration and litigation; (6) international tax planning; and (7) trade law.⁸ For example, contractual and transactional law is a key area of transnational practice that is central to the relationship between the United States and Mexico.⁹ Because the legal system is involved in the everyday operation of these areas between the two countries, attorneys play a critical role in the success of transnational business between the United States and Mexico.

The objective of free trade in legal services has been addressed in various ways,¹⁰ but one approach is the concept of foreign legal consultants.¹¹ Foreign legal consultants are attorneys who are temporarily

7. See Goebel, *supra* note 4, at 446 ("Another common justification offered in recent years to encourage the practice of transnational law is that such practice is an increasingly important part of the trade in services on a global basis."); cf. Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT'L L.J.* 1239, 1241-51 (1998) (discussing the need for U.S. law schools to begin preparing students for practice in a transnational marketplace due to the growing international economy).

8. See Goebel, *supra* note 4, at 444 (discussing the impact of transnational legal services on these specific areas).

9. Cf. VA-Interactive.com, *Doing Business with our NAFTA Partners: Canada and Mexico*, <http://www.va-interactive.com/inbusiness/editorial/bizdev/articles/nafta.html> (last visited Jan. 3, 2006) (discussing Mexican laws that interact with transnational contractual law within the context of specific markets between the United States and Mexico).

10. See, e.g., Owen Bonheimer & Paul Supple, *Unauthorized Practice of Law by U.S. Lawyers in U.S.-Mexico Practice*, 15 *GEO. J. LEGAL ETHICS* 697, 701-07 (2002) (discussing several methods by which a U.S. attorney could attempt to practice law in Mexico).

11. See Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United*

admitted for limited practice in a host country, subject to that country's rules on foreign attorney practice.¹² Although certain obstacles stand in opposition to this concept,¹³ foreign legal consultants offer the most comprehensive solution to the need for transnational legal services in a global economy.¹⁴

In response to this developing need between the two nations, both the United States and Mexico have attempted to create systems through which their respective attorneys may practice limited aspects of law in a neighboring country.¹⁵ By establishing a workable structure, both countries could achieve the ultimate goal of providing better services to clients.¹⁶ Perhaps predictably, neither the United States nor Mexico has yet achieved the goal of a compatible foreign legal consultant licensing system.¹⁷ Nevertheless, negotiations continue between the two countries.

A. *The Need to Practice Law Across Borders*

Growing global economies require efficient provision of legal services across borders.¹⁸ Inconsistent or incapable legal systems subject international business transactions to a maze of jurisdictional debates,

States, 21 *FORDHAM INT'L L.J.* 1126, 1151 (1998) (discussing the benefits foreign legal consultants would provide in the practice of international law in the United States). *But see* Symposium, *Mexican Lawyers Going North and U.S. Lawyers Going South: Interstate Legal Practice, NAFTA and U.S. State Bar Regulations*, 9 *U.S.-MEX. L.J.* 189, 189 (2001) (asserting that rules relating to the regulation of foreign legal consultants have never been workable and have not been adequately clarified by any nation's government since the conception of foreign legal consultants).

12. See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 *NW. J. INT'L L. & BUS.* 487, 510 (2003) (explaining the role of foreign legal consultants).

13. See *infra* Part II.C.

14. See, e.g., Nelson, *supra* note 3, at 76 ("The ABA considers the only effective solution to the education/examination barrier is the widespread adoption of foreign legal consultant rules.").

15. See Symposium, *Delivery of International Legal Services in the Coming Decade*, 15 *INT'L L. PRACTICUM* 67, 71-73 (2002) (discussing NAFTA negotiations between the United States and Mexico in reference to the proposed legal practice rules).

16. See Goebel, *supra* note 4, at 444-45.

17. See Symposium, *Delivery of International Legal Services*, *supra* note 15, at 67, 72 (In reference to NAFTA negotiations, Mexican attorney Jaime Cortes Rocha with the firm of Mijares, Angoitia, Cortes & Fuentes in Mexico City commented during the annual meeting of the International Law and Practice Section of the New York State Bar Association that "no rules on forming partnerships or other associations with Mexican licensed lawyers were agreed upon with the U.S. under NAFTA.").

18. See generally Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 *GEO. J. INT'L L.* 239 (2004) (discussing proposals by the American Law Institute for the need for uniform interpretation of international law in response to the growing role of legal services in the global economy).

interpretation disagreements, and conflicts of laws.¹⁹

The last several years have witnessed an explosive growth in the volume of international economic activity, and more particularly in the transnational flow of goods, services, labor and investment. It is a familiar cliché that the United States now finds itself in a relationship of global interdependence with the rest of the world. This has, not surprisingly, been reflected in a corresponding increase in the volume of transnational legal issues and problems, resulting in a need for more effective means of delivering legal services across national boundaries and for better means of integrating lawyers trained in different legal systems into the same law firms.²⁰

Business dealings are complicated and certainly changing. Accordingly, the legal systems that govern these dealings should be organized and clear. Legal systems that properly implement national foreign legal consultant programs may contribute to the efficient provision of legal services across borders.

B. *Benefits of a National Foreign Legal Consultant Program*

Foreign legal consultant licensing systems are promising solutions to the problems associated with transnational legal practice. Foreign legal consultants can increase trade, facilitate transnational transactions, and improve client communication and service. Although no uniform rules on the practice of foreign legal consultants exist on an international platform, the ABA proposed a model rule for the licensing and practice of legal consultants in the United States in 1994.²¹ The ABA Section of

19. See, e.g., Louis B. Sohn, American Bar Association Section of International Law and Practice Report to the House of Delegates, *Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207, 235 (1994) [hereinafter American Bar Association].

The way in which foreign lawyers are regulated in this country has a dual impact on the competitive position of American lawyers and law firms in a global economy. First, it directly affects the ability of American firms to add to their ranks lawyers qualified to practice in other jurisdictions, which is a prerequisite to the establishment and expansion of truly multinational practices. Second, it produces an indirect effect through the "mirror image" phenomenon by which arbitrary and unnecessary restrictions in the Rules adopted by various states are seized upon as an excuse for the imposition of similar, or even more stringent, restrictions on American lawyers abroad. In order to obtain fair treatment abroad, we must be in a position to accord to foreign lawyers and law firms the possibility of carrying on their practices in the United States, subject to the same scrutiny, regulation and discipline as members of the bars of the United States but unencumbered by unnecessary and even protectionist restrictions, on a basis of full reciprocity.

Id.

20. *Id.* at 212.

21. See generally *id.* (outlining the proposed model rule on foreign legal consultants and describing the need for such a rule).

International Law and Practice recognized the need for legal consultant programs:

A Model Rule for the Licensing of Legal Consultants is sorely needed, not only to provide considered guidance to those states that are now considering or may in the future consider the adoption of such Rules, but to enhance the opportunity for American lawyers and law firms to develop transnational practices on the basis of broad reciprocity and mutual respect for the qualifications of members of recognized foreign legal professions.²²

Reciprocity and mutual respect are imperative because the interdependence of the United States and Mexican economies is well established.²³ The historic relationship²⁴ between the two countries has done little to foster complementary foreign legal consultant programs that could potentially serve as resources for both nations.²⁵

Although identifying every benefit of the foreign legal consultant program would produce an extensive list, some benefits are particularly noteworthy. For example, one of the most significant benefits of a foreign legal consultant program is the promotion of transnational business.²⁶ By merely adopting a foreign legal consultant program, both nations would open their borders to experienced foreign attorneys who could bring foreign clientele to launch new or additional business within the countries.

