SHIFTING TO AN OPEN LEGAL MARKET POLICY: *THE PROSPECT OF MULTI-JURISDICTIONAL PRACTICE OF LAW IN THE PHILIPPINES UNDER THE AEGIS OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)*[*]

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The sentinels who stand guard at the portals leading to the hallowed Temples of Justice cannot be overzealous in admitting only those who are intellectually and morally fit.

U.P. v. Ligot-Telan[1]

I. INTRODUCTION

The practice of law has gone a long way since its inception in the courts of medieval England where advocates, under oath to do no falsehood, would engage in the heated combat of legal argument.[2] Through the centuries, the practice of law evolved and adapted to the changing times. From fierce gladiators of the courtroom advocates of law transformed into sophisticated problem-solvers of the boardroom.[3] Like the wolves that they are, lawyers have progressed from moving alone as solo practitioners into moving in packs as a law firm, or in throngs under a mega firm. While in the medieval ages advocates could only show flare in the confines of an English courtroom, in this age of globalization, it would not be uncommon to see an Englishman present his case in a spartan courtroom in the Asian continent.

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[1] University of the Philippines Board of Regents v. Ligot-Telan, G.R. No. 110280, 227 SCRA 342, 359, Oct. 21, 1993.

[2] Carol Andrews Rice, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004).

[3] Susan Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997).

And the complexities of the times necessitated supplementing verbal oaths with written codes as well.

It is indeed an oft-quoted truism that the only thing permanent in this world is change. And as the pages of history show, even the lofty legal profession is not impervious to this truth.

II. THE PRACTICE OF LAW IN THE PHILIPPINES

What constitutes the "practice of law" in the Philippines has been defined, in liberal terms, in the celebrated case of *Cayetano v. Monsod*[4] wherein a split Supreme Court defined it as thus:

> **Practice of law under modern conditions** consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. **It embraces conveyancing, the giving of legal advice on a very large variety of subjects, and the preparation and execution of legal instruments covering an extensive filed of business and trust relations and other affairs.** Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations.
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> **Practice of law means any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience.** To engage in the practice of law is to perform those acts which are characteristic of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill." (emphasis supplied)

Verily, the practice of law in the Philippines is not to be treated as a right, but rather as a privilege conferred by the State to only a select few who possess, and continue to possess, the qualifications required by law for the enjoyment of such privilege.[5]

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[4] G.R. No. 100113, 201 SCRA 210, 213-14, Sep. 3, 1991.
[5] Sebastian v. Callis, A.C. No. 5118, 314 SCRA 1, 8, Sep. 9, 1999.

A. ADMISSION TO THE PHILIPPINE BAR

Article XII, Sec. 14(2) of the 1987 Constitution mandates that "the practice of all professions in the Philippines shall be limited to Filipino citizens,[6] save in cases prescribed by law." In *in re: Dacanay*,[7] the Supreme Court even went so far as to declare that "the loss of Filipino citizenship *ipso jure* terminates the privilege to practice law in the Philippines [as] the practice of law is a privilege denied to foreigners."

The practice of law, more than being just a profession, is conceived to be a form of public trust handed only to those who are qualified and who possess good moral character.[8] And beyond being a form of public trust, the Supreme Court has classified it as an exercise of public function, and as the Sovereignty of the people stands behind all public functions, it is deemed a matter of high and wise policy not to entrust that function to foreigners.[9]

Citizenship certainly has no correlation with a lawyer's competence to practice his profession. Thus it may be that this citizenship requirement stems from the duty of a lawyer in the Philippines to maintain allegiance to the Constitution and obey the laws of the land. This is clear from Canon 1 of the Code of Professional Responsibility (CPR)[10] and the Lawyer's Oath.[11]

The qualifications before one can be admitted to the Philippine Bar far extend mere requirements of citizenship. Not only must an applicant be a citizen of the Philippines and of good moral character, but he must also be at least twenty-one (21) years of age, and a resident of the Philippines.[12] Also, the applicant must have successfully completed all prescribed courses in a law school or university officially approved by the Secretary of

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[6] *See also* RULES OF COURT, Rule 138, § 2.

[7] B.M. No. 1678, 540 SCRA 424, 429, Dec. 17, 2007.

[8] RUBEN AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT 3 (2004 ed.).