Another considerable benefit of adopting a foreign legal consultant program is enhanced client service. Even United States attorneys who work with Mexican clients on a daily basis would undoubtedly welcome the advice and assistance of a Mexican attorney who understands not only the legal aspects of a certain business transaction, but also understands the nuances of Mexican customs and business practices.²⁷ The presence of a

22. *Id.* at 235.

23. *See generally* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995) (discussing the relationship of the economies of the United States and Mexico within the context of NAFTA negotiations).

24. *See* Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1369–70 (2004) (noting the “atmosphere of resentment and tension” in political relations between the United States and Mexico).

25. *See generally* John E. Rogers, *Cross-Border Legal Practice: The Role of Foreign Legal Consultants*, 7 U.S.-MEX. L.J. 1 (1999) (describing the divisive concerns voiced during NAFTA negotiations relating to cross-border legal practices between the United States and Mexico and discussing their historical roots in the distrust between the two countries).

26. *See, e.g.*, *Bar Asks to Keep Consultants Rule*, FLA. B. NEWS, Aug. 1, 1997, at 5 (discussing the benefits that the use of foreign legal consultants brings to Florida’s economy, such as promotion of foreign trade and contacts).

27. *See* Vargas, *supra* note 24, at 1359–60 (discussing the importance of understanding Mexican culture in business and legal transactions).

Mexican attorney who speaks fluent Spanish, understands the customs, and recognizes the fine distinctions between the United States and Mexico may, in-and-of-itself, elevate client communication and satisfaction in a way that cannot be accomplished absent the presence of a Mexican attorney.

Advantages gained via a foreign legal consultant program are not nationally limited as individual states have already recognized potential economic benefits²⁸ and have independently adopted foreign legal consultant rules to allow for the limited, or not-so-limited, practice of transnational law.²⁹ One professor isolated three primary purposes of adopting a foreign legal consultant program in the United States:

Establishment of a limited Foreign Legal Consultant category of practice serves three purposes of interest to attorneys generally licensed in the United States. First is the increased local availability of foreign lawyers knowledgeable in the intricacies of practice in foreign nations. This exposure would help not only the large U.S. firms dealing in international trade, but also the smaller companies able to retain the local advice of a foreign legal consultant. Second, many U.S. lawyers wish to express an attitude of international cooperation, demonstrated by the abandonment of exclusionary and isolationist tendencies that retard a state's share of expanding international commerce. Finally, the establishment of a Foreign Legal Consultant certification scheme would open the door to the expansion of local law firms into the international marketplace. Severe restrictions through a local bar monopoly may not serve the interest of the public or of the bar itself, particularly for those firms that desire to "go international" but face expectations of reciprocity in foreign nations.

... International transactions can be directly simplified by the presence of a Foreign Legal Consultant and indirectly simplified by

28. Potential benefits of a nationally-recognized regulatory framework can even be seen in state-specific proposals:

Texas should modernize its foreign legal consultant rule to adapt to changing times. Texas would benefit in numerous ways, including: (a) more affordable international legal services for Texas consumers; (b) improved international legal services that become more "seamless" as law firms of all sizes are able to advise Texas clients more thoroughly; (c) an improved regulatory framework for foreign lawyers that would make their presence more transparent to the bar; and (d) additional legal work and trade generated between Texas and the world by virtue of the presence of foreign lawyers in Texas. Moreover, Texas may be placed at a competitive disadvantage vis-à-vis its peer states if a legal services accord is reached that depends on reciprocity.

Pascal, *supra* note 4, at 794-95.

29. See generally *id.* (describing the rules and benefits regarding foreign legal consultants within the state); Kenneth L. Port, *Foreign Legal Consultants in Wisconsin*, 82 MARQ. L. REV. 827 (1999) (same); William R. Slomanson, *California Becomes Latest State to Consider "Foreign Legal Consultant"*, 80 AM. J. INT'L L. 197 (1986) (same).

the development of an atmosphere conducive to sophisticated international transactions.³⁰

Functional foreign legal consultant programs would further benefit national legal communities by ensuring adherence to ethical standards. The ABA's proposed Model Rule addressed such standards for the licensing of legal consultants in the United States, as any country implementing a foreign legal consultant program would have the opportunity to delineate specific ethical standards for such practitioners.³¹ The benefits of a foreign legal consultant program are certainly not free of prospective frustration and impediments;³² however, the potential for true economic progress overwhelms those possibilities.

C. *Obstacles to a National Foreign Legal Consultant Program*

Although the obstacles facing a reciprocal foreign legal consultant program between the United States and Mexico are numerous,³³ five distinct concerns present the most challenging hurdles: (1) discrepancies between the professional licensing systems; (2) educational requirements; (3) cultural differences; (4) variation between the countries' substantive law and policies; and finally, (5) concern over one country losing more than is gained.

The first hurdle that must be attempted involves fundamental differences between the professional licensing systems of the United States and Mexico.³⁴ In the United States, individual state governments have historically dominated the admission of attorneys within their respective jurisdictions.³⁵ Conversely, the national licensing system used in Mexico

30. Slomanson, *supra* note 29, at 198–99 (footnotes omitted).

31. See generally American Bar Association, *supra* note 19 (outlining the proposed model rule on foreign legal consultants).

32. See *infra* Part II.C; see also Silver, *supra* note 12, at 531–41 (discussing potential impediments of a foreign legal consultant program).

33. See generally Nelson, *supra* note 3 (discussing the principal barriers involved in the international trade of legal services).

34. See Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453, 458–61 (2004) (describing the shortcomings of creating a national bar examination that would allow United States attorneys to be admitted to all state bars, therefore overcoming the barrier currently in place due to the array of individual state admission rules); see also Pascal, *supra* note 4, at 792.

[T]he ability of the United States to negotiate a liberalization in [the regulation of foreign attorneys] . . . (and by implication its existing investment in these markets) may be compromised by the regulation of foreign lawyers and law firms in the United States. Due to the practice of law being primarily regulated at the state level, the U.S. system is a patchwork of rules.

Id. (footnote omitted).

35. See Brand, *supra* note 2, at 1137.

grants an attorney authorization to practice law in any Mexican state.³⁶ These licensing systems are incompatible at first glance;³⁷ however, to overcome the barriers presented by the transnational practice of law, the systems must be willing to accommodate each other for the benefit of both.³⁸ Absent minimal flexibility,³⁹ little hope exists for a workable solution to the changing demands of the economy.⁴⁰

Another obstacle in the path of a uniform foreign legal consultant

While the practice of law has moved from being local to national to international in scope, the regulation of the profession in the United States remains largely localized. . .

Dynamic changes in the practice of law, combined with the static system of regulation of that practice, produce significant problems for lawyers concerned with reconciling a transnational practice with local admission.

Id.; see also Symposium, *supra* note 11, at 189 (“No nation has the same state barriers that exist in the United States. The Mexico-U.S. barriers are no more severe than some of those that have existed for some time in the United States that keep people from moving from state to state.”).

36. Symposium, *Interstate Legal Practice*, *supra* note 11, at 204. For a comprehensive overview of the Mexican legal system, see generally Vargas, *supra* note 24.

37. See Vargas, *supra* note 24, at 1369–72 (discussing origins of the tension between the United States and Mexico). See generally Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV. 23 (2000) (comparing the differences in the legal systems of the United States and Mexico); Rogers, *supra* note 25 (outlining contentious issues raised during negotiations relating to cross-border legal practices conducted under NAFTA).

38. See generally Stephen T. Zamora, *Comments on the Regulation of Financial and Legal Services in Mexico Under NAFTA*, 1 U.S.-Mex. L.J. 77 (1993) (discussing the potential for economic gain to both the United States and Mexico in the trade of legal services); cf. Pascal, *supra* note 4, at 792.

Texas law firms depend on cross-border work for a growing percentage of their revenue. . . . But cross-border work is becoming more common, if not indispensable, for all Texas practitioners, and even small and mid-size law firms are putting more emphasis on, and investing more resources in, their cross-border practices.

Id.; Nelson, *supra* note 3, at 71 (“The growth of international trade in services did not keep pace with that of trade in goods because services are by their nature, more difficult to export. Additionally, services are often subject to extensive domestic regulations that readily lend themselves to protectionist ends.”).

39. For a discussion of a state foreign legal consultant rule that arguably impedes the goals of transnational practice, see Pascal, *supra* note 4, at 793.

[T]he Texas FLC rule is more restrictive than the ABA Model Rule, does not reflect professional practices or needs, and has failed to attract foreign law firms to the state (despite the presence of the largest energy center in the world and a large border with Mexico), thereby resulting in less cross-border legal work for Texas law firms. . . .

. . . . Texas could receive more . . . coveted value-added, cross-border legal work if its regulatory framework better suited the needs of foreign law firms and the legal market.

Id.

40. See Vargas, *supra* note 24, at 1369–72 (outlining potential problems with the transnational practice of law between the United States and Mexico); see also Symposium, *Interstate Legal Practice*, *supra* note 11, at 190 (noting that legal rules have “failed to keep up with the movement of lawyers as individuals across international borders”).

program is the considerable disparity between the United States and Mexican educational requirements for attorneys.⁴¹ Prospective attorneys in the United States attend a four-year university to receive an undergraduate degree and then attend an accredited law school for an additional three years.⁴² Moreover, United States attorneys typically learn basic concepts and procedures associated almost exclusively with the United States legal system and have little or no meaningful exposure to other nations' legal systems.⁴³ The Mexican system requires five years of study to receive a law degree (*licenciado en derecho*).⁴⁴ A contributing impediment is the perceived, even if not actual, difference in the quality of the respective legal educations.⁴⁵ The primary benefit of a foreign legal consultant program, however, lies within the experience of foreign attorneys in their respective jurisdictions—not the details of their legal education.

A third obstacle exists in the cultural differences between the United States and Mexico. Often overlooked as an important piece of the trade, customs and traditions of a foreign country have cognizable effects on client relationships, particularly within the context of business dealings.⁴⁶ Although a United States attorney may be able to study Mexican culture and traditions, just as a Mexican attorney might study United States culture, there is no substitute for a local attorney when negotiating an important business deal.⁴⁷

Basic discrepancies between the substantive law of the United States and Mexico present the final obstacle. Law students in the United States spend three years reading cases ranging from minor to landmark decisions and covering everything from basic torts to complex intellectual property opinions.⁴⁸ A foreign legal consultant is not typically required to attend a

41. See Barker, *supra* note 6, at 114–28 (comparing the legal education systems of the United States and Mexico).

42. See *id.* at 120–22 (describing the process of getting a law degree in the United States).

43. See Silver, *supra* note 12, at 492 (describing the national legal system of the United States).

44. See Bonheimer & Supple, *supra* note 10, at 702 (outlining the process of getting a Mexican law degree).

45. See generally Alejandro Ogarrio, *A Transnational and International Perspective on Legal Education*, 15 FLA. J. INT'L L. 133 (2002) (describing the Mexican legal education system).

46. See Colloquy, *Arizona Attorney Roundtable: Southward Ho! Law and Life in Mexico*, 38 ARIZ. ATT'Y 18, 21–22 (2002) (discussing the importance of understanding the culture and history of a foreign country with respect to the practice of law).

47. See VA-Interactive.com, *Doing Business with our NAFTA Partners: Canada and Mexico*, <http://www.va-interactive.com/inbusiness/editorial/bizdev/articles/nafta.html> (last visited Jan. 3, 2006) (describing specific Mexican customs that affect negotiations and are unknown to the typical United States attorney, such as the traditional long lunch that may last several hours and thereby push an early afternoon meeting into the late evening).

48. See Barker, *supra* note 6, at 121–22 (describing the legal education system of the United States).

United States law school; however, such an attorney may well be missing out on a fundamental part of the practice of law in the United States.⁴⁹ Finally, confidence must develop that foreign legal consultants will practice only in international trade matters and not enter the local or nontrade areas of practice.

Notwithstanding these obstacles, the foreign legal consultant approach remains a good solution to problems encountered in the practice of transnational law.⁵⁰ Although perhaps a daunting task, all five of these obstacles can and must be overcome to support and promote today's emerging international markets.

D. *International Trade Agreements*

As growing global economies began to recognize the complexities associated with transnational trade, international agreements among nations have attempted to address the legal aspects of transnational business practice. Two agreements that have significantly impacted commerce between the United States and Mexico are the North American Free Trade Agreement⁵¹ ("NAFTA") and the General Agreement on Trade in Services ("GATS").⁵² Both agreements stress the importance of implementing foreign legal consultant programs to facilitate transnational trade and commerce; however, neither agreement has been implemented by the United States or Mexico in a way that has achieved practical effectiveness.⁵³

49. This hypothetical applies conversely to a United States attorney attempting to gain limited practice ability in Mexico without having developed a fundamental understanding of basic Mexican law.

50. *Cf.* Chrusch, *supra* note 3, at 191.

There are several measures an individual can take to become an effective foreign legal consultant or lawyer. First, a consultant should know and understand the language and customs of the city and country that the consultant is doing business with. Second, a consultant should know the local officials of the city in case of any problems. Third, a consultant should know local counsel for general advice or information. These measures, if taken, will facilitate transactions between different countries and issues will not be as foreign to understand.

Id.

51. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

52. General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167 [hereinafter GATS].

53. *See* Nelson, *supra* note 3, at 76-77 (describing the reservations of both Mexico and the United States in NAFTA negotiations).

I. NAFTA

In 1993, the United States and Mexico⁵⁴ signed NAFTA, an agreement designed to generally promote trade in goods as well as services between the nations.⁵⁵ Although NAFTA's language evokes a spirit of compromise and liberalization of cross-border services, since NAFTA came into effect on January 1, 1994, neither the United States nor Mexico has agreed on uniform requirements for foreign legal consultants.⁵⁶ This failure to reach a compromise is likely a result of the "very defensive posture" with which the countries approached NAFTA negotiations in the legal services sector.⁵⁷

NAFTA requires each party to consult with and obtain advice from their professional bodies on what type of association a domestic lawyer and a foreign consultant need to create. In addition, the professional bodies of each country are to recommend standards and criteria that foreign legal consultants must follow in order to be authorized to consult in the other party's territory. NAFTA allows the professional bodies to recommend standards and criteria for any matter connected to foreign legal services.

Each signatory Party to NAFTA agrees to consult with each other in the area of foreign legal consultation. NAFTA requires each party to establish national programs to create common procedures for the

54. Although Canada is also a signatory of NAFTA, its role is not addressed here as this article focuses on the relationship between the United States and Mexico.

55. Nelson, *supra* note 3, at 76 (discussing NAFTA's role in trade in legal services); *see* Chrusch, *supra* note 3, at 181–82.

The preamble of NAFTA established the commitment among the United States, Canada, and Mexico to work together. The governments resolved to strengthen their friendship and cooperation, contribute to the development and expansion of world trade, and provide a catalyst to broader international cooperation.