[9] In re JF Boomer, 12 Lawyers J. 421 (1947); *cited in* Harry Roque Jr., *Globalization of Legal Services: Challenges and Possibilities in the Philippine Setting*, 8TH ASEAN LAW ASSOCIATION GENERAL ASSEMBLY WORKSHOP PAPERS 55-66 (2003).

[10] CANON 1 – A lawyer shall uphold the Constitution, obey the laws of the land and promote respect for law and legal process.

[11] "I, _____, of _____ (place of birth) do solemnly swear that I will maintain allegiance to the Republic of the Philippines; I will support its Constitution and obey the laws as well as the legal orders of the duly constituted authorities therein; I will do no falsehood, nor consent to the doing of any in court; I will not wittingly nor willingly promote nor sue any groundless, false or unlawful suit, or give aid nor consent to the same; I will delay no man for money or malice, and will conduct myself as a lawyer according to the best of my knowledge and discretion, with all good fidelity as well to the court as to my clients; and I impose upon myself this voluntary obligations without any mental reservation or purpose of evasion. So help me God."

[12] RULES OF COURT, Rule 138, § 2.

Education,[13] and has completed a bachelor's degree prior to such study of law.[14]

In the case of *Re: Application of Adriano M. Hernandez to Take the 1993 Bar Examination,*[15] the Supreme Court stated therein in clear and unequivocal terms that the Court will no longer allow graduates of foreign law schools to take the bar examinations.[16] Indeed, the power to admit, suspend, disbar, and reinstate attorneys to the practice of law involves the exercise of judicial discretion and responsibility, thus, it has been traditionally exercised by the Supreme Court as an inherent part of its judicial power.[17]

The rigid requirements and conditions imposed before one can practice law in the Philippines supposedly are not intended to create a monopoly in the legal profession. Rather, it is to protect the public, the court, the client, and the bar from the incompetence and dishonesty of those who are unfit to become members of the legal profession.[18] While the requirements were not intended to create a monopoly among Filipinos, it certainly did create a monopoly limited to Filipinos.

The Supreme Court in *Dacanay v. Baker & McKenzie*[19] held that an alien law firm cannot practice in the Philippines. The Court pronounced that the respondents in this case, though members of the Philippine Bar, as members of Baker & McKenzie cannot use the firm name "Baker & McKenzie" as it "constitutes a representation that being associated with the firm they could render legal services of the highest quality to multinational business enterprises and others engaged in foreign trade and investment." Such representation, according to the Court, is unethical because Baker & McKenzie is not authorized to practice law in the Philippines.

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[13] § 5.

[14] § 6.

[15] 225 SCRA xi, July 27, 1993; Although in this case, the Supreme Court allowed Mr. Hernandez to take the bar examinations despite the fact that he completed his law degree in Columbia Law School, New York and his bachelor's degree in Duke University, North Carolina.

[16] *See however,* B.M. No. 1153 (2010) – Amending RULES OF COURT, Rule 138, §§ 5-6. This allows a Filipino citizen who graduated from a foreign law school to be admitted to take the bar examination. Interesting as well is the now popular practice among Filipinos of obtaining a law degree in the Philippines, pass the Philippine Bar, then take an LLM degree in the United States and afterwards, take a U.S. state bar exam.

[17] CONST. art. VIII, §5(5); Phil. Lawyers Ass'n v. Agrava, G.R. No. 12426, 105 Phil. 173, 176, Feb. 16, 1959; In re Cunanan, 94 Phil. 534, 544, Mar. 18, 1954.

[18] Ryan Hartzell Balisacan, *Towards Recognizing and Accommodating Differentiation Within the Legal Profession: A Critique of the Code of Professional Responsibility's Treatment of the Non-Litigation Practice of Law*, 81 PHIL. L.J. 322, 327 (2006). JORGE COQUIA, LEGAL PROFESSION READINGS AND MATERIALS: FOR STUDENTS ON HOW TO BECOME A LAWYER AND YOUNG LAWYERS OF THE 21ST CENTURY 264 (2nd ed. 2003).

[19] Adm. Case No. 2131, 136 SCRA 349, May 10, 1985.