....

The preamble of NAFTA includes each country's desire to enhance the competitiveness of their firms in global markets, foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.

Id. (footnotes omitted).

56. *See generally* Symposium, *Interstate Legal Practice*, *supra* note 11 (debating the concerns created in NAFTA negotiations between the United States and Mexico concerning the foreign legal consultant provision); *cf.* Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615, 633 (1997).

[W]hen the NAFTA was under consideration in the U.S. Congress, the federal executive branch had to reassure those who were worried about the continued vitality of states rights that the NAFTA would not give free reign to a supranational authority, working in concert with the federal government, to curtail state laws.

Id.

57. *See* Del Duca & Sciarra, *supra* note 5, at 1120 ("A review of these different annex entries demonstrates that each of the NAFTA countries completed the negotiations with respect to the legal services sector in a very defensive posture.").

authorization of foreign legal consultants. If a Party recommends a course of action, the other party should implement the recommendation through its authorities within one year from the date of such recommendation.

Article 1210 sets forth licensing and certification requirements for foreign legal consultants. Article 1210 is in NAFTA to ensure unnecessary barriers to trade are not created. Under article 1210(1)(a) “each party shall ensure that any such measure is based on objective and transparent criteria, such as competence and the ability to provide a service, and is not more burdensome than necessary to ensure the quality of a service.” In addition, “each measure should not constitute a disguised restriction on the cross-border provision of a service.”⁵⁸

Application and interpretation of NAFTA’s legal services provisions has proven inconsistent since the signing of the agreement, despite lengthy negotiations.⁵⁹ One of the most frequently noted and fundamental impediments in NAFTA’s foreign legal consultant guidelines concerns the language of Annex 1210.5,⁶⁰ which addresses foreign legal consultants, and

58. Chrusch, *supra* note 3, at 183–84 (footnotes omitted) (quoting NAFTA, *supra* note 51, art. 1210(1), at 650).

59. See Del Duca & Sciarra, *supra* note 5, at 1119–22 (discussing reservations of the United States and Mexican governments during NAFTA negotiations concerning the legal services area).

60. The following is the applicable section of NAFTA Annex 1210.5:

Section B - Foreign Legal Consultants

1. Each Party shall, in implementing its obligations and commitments regarding foreign legal consultants as set out in its relevant Schedules and subject to any reservations therein, ensure that a national of another Party is permitted to *practice or advise on the law of any country in which that national is authorized to practice as a lawyer*.

Consultations With Professional Bodies

2. Each Party shall consult with its relevant professional bodies to obtain their recommendations on:

- (a) the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants;
- (b) the development of standards and criteria for the authorization of foreign legal consultants in conformity with Article 1210; and
- (c) other matters relating to the provision of foreign legal consultancy services.

3. Prior to initiation of consultations under paragraph 7, each Party shall encourage its relevant professional bodies to consult with the relevant professional bodies designated by each of the other Parties regarding the development of joint recommendations on the matters referred to in paragraph 2.

Future Liberalization

4. Each Party shall establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants.

5. Each Party shall promptly review any recommendation referred to in paragraphs 2 and 3 to ensure its consistency with this Agreement. If the recommendation is consistent with this Agreement, each Party shall encourage its competent authorities to implement the recommendation within one year.

6. Each Party shall report to the Commission within one year of the date of entry into

the lack of definition those guidelines actually afford to practicing attorneys.⁶¹ By providing little direction as to what terms such as “practice of law” and “lawyer” encompass, the Annex fails to establish a workable standard against which attorneys can evaluate their conduct in foreign jurisdictions.⁶²

Although NAFTA eliminates nationality restrictions by requiring the signatory countries to accord no less favorable treatment to service providers than they give their own,⁶³ that guideline may be construed to, in effect, allow disparate treatment for attorneys seeking to practice in a foreign country. Article 1210 further instructs that licensing and certification of service providers should be based on “objective and transparent criteria . . . not more burdensome than necessary to ensure the quality of a service . . . [and cannot] constitute a disguised restriction.”⁶⁴ Like the nationality requirements, the broadly worded criteria here may be easily manipulated by the United States and Mexico to allow themselves significant influence over the practice of foreign legal consultants.

Additionally, by signing Annex 1210.5, each nation pledges to devise a licensing and certification scheme within a “reasonable time.”⁶⁵ Under the *Future Liberalization* section, each party agrees to “establish a work program to develop common procedures throughout its territory for the

force of this Agreement, and each year thereafter, on its progress in implementing the work program referred to in paragraph 4.

7. The Parties shall meet within one year of the date of entry into force of this Agreement with a view to:

- (a) assessing the implementation of paragraphs 2 through 5;
- (b) amending or removing, where appropriate, reservations on foreign legal consultancy services; and
- (c) assessing further work that may be appropriate regarding foreign legal consultancy services.

NAFTA, *supra* note 51, annex 1210.5(B), at 652 (first emphasis added).

61. One professor rightly noted: “When NAFTA was written, they should have accomplished the first step and defined who is a lawyer under NAFTA, and then determined what is the practice of law.” Symposium, *Interstate Legal Practice*, *supra* note 11, at 193. *But see id.* at 194. Fellow panelist and attorney, Stephen C. Nelson felt differently:

I respectfully disagree. You are expecting too much of NAFTA. It is not NAFTA’s job to decide what is the practice of law or what is the unauthorized practice of law. I think the job of NAFTA is to determine whether Canada, the United States or Mexico, as consistent with NAFTA, can regard something as the unauthorized practice of law. . . . NAFTA does nothing more than tell us whether there are any limits and, if so, what those limits are on a NAFTA country’s determination that someone licensed elsewhere is engaged in the unauthorized practice of law.

Id.

62. *See id.* at 193–95.

63. NAFTA, *supra* note 51, art. 1202, at 649.

64. *Id.* art. 1210(1)(a)–(c), at 650.

65. *Id.* Annex 1210.5(A)(1), at 651.

authorization of foreign legal consultants,” as well as submit an annual progress report.⁶⁶ In spite of this seemingly instructive language, these guidelines remain largely unpredictable in their application and interpretation.

In addition to NAFTA’s vague requirements, significant reservations by both the United States and Mexico substantially dilute the treaty’s potential benefits.⁶⁷ “The key to liberalizing the legal profession is reciprocity. Reciprocity in this context means providers from countries granting access to their legal markets are themselves allowed equal access to foreign legal markets. National authorities are very intolerant of asymmetric access to legal markets.”⁶⁸ As a result of the treaty’s often-unilateral language, “both Mexico and the United States are technically free under NAFTA to impose whatever restrictions they wish on lawyers of the other [nation] practicing in their respective territories.”⁶⁹ Considering this effect, the fact that the United States and Mexico have failed to adopt uniform guidelines should come as no surprise.

The vagueness of NAFTA’s language and the reservations of the United States and Mexico combine to undermine their pledged commitment

66. *Id.* Annex 1210(B)(4), (6), at 652.

67. Nelson, *supra* note 3, at 76–77.

Significant reservations taken by the parties substantially diluted the salutary effects of these provisions, insofar as the legal profession is concerned.

... [R]epresentatives of the U.S. legal profession ... advised that the proposed partnership restrictions would effectively preclude the formation of meaningful cross-border partnerships with Mexican lawyers. The result was that Mexico took a complete reservation *vis-a-vis* the United States as to legal services, which was then reciprocated by the United States.

Id. (footnote omitted).

68. Barker, *supra* note 6, at 133 (footnotes omitted).

69. Nelson, *supra* note 3, at 77.

The U.S. delegation circulated the draft joint recommendation [prepared by representatives from the three NAFTA countries] and Model Rule to interested members of the U.S. legal profession, including members of the firms currently having offices in Mexico, requesting their comments. The draft was, to say the least, extremely unpopular. Many of the objections came from Mexican lawyers practicing with law firms based in the United States. They saw the restrictive provisions of Rule 15 as an infringement upon their own freedom of professional association and their rights under the Mexican Constitution.

Id. at 78; cf. Amy D. Ronner & Dennis J. O’Connor, *Good Fences Make Bad Neighbors: Is the North American Free Trade Agreement a Lie for Lawyers?*, 32 U. MIAMI INTER-AM. L. REV. 437, 450 (2001).

The concept of “most-favored nation treatment,” provides that each party to NAFTA will treat service providers of another NAFTA Party no less favorably than service providers of any other NAFTA Party or a non-Party, in similar circumstances. The practical application of this concept to the legal profession raises questions about its effectiveness.

Id. (footnote omitted) (quoting NAFTA, *supra* note 51, art. 1203, at 649).

to establishing cross-border trade in legal services. Ten years after NAFTA's signing, Mexico and the United States have yet to adopt a comprehensive system for licensing foreign legal consultants as negotiations have continued to stall.⁷⁰ Mexico has virtually abandoned the issue, and despite the ABA's promotion of a model rule for foreign legal consultants, only twenty-six United States jurisdictions have adopted foreign legal consultant rules.⁷¹

Now is the time for both the United States and Mexico to reaffirm their commitments to NAFTA's principles.⁷² By intensifying their efforts to adopt national rules for the licensing of foreign legal consultants, Mexico and the United States can strengthen their relationship and promote transnational economic growth.⁷³

2. GATS: A Work in Progress

The General Agreement on Trade in Services was "the first multilateral trade agreement that applied to services, rather than goods."⁷⁴ It

70. See Symposium, *Delivery of International Legal Services*, *supra* note 15, at 72 ("[N]o rules on forming partnerships or other associations with Mexican licensed lawyers were agreed upon with the U.S. under NAFTA.").

71. See Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUS. J. INT'L L. 527, 530-31 (2005).

Legal consultant rules have been adopted by Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Utah, and Washington. Practice opportunities for foreign lawyers are not available in twelve states that deny foreign educated lawyers the right to sit for the state's bar examination and also have not adopted foreign legal consultant licensing regimes: Arkansas, Delaware, Iowa, Kansas, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming.

Id. at 530-31 n.12 (citation omitted). For an exceptional, comprehensive summary of each state's rules, see *id.* at 546-57.

72. Chrusch, *supra* note 3, at 190-91 ("Each country has realized tremendous economic benefits as a result of NAFTA. . . . With increasing trade among the NAFTA Parties, the need for foreign legal consultants should expand. To consult or advise in a foreign Party's territory should be facilitated by the licensing requirements enumerated within chapter twelve of NAFTA.").

73. *But see* Ronner & O'Connor, *supra* note 69, at 448 ("What appeared to be the inception of unobstructed cross-border trade of legal services turned out to be a practical illusion: in truth there were few progressive developments after NAFTA.").

74. Terry, *supra* note 4, at 994. Perhaps the World Trade Organization summarizes GATS' importance best:

The General Agreement on Trade in Services (GATS) is among the World Trade Organization's most important agreements. The accord, which came into force in January 1995, is the first and only set of multilateral rules covering international trade in services. It has been negotiated by the Governments themselves, and it sets the framework within which firms and individuals can operate. The GATS has two parts: the framework agreement containing the general rules and disciplines; and the national

was one of several trade agreements signed as part of the creation of the World Trade Organization (“WTO”) in April of 1994.⁷⁵ As of May 31, 2005, one hundred and forty-eight nations have joined the WTO, and therefore, are signatories to the agreement.⁷⁶ Unlike the more extensive, although certainly not comprehensive, provisions found in NAFTA, GATS provides only a very basic framework for trade in legal services.⁷⁷ This lack of detail leaves policymakers and practitioners to speculate how the general rules should translate into complementary transnational procedures.⁷⁸

GATS covers four principal areas of international legal service: (1) cross-border supply of service; (2) cross-border travel of clients; (3) international commercial presence of firms; and (4) international presence of individual service providers.⁷⁹

Based on GATS, if professional rules work to restrain competition in any of these areas, the signatory governments must act to eliminate the trade restriction.

GATS began with excellent intentions for reducing restrictions in the legal industry. The Agreement required that each signatory provide legal service suppliers from another member state: “treatment no less favourable than provided for under the terms specified in its Schedule; and treatment no less favourable than it accords to its own service providers.” Under the Schedule, however, each state is only

“schedules” which list individual countries’ specific commitments on access to their domestic markets by foreign suppliers.

World Trade Organization, GATS: Fact and Fiction, http://www.wto.org/english/tratop_e/serv_e/gats_factfiction1_e.htm (last visited Jan. 3, 2006).

75. Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. J. INT’L & COMP. L. 361, 361, 365 (2003); Terry, *supra* note 4, at 998. The WTO’s website is a comprehensive resource for WTO news and reference, including general information, negotiations updates, archives, official documents, minutes of meetings, copies of published handbooks, and much more for no charge. See World Trade Organization, <http://www.wto.org/> (last visited Jan. 3, 2006).

76. World Trade Organization, Understanding the WTO: The Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 3, 2006).

77. Paton, *supra* note 75, at 369–70; Terry, *supra* note 4, at 1006.

In sum, in my view, there are seven key GATS provisions that ultimately will be of the most significance to regulators of U.S. legal services. These seven provisions include: (1) the requirements of transparency; (2) most favored-nation (MFN) treatment; (3) domestic regulation; (4) recognition; (5) progressive liberalization, all of which are generally-applicable, and (6) the market access; and (7) national treatment provisions

Id.

78. Paton, *supra* note 75, at 369–70 (“Although the GATS was agreed upon in 1995, it provided only the basic framework of general rules for trade in services, leaving questions of how the general rules would apply to specific countries, service sectors, industries and modes of supply.”); Terry, *supra* note 4, at 1015 (“The last important aspect to note about the GATS is the incomplete nature of its regulation of legal and other services.”).

79. Tanner, *supra* note 5, at 141.

bound by its own offer or reservations. Thus, most states merely continued to restrict the international legal industry by means of their offers.

Each of the member nations chose to continue to restrict the legal industry.⁸⁰

The United States agreed to treat all WTO members no less favorably than it treats its most-favored trading partner; however, by listing the various state rules on licensing of foreign legal consultants in the *Schedules of Specific Commitments* section of the GATS, the United States has reserved the right to continue applying those rules even if they are inconsistent with its other commitments under GATS.⁸¹

Although both NAFTA and GATS serve as the first steps toward a solution to the problems faced in the transnational practice of law between the United States and Mexico, the weakness of both agreements is identical—failure to provide concrete guidelines for member nations. Member nations can assert requirements incompatible with those of other countries and provide reservations of their signatory nations.⁸² NAFTA and GATS are not definitive standards for transnational law.

III. THE CENTURY OF EVOLUTION

Increases in global commerce and advances of modern technology in the twentieth century have produced a demand for foreign-educated attorneys in the United States, as international businesses require efficient legal services in foreign matters. Foreign legal consultants, one solution to this need, gained recognition in New York in the 1970s.⁸³ After years of

80. *Id.* (footnotes omitted) (quoting Tom De Waard, *Establishment of a Lawyer in a Foreign Jurisdiction*, 23 INT'L BUS. LAW. 523, 524 (1995)).