III. THE LEGAL PROFESSION IN THE AGE OF GLOBALIZATION

A. MULTI-JURISDICTIONAL PRACTICE OF LAW (MJP)

In response to the redevelopment of national and international business practices, as well as the need to assist and reduce cost for clients, there has been a marked growth in the multi-jurisdictional practice of law (MJP).[20]

The term "multi-jurisdictional practice" of law (MJP) refers to a situation wherein a lawyer admitted to practice in one jurisdiction (the "home state") enters and performs legal services in a jurisdiction (the "host state") in which the lawyer is not admitted. Another term for this situation in legal literature is "extra-jurisdictional practice."[21]

The declared purpose of the prohibition on extra-jurisdictional practice is the protection of local clients against possibly incompetent representation.[22] It has been said that "without legal competence, a lawyer's advice is mere conversation."[23] In the Philippines, a lawyer is obliged to serve his client with competence and diligence.[24] Competence requires a lawyer's full understanding of the factual bases on which his advice will be provided, the legal principles applied to those facts, and an ability to articulate for the client how the facts and the law relate to one another.[25] The leading United States case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*[26] reasoned that the prohibition "protects local citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." The court in *Birbrower* pronounced that in the absence of proper training, examination and local licensing, it is irrelevant whether an attorney is duly admitted in another state and is, in fact, competent to practice locally.[27]

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[20] Michael Posner, *Multi-Jurisdictional Practice Issues for Labor and Employment Attorneys; A Union and Employee Side Perspective* (2004), available at www.bna.com/bnabooks/ababna/ethics/2004/posner.doc (last accessed, Jul. 17, 2009).

[21] Charles McCallum, *MJP: A Review of Proposals for Reform*, 71 THE BAR EXAMINER 26 (2002).

[22] William Barker, *Extra Jurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001).

[23] Peter Ehrenhaft, *Legal Ethics and Professional Responsibility in a Global Context*, 4 WASHINGTON UNIV. GLOBAL STUDIES L. REV. 595 (2001).

[24] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 18.

[25] Ehrenhaft, *supra* note 23.

[26] 70 Cal. Rptr. 2d 304, 949 P.2d 1 (Cal. 1998).

[27] Barker, *supra* note 22.

It has been opined however, that the prohibition may be subject to more lenient application where the client is non-local, especially if the client and the lawyer are from the same jurisdiction or, perhaps, already have a pre-existing relationship. This leniency could be also proper when certain aspects of the case relate to the jurisdiction in which the non-local lawyer is admitted.[28] These are of importance particularly to transactional lawyers[29] representing clients from their own jurisdictions or in matters connected with those jurisdictions.[30] In *Fought & Co. v. Steel Engineering & Erection, Inc.*[31] the court even quoted *Birbrower* and held that:

> **In furtherance of the public interest, the 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.[32] (emphasis supplied)

Thus, as William Barker aptly puts it: "interpretation of statutes prohibiting unauthorized practice must be expansive enough to afford the public needed protection from incompetent legal advice, but not so broad as to unnecessarily impair other public interests."[33]

Reform proposals in the United States in this field range from dealing with a lawyer's temporary presence in a host state, and reaches to the possibility of authorization to open up an office and establish a permanent presence in a host state.[34] Some of these proposals have even been presented to the WTO.[35] And as will be subsequently illustrated, other countries have in fact already introduced reforms in order to address this growing field of law.

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[28] *Id.*

[29] i.e. those who primarily engage in non-litigation aspects of law.

[30] Barker, *supra* note 22.

[31] 76 Cal. Rptr. 2d 922 (Cal. Ct. App. 1998).

[32] AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration EC 3-9.

[33] Barker, *supra* note 22.

[34] McCallum, *supra* note 21.

[35] *See* World Trade Organization, *Communication from the United States: Legal Services*, S/CSS/W/28, Dec. 18, 2000.

1. The GATS classification list should be understood to include the provision of legal advice or legal representation in such capacities as counselling in business transactions, participation in the governance of business organizations, mediation, arbitration, and similar non-judicial dispute resolution services, public advocacy, and lobbying;

2. The WTO Members must be allowed to examine liberalization opportunities with regard to market access and national treatment barriers as those terms are understood in the GATS.

B. OPENING THE LEGAL MARKET TO BOOST THE ECONOMIC MARKET

Globalization may be defined as the "integration and democratization of the world's culture, economy and infrastructure through transnational investment, rapid proliferation of communication and information technologies, and the impact of free-market forces on local, regional, and national economies."[36] The three main elements associated with economic globalization are (1) increased openness of economies to international trade, (2) financial flows, and (3) direct foreign investments, which leads to an integrated global economy, and in theory, translates to business opportunities, rapid growth of knowledge and innovation, and development.[37] This is most especially true for developing countries.