81. GATS, *supra* note 52, art. 20, at 1181; *see also* Tanner, *supra* note 5, at 142.

82. Terry, *supra* note 4, at 999–1000.

The inclusion of “legal services” in the GATS, however, does not mean that a country’s regulation of cross-border legal services automatically must comply with all twenty-nine articles in the GATS. To determine the effect of the GATS on cross-border legal services, one must examine three different aspects of the GATS. First, one must consider the provisions that automatically apply to every country that is a WTO Member State and GATS signatory. Second, one must determine if a country exempted itself from the most-favored nation provision in the GATS (the *MFN Exemption List*). Third, one must consult the *Schedules of Specific Commitments* (the *Schedule*) submitted by individual countries.

Id. (footnotes omitted).

83. Howard A. Levine, *The Regulation of Foreign-Educated Lawyers in New York: The Past, Present, and Future of New York’s Role in the Regulation of the International Practice of Law*, 47 N.Y.L. SCH. L. REV. 631, 637–38 (2003) (explaining that New York policymakers had actually been attempting to persuade the legislature to enact legislation addressing the licensure of foreign attorneys since the mid-twenties).

lobbying, negotiation, and compromise, New York adopted rules regulating the licensure and practice of foreign legal consultants. Likely in response to the results achieved in New York, today twenty-five states as well as the District of Columbia have adopted rules allowing foreign legal consultants to practice in various capacities within their jurisdictions.⁸⁴ The following section traces the history of foreign legal consultants and the adoption of rules regulating their ability to practice limited aspects of law in the United States.

A. *New York's Advancement of the Solution*

By the very nature of Manhattan's status as a worldwide commercial center, New York has been a leader in the internationalization of the practice of law.⁸⁵ The adoption of New York's first foreign legal consultant rule in 1974 was the culmination of years of efforts by its legislature, judiciary, and practitioners.⁸⁶ Not only was the road to the adoption of that first rule difficult, later struggles with its application would lead to necessary amendments.⁸⁷ Nevertheless, in 1993, the American Bar Association's Section of International Law and Practice recognized the success of New York's system for licensing foreign legal consultants:

It is fair to say that the system established under the New York Rule has operated successfully and without significant problems since its inception over 18 years ago. . . . Many New York practitioners have found that the possibility of local access to foreign lawyers, either as independent counsel or as associates or partners in their own firms, has enhanced their ability to render effective legal services to their clients in connection with the burgeoning volume of international transactions and disputes and has resulted in a strengthening of New York as a center of international legal practice, to the benefit of all concerned.⁸⁸

1. *Judicial Attempts at Resolution*

Although the complexities of foreign law practice had been recognized since the 1920s, it was not until the 1970s that New York truly became a pioneer by advocating the licensure of foreign-trained attorneys as legal

84. See Silver, *supra* note 71, at 530 n.12.

85. Levine, *supra* note 83, at 632 ("New York law firms have been leaders in the 'exportation' of legal services abroad, and have stood at the forefront of the internationalization of legal practice during the post-World War II era.").

86. See *id.* at 636-39.

87. See *id.* at 639-43.

88. American Bar Association, *supra* note 19, at 214.

consultants.⁸⁹ At the same time, foreign attorneys had begun to question the United States' refusal to allow them to practice law within its borders absent extensive requirements.⁹⁰ In contrast to the expansive rights to practice law in foreign jurisdictions afforded to U.S. attorneys, the United States simply did not reciprocate.⁹¹

As the business and legal communities in New York began to acknowledge the relationship between the global economy and the international practice of law in the mid-twentieth century, the judiciary was pressed for a way to manage foreign legal matters. In 1957, the New York Court of Appeals⁹² decided *In re Roel*, in which the court enjoined a Mexican lawyer⁹³ "from practicing or assuming to practice law in any manner whatsoever, and from giving and furnishing any legal advice and opinions and rendering legal services of any kind, nature and description."⁹⁴ Although the lawyer maintained offices in New York, he advised clients solely on Mexican legal matters.⁹⁵

Nevertheless, the court held that his conduct constituted the practice of law and refused to disregard the requirement in place at that time that the New York State Bar certify anyone practicing "law" within the state.⁹⁶ The court acknowledged that "[i]t may well be that foreign attorneys should be licensed to deal with clients in matters exclusively concerning foreign law," however, the court refused to rule on the issue, reasoning that it was "solely within the province of the Legislature."⁹⁷

The court maintained that its primary goal was to protect members of the public seeking legal advice and that an unlicensed attorney providing legal advice on foreign legal matters placed the public at risk because of the lack of enforceable professional standards.⁹⁸ The dissent quickly dismissed the majority's concern:

89. Levine, *supra* note 83, at 637–38.

90. See American Bar Association, *supra* note 19, at 212–13.

Even after the decision of the United States Supreme Court in *In re Griffiths*, the only way in which a foreign lawyer could engage in the practice of law in the United States, even if limited to the giving of advice on the law of his or her own country, was, with certain limited exceptions, to attend an accredited American law school, sit for the bar examination and become a full member of the bar.

Id. (footnotes omitted).

91. *Id.*

92. The New York Court of Appeals is the highest court of the State of New York.

93. *In re Roel*, 144 N.E.2d 24, 25 (N.Y. 1957) (explaining that the attorney was not a citizen of the United States, nor a member of the New York Bar; however, he was educated in and admitted to practice in Mexico).

94. *Id.*

95. *Id.* at 25–26 (internal quotations omitted).

96. *Id.* at 26–27.

97. *Id.* at 28.

98. *Id.* at 29.

In this century when the United States has become the creditor nation of the world and when the ramifications of our industrial, commercial, financial and recreational lives extend to every corner of the globe, it is especially improbable that the Legislature intended to preclude the giving of legal advice in this State to our citizens concerning these far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them.⁹⁹

Following *In re Roel* and the United States Supreme Court's decision in *In re Griffiths*,¹⁰⁰ almost twenty years passed before the New York Legislature finally provided guidance for foreign attorneys.

2. *Legislative Attempts at Resolution*

In 1974, the New York Legislature responded to the New York Court of Appeals' suggestion in *In re Roel* that the legislature address the issue of foreign legal practice by enacting a law that allowed the court of appeals to adopt rules regulating the practice of foreign attorneys.¹⁰¹ Later that same year, the court issued its rules regarding licensing of foreign legal consultants in Part 521 of the Rules of the Court of Appeals.¹⁰²

The struggle to develop laws addressing foreign attorney practice, however, began long before the rules were adopted in 1974. Certainly, New York policymakers had been advocating an effective means for delivering transnational legal services throughout the twentieth century.¹⁰³ In both 1924 and 1925, the City of New York Bar Association unsuccessfully attempted to persuade the New York Legislature to pass regulations for licensing foreign lawyers; later endeavors in 1947 and 1955 also failed to

99. *Id.* at 30 (Van Voorhis, J., dissenting).

100. *See generally* 413 U.S. 717 (1973) (holding that a Connecticut court rule allowing only citizens of the United States to be admitted to practice law in Connecticut was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

101. American Bar Association, *supra* note 19, at 213; *see also* Levine, *supra* note 83, at 638-39.

[T]he New York State Legislature responded by adopting Judiciary Law § 53(6), which expressly authorized the 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," with the proviso that a person so licensed not practice in the courts of the state. Subdivision 6 also expressly subjected licensed foreign legal consultants to the appellate division's admission and disciplinary authority and the other regulatory provisions of the Judiciary Law governing attorneys and counselors-at-law. By adopting subdivision 6, New York became the first state in the nation to formally recognize foreign legal consultants.

Id. (footnotes omitted) (quoting N.Y. JUD. CT. ACTS LAW § 53(6) (McKinney 2002)).

102. Levine, *supra* note 83, at 639.

103. *See generally id.* (describing the evolution of the New York foreign legal consultant rule).

change the laws.¹⁰⁴

Not until the early 1970s was this initiative finally successful.¹⁰⁵ A committee of the Association of the Bar of the City of New York drafted proposed rules for the licensing of foreign attorneys that recommended the adoption of foreign lawyers as legal consultants and authorized a licensing system to be administered by New York Bar authorities.¹⁰⁶ Relying on New York City's status as a "center in the flow of international investment and development," the committee argued four major points:

(1) a system of licensing of foreign legal consultants would facilitate international transactions and encourage foreign investment within the state; (2) it would benefit New Yorkers engaged in international transactions if experts in foreign laws were readily accessible to them; (3) granting foreign lawyers the privilege of practicing their specialty here would encourage reciprocal privileges to New York firms abroad; and (4) consumer protection objectives could be met by a system of licensing.¹⁰⁷

Persuaded by the committee's arguments, the New York State Legislature enacted Judiciary Law section 53(6) in April of 1974.¹⁰⁸ The law authorized the New York Court of Appeals to adopt rules granting the title of "legal consultant" to "a person admitted to practice in a foreign country as an attorney or counsellor or the equivalent."¹⁰⁹ With the passage of section 53(6), New York became the first state in the nation to officially acknowledge foreign legal consultants.¹¹⁰

Under its new authority, the New York Court of Appeals issued rules for the licensing of legal consultants in Part 521 of the Rules of the Court of Appeals.¹¹¹ Foreign attorneys seeking certification encountered problems in

104. *Id.* at 637–38; *see also In re Roel*, 144 N.E.2d at 27–28.

105. Levine, *supra* note 83, at 638.

106. *See* Sidney Gribetz, *Legal Consultants in New York*, 67 B. EXAMINER 6, 7 (1998).

107. Levine, *supra* note 83, at 638 (footnotes omitted).

108. N.Y. JUD. CT. ACTS LAW § 53(6) (McKinney 2002); *see also* Levine, *supra* note 83, at 638.

109. N.Y. JUD. CT. ACTS LAW § 53(6).

110. Levine, *supra* note 83, at 638–39; *see also* Needham, *supra* note 11, at 1141 ("New York was the first jurisdiction in the United States to create an official status for non-U.S. licensed lawyers."); Silver, *supra* note 12, at 531 ("The legal consultant category was created in 1974 with the adoption of the first U.S. legal consultant rule by New York . . .").

111. Levine, *supra* note 83, at 639.

Under the 1974 rules, the appellate division had the discretion to license, without examination, a foreign-educated attorney who was admitted, actually practiced and was in good standing as an attorney or counselor at law or the equivalent in a foreign country for at least five of the seven years immediately preceding the lawyer's application. The applicant was also required to possess the good moral character and general fitness requisite for a member of the New York Bar and to be an actual resident of the state. A duly licensed legal consultant was subject to the disciplinary authority of

the application of the rules; so in the mid-1980s, the New York Court of Appeals amended them.¹¹² Further amendments liberalizing the New York Rules were adopted in 1993, largely in response to the Model Rule, drafted by the American Bar Association.¹¹³ Among the 1993 amendments, the most important allowed a foreign legal consultant to become a partner in any partnership that included members of the New York Bar, as well as to employ or be employed by members of the New York Bar.¹¹⁴

As a result of these amendments, an applicant for a foreign legal consultant license in New York must now meet five general requirements:

[(1)] the applicant must be a member in good standing of a recognized legal profession in a foreign country, [whose] members . . . are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a . . . professional body or public authority[;]

[(2)] the applicant must have been such a member in good standing and actually been engaged in the practice of law [in] the applicant's home country for at least three of the five years immediately preceding application[;]

the appellate division, including the Disciplinary Rules. Licensed legal consultants were not authorized to litigate before the courts, prepare any instrument conveying real property, or engage in any decedents' estates or matrimonial practice. A legal consultant was also prohibited from rendering professional legal advice on the law of New York or the United States, except on the basis of advice from a member of the New York Bar.

Id.

112. *Id.* at 639–41. Two major amendments were made to the rules at that time. *Id.* at 639. First, the court modified the rules to permit the waiver of the practice requirements in response to the complaints of refugees from east of the Iron Curtain who had been unable to meet the years of recent practice requirement of the rules due to their victimization by communist regimes. *Id.* at 639–40. Second, the court modified the requirement that a foreign-educated attorney be admitted and practice the law of the applicant's home country for at least five of the seven years immediately preceding an application for a foreign legal consultant license by clarifying that the five-year prior practice requirement could be satisfied by practice within or outside the applicant's home country. *Id.* at 640.

113. *Id.* at 641–42; *see also* American Bar Association, *supra* note 19, at 208–12 (setting out the provisions of the ABA's model rule on foreign legal consultants); Needham, *supra* note 11, at 1144 ("In November 1993, New York's rule governing foreign legal consultants was amended to make the requirements more liberal in a number of areas.").

114. Needham, *supra* note 11, at 1144–45 ("This [amendment] ended a controversy over whether such partnership or employment was ethically proper for the full members of the New York bar."). Other changes made in the 1993 amendments included: (1) the replacement of the residency requirement with a provision requiring that an applicant must intend to practice as a legal consultant and maintain an office in New York; (2) the five of seven years prior practice requirement was changed to three of five years; (3) the addition of provisions setting out the rights and obligations of foreign legal consultants, including the consultant's entitlement to the attorney-client privilege, work-product privilege, and similar professional privileges; and (4) the removal of the restriction on the preparation of pleadings or other papers in connection with legal pleadings. *Id.* at 1144.

[(3)] the applicant must possess the good moral character and general fitness [required by] the New York Bar[;]

[(4)] the applicant must be over 26 years of age[;] and

[(5)] the applicant must intend to practice as a legal consultant in New York and [intend] to maintain an office in the State for that purpose.¹¹⁵

Because New York's foreign legal consultant rule has "operated successfully and without significant problems since its inception," it has served as an example not only for the ABA's Model Rule, but also for other states in the nation.¹¹⁶

B. *Three Decades of Lobbying*

Although several states have adopted rules regulating the practice of foreign legal consultants, these rules have failed to adhere to a national standard,¹¹⁷ and therefore, the rules do little to alleviate problems encountered in the transnational practice of law. Without a national standard—a single law governing the licensing of foreign legal consultants throughout the United States—the benefits of foreign legal consultants are greatly diminished. Absent the adoption of a uniform rule, Mexico and other foreign countries are still forced to negotiate and follow the laws adopted by each individual state, thus undermining the purpose and value of a standardized rule.