As a matter of sound national policy, a country must respond to this phenomenon with greater openness and economic integration, otherwise, it runs the risk of being caught unprepared or left behind.[38] However, it cannot be gainsaid that this requires strategic policy formulation and establishment of the proper regulatory framework.

Legal services have as their vital role business support and facilitation which is a critical part of the infrastructure that underpins commercial transactions.[39] It facilitates economic and commercial activity by "defining rights and responsibilities of corporations and outlines for them the processes for dispute resolution should commercial conflicts arise."[40] The nature of legal services as a key business input has further been placed at the forefront with the emergence of borderless commerce and it is now commonplace that clients demand for multi-jurisdictional advice from law firms.[41] In other words, "corporations, financial institutions and other clients involved in cross-border commercial transactions constantly seek legal advisory services covering the laws of jurisdictions in which the transaction spans."[42] Verily, as the volume of cross-border business transaction increase, the demand for fully integrated legal services covering the laws of multiple

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[36] Flerida Ruth Romero, *Legal Challenges of Globalization*, 81 PHIL. L.J. 137, 137-38 (2006).

[37] MICHAEL TODARO & STEPHEN SMITH, ECONOMIC DEVELOPMENT 510 (8th ed. 2003).

[38] Myrna Austria, *Liberalization and Regional Integration: The Philippines' Strategy to Global Competitiveness*, PHILIPPINE INSTITUTE FOR DEVELOPMENT STUDIES DISCUSSION PAPER SERIES NO. 2001-09 (2001)

[39] World Trade Organization, *Communication from Australia: Negotiating Proposal for Legal Services*, S/CSS/W/67, Mar. 28, 2001.

[40] International Legal Services Advisory Council (hereinafter "ILSAC"), *ILSAC Submission on Legal Services to the Department of Foreign Affairs and Trade in respect of a possible Australia-Republic of Korea Free Trade Agreement* (2009), *available at* http://www.dfat.gov.au/geo/rok/fta/submissions/akfta_pubsub_ilsac.pdf.

[41] World Trade Organization, *supra* note 35.

[42] ILSAC, *supra* note 40.

jurisdictions needs to be addressed as it is "critical to [the] sustainability and growth of international trade and investment."[43] Certainly it is no surprise that law firms around the world are capitalizing on this increase in cross-border transactions and are inevitably internationalizing as their clients pursue opportunities in a rapidly globalizing marketplace.

In the field of economics, the principle of *comparative advantage* asserts that "a country should, and under competitive conditions, specialize in the export of the products that it can produce at the lowest relative cost."[44] The Philippines, as a nation of over 80 million people, has human resource and skilled services as its primary surplus product. Even in the legal profession, lawyers admitted to the Philippine Bar continue to increase each year. The Philippine Institute for Development Studies (PIDS) reported that the services sector is in fact the biggest source of employment in the Philippines and ASEAN.[45] Thus, in terms of taking advantage of opportunities that globalization brings, the Philippines looks to foreign investments to generate jobs for its surplus of human resource.[46]

While legal services are essential for trade and investment, they are increasingly traded internationally as well. Foreign law firms found in other countries provide an additional pool of available jobs as they primarily recruit fresh graduates of law schools. In the process, these young lawyers are provided an opportunity to gain a first-hand-first-class experience in cross-border and transnational commercial transactions, which further increase the global competitiveness of the host country's legal services pool.

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[43] *Id.*

[44] TODARO & SMITH, *supra* note 37, at 526.

[45] PHILIPPINE INSTITUTE FOR DEVELOPMENT STUDIES, THE GLOBAL CHALLENGE IN SERVICES TRADE: A LOOK AT PHILIPPINE COMPETITIVENESS 3 (2006).

[46] Section 2 – Declaration of Policy, of the Foreign Investments Act of 1991 (R.A. 7042) in fact provides that:

> "It is the policy of the State to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and governments, including their political subdivisions, in activities which significantly contribute to national industrialization and socio-economic development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws. Foreign investments shall be encouraged in the enterprises that significantly expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services. Foreign investments shall be welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market."
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The importance to international trade and investment of a regulatory framework that facilitates the steady provision of competent transnational legal services and service suppliers cannot be overemphasized. Such systems are seen as a catalyst for foreign investment, contributing to investors' sense of security and predictability of the local business environment.[47] And as previously implied, the presence of foreign law firms in a country is a good source of skill and experience with respect to transnational transactions.