1. *The ABA's State-By-State Attempts at Uniformity*

In an attempt to create the uniform system necessary to effectively address transnational practice and the licensing of foreign legal consultants, the American Bar Association House of Delegates adopted a Model Rule for the Licensing of Legal Consultants sponsored by the ABA's Section of International Law and Practice and Committee on Transnational Legal Practice in August of 1993.¹¹⁸ The Model Rule closely follows the original New York Rule¹¹⁹ and generally provides:

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

115. Levine, *supra* note 83, at 642–43 (footnotes omitted).

116. American Bar Association, *supra* note 19, at 214.

117. See *infra* Part III.B.1.

118. See American Bar Association, *supra* note 19, at 208–12; see also Needham, *supra* note 11, at 1149.

119. See American Bar Association, *supra* note 19, at 219; see also Needham, *supra* note 11, at 1149–50.

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age; and
- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.¹²⁰

Also similar to the New York Rule, under the Model Rule, a foreign legal consultant may form partnerships with local attorneys and advise clients on state or United States law, with the advice of a local licensed attorney.¹²¹ Foreign legal consultants are held to the standards of the Rules of Professional Conduct but also enjoy the benefits of the attorney-client privilege and the work-product privilege.¹²²

Despite the ABA's encouragement to the states to universally adopt the language of the Model Rule, thereby creating a uniform rule among the states, the states have not followed the ABA's recommendation.¹²³ Many states that have adopted the Model Rule have done so with modifications, while others have yet to adopt a rule at all.¹²⁴ Because the states must each individually adopt their rules, the lack of uniformity seriously undermines the effect of the rules in the provision of transnational legal services. This complicates and impedes the ability of United States lawyers to gain access to foreign legal markets, such as Mexico.¹²⁵

120. American Bar Association, *supra* note 19, § 1, at 208 (asterisks omitted).

121. *Id.* §§ 4–5, at 209–10.

122. *Id.* §§ 5–6, at 210–11.

123. *Id.* at 235–36 (describing the need for a uniform rule and the failure of the states to adopt such a rule); *see also* Needham, *supra* note 11, at 1150–51 (describing a need for a uniform rule).

124. *See* Needham, *supra* note 11, at 1150–51.

125. *Id.* at 1151 (“It is possible to urge other nations to deal separately with the federal structure of the United States, but it creates an additional diplomatic hurdle which unnecessarily complicates and impedes the ability of U.S. lawyers to gain access to markets for legal services abroad.”).

2. *Transnational Approach*

A primary reason the American Bar Association recommended its Model Rule was a concern that conflicting rules among the states could cause other countries to withhold reciprocity for American lawyers.¹²⁶ Without the guaranteed benefit of reciprocity, Mexico would be able to cite the more restrictive laws adopted by various states as justification for refusal to license American lawyers or significantly limit their ability to practice in Mexico.¹²⁷ If, however, a uniform rule was adopted by all the states, Mexico might be more willing to negotiate a mutually beneficial foreign legal consultant system with the United States.

Attempts by Mexico and the United States to develop international

126. See American Bar Association, *supra* note 19, at 225 (“[T]he inclusion of discretionary reciprocity provisions in Rules adopted in the District of Columbia and elsewhere reflects a recognition that such provisions may provide the most effective incentive to foreign jurisdictions to participate in such an open system.”); see also Needham, *supra* note 11, at 1151 (“The countries in which U.S. licensed lawyers would like to be able to practice law understandably expect reciprocal treatment of their attorneys in the United States.”).

127. See Zamora, *supra* note 38, at 79–80.

Finally, I would point out that continued restrictions on trade in legal services, even after the entry into force of NAFTA, runs counter to the notion of market integration. Under NAFTA, all three NAFTA countries are to adopt rules to permit foreign legal consultants from NAFTA countries to operate in their territories, and must eliminate citizenship restrictions on the granting of professional licenses. Thus, U.S. lawyers can hope to practice as foreign legal consultants in Mexico, and may even be allowed to pursue Mexican law degrees in order to become practitioners of Mexican law.

American law firms have also been allowed to establish offices in Mexico, under foreign investment permits granted by the Ministry of Trade (Secretaría de Comercio y Fomento Industrial). To date, however, such permits have been granted only on the condition that the foreign law firm not attempt to employ lawyers who practice Mexican law. As a result, the few U.S. law firms in Mexico can only practice foreign law, and must refer all Mexican law questions to outside counsel. NAFTA leaves this rule intact, stating merely that “Mexico will adopt measures regarding the practice of foreign legal consultants in the territory of Mexico, including matters related to association with and hiring of lawyers licensed in Mexico.”

This is a serious limitation, because many law firms would prefer to establish offices in Mexico that can render the most efficient service possible. Many international transactions involve a simultaneous analysis of American, Mexican, and international laws and regulations. It is both arbitrary and inefficient to draw rigid lines to separate them, and to prohibit a law firm from hiring the best personnel possible—American or Mexican—to serve a client’s needs. No such limitation exists, as far as I can tell, on the operations of U.S.-based accounting firms in Mexico. In short, lawyers are not willing to submit themselves to foreign competition in the same way that other sectors are being required to do. It is reasonable and necessary to adopt rules to protect the public from irresponsible or unprofessional practitioners of law, and the NAFTA governments are correct to control the provision of legal services to their citizens. Such protection, however, does not require undue restrictions that limit foreign competition

Id. (footnotes omitted) (quoting NAFTA, *supra* note 51, Annex VI, at 767).

standards for the licensing and practice of foreign legal consultants are addressed in NAFTA Annex 1210.5.¹²⁸ Although most of the provisions are not controversial, negotiations have continued to stall over a few divisive concerns, and negotiations in 1998 produced a joint recommendation for a model rule that was ultimately rejected by both countries.¹²⁹

The primary division between the United States and Mexico concerned partnership interests in law firms.¹³⁰ Under NAFTA's proposed model rule, Mexican lawyers can become partners in firms headquartered in the United States; however, the rule severely limits the ability of United States law firms wishing to affiliate with firms headquartered in Mexico by restricting majority ownership in Mexican firms to lawyers licensed in Mexico and excluding non-Mexican lawyers from management.¹³¹ Such restrictions are inconsistent with the goals of NAFTA and GATS, both of which aim to eliminate discrimination against foreign service providers.

IV. CONCLUSION

To date, Mexico and the United States have yet to adopt a national foreign legal consultant program. Since the adoption of NAFTA in 1994, Mexico and the United States have demonstrated their commitment to reducing the barriers to trade in many sectors of the economy; however, the benefits of NAFTA and GATS should not be confined to the trade of goods. Free trade in services, including legal services, is also an important aspect of a global economy. The foreign legal consultant system would be a considerable step toward free trade in legal services.

New York, an acknowledged international trade center, is an example for foreign trade consultant provisions within the United States. Will Mexico determine that it is in Mexico's best interest to accept foreign legal consultant systems in twenty-six of the united states for a national Mexican agreement with the United States?

128. NAFTA, *supra* note 51, Annex 1210.5, at 651–53.

129. See Symposium, *Delivery of International Legal Services*, *supra* note 15, at 72 (“[N]o rules on forming partnerships or other associations with Mexican licensed lawyers were agreed upon with the U.S. under NAFTA.”); Symposium, *Interstate Legal Practice*, *supra* note 11, at 212; see also Del Duca & Sciarra, *supra* note 5, at 1119–21 (discussing reservations of the United States and Mexican governments during NAFTA negotiations concerning the legal services area); Nelson, *supra* note 3, at 77 (“[R]epresentatives of the U.S. legal profession . . . advised that the proposed partnership restrictions would effectively preclude the formation of meaningful cross-border partnerships with Mexican lawyers.”).

130. See NAFTA, *supra* note 51, Annex 1210.5(B), at 652.

131. See generally Symposium, *Delivery of International Legal Services*, *supra* note 15 (describing the proposed model rule under NAFTA and the partnership structure); see also Del Duca & Sciarra, *supra* note 5, at 1119–21 (discussing reservations during NAFTA negotiations).