C. STATE MODELS

i. JAPAN

Japan was one of the first Asian countries to liberalize its legal services. The country went through a lengthy transition period and opened its legal services market in three stages:

1. In 1986 Japan enacted the Special Measures Law for the Handling of Legal Practice by Foreign Attorneys, otherwise known as the Gaiben[48] Law. A major criticism of this Law was the prohibition on foreign law firms in that, "[w]hile foreign lawyers could obtain qualification in Japan as *gaiben*, foreign law firms were denied access to Japan's legal market. *Gaiben* were obliged to use their individual names, rather than the *gaiben's* firm name when doing business in Japan."[49] By 1987, foreign attorneys were allowed to practice as foreign legal consultants;

2. The Gaiben Law was liberalized in 1994, following pressure from other countries - primarily the United States. This partial revision of the law was for the purpose of introducing a "more open system for the internationalization of legal services suitable for Japan's position internationally."[50] The amendment also allowed the law firm's name to be used without referring to the individual, and "foreign law firms were allowed to jointly retain clients with Japanese firms for qualified matters and to share profits";[51]

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[47] World Trade Organization, Council for Trade in Services, *Legal Services - Background Note from the Secretariat*, Jul. 6, 1998.

[48] "Gaiben" is the Japanese term for a foreign attorney.

[49] *Japan's Liberalisation in Legal Services*, WINDOW ON THE WORLD, at 10.

[50] *Id.*

[51] Brian Rupp & Jae En Kim, *Korean Legal Services Set to Open Up*, THE NAT'L L.J. (2008).

The revised law also allowed for specified joint enterprises (SJE) between *gaiben* and Japanese lawyers. The advantage of this is that 'one-stop' shopping of global legal services may be provided. Thus, *gaiben* are no longer required to hire different local law firms for legal services in Japan.[52]

3. Finally, in 2005, joint ventures with Japanese firms and hiring of Japanese lawyers were permitted.

It has been observed that since 1987, "Japan has seen a gradual expansion of Japanese law firms. This expansion was partly realized through mergers with other Japanese firms to create full-practice mega firms."[53] Moreover, since the Gaiben Law's enactment in 1986, 43 foreign law firms, 28 of them American, have opened, branches in Japan and more than 150 foreign lawyers have qualified to practice as *gaiben*.[54]

ii. KOREA

South Korea is one of the latest countries in Asia to liberalize its legal services market. Like in the Philippines at present, Korean law once prohibited foreign law firms from establishing offices in Korea, and lawyers with foreign licenses were not officially allowed to practice foreign law. Only a *byeon-ho-sa*[55] registered with the Korean Bar Association could supply legal services in Korea. So-called "foreign legal consultants (FLC)" in various Korean law firms were not permitted to work independently as there was no formal registration system recognizing their status as foreign lawyers.[56] Despite all this, a small number of US and UK law firms, along with a few Australian firms, provided a limited amount of fly-in, fly-out commercial legal advisory services to both government and private sector enterprises from offices in the region. [57]

However, the legal landscape changed with the Korean National Assembly's passing of the Foreign Legal Consultant Act (FLCA) on March 2, 2009. This new legislation permits foreign lawyers to register as "foreign legal consultants" and foreign law firms called "foreign legal consulting offices (FLCO)" to open offices in Korea, provided that the countries of the jurisdiction where they are licensed have signed and ratified free trade

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[52] *Supra* note 49.
[53] Rupp & Kim, *supra* note 51.
[54] *Supra* note 49.
[55] i.e. Korean-licensed lawyer
[56] Rupp & Kim, *supra* note 51.
[57] ILSAC, *supra* note 40.

agreements (FTAs) with Korea, including liberalization of the legal services market. The Act took effect on September 26, 2009.[58]

a. With the United States

Under the United States-Korea FTA – signed in June 2007 –, the opening of the Korean legal services market is phased in three steps:[59]

The first phase allows lawyers who are licensed in the United States to counsel on U.S. laws and treaties to which the United States is a party. U.S. law firms will also be permitted to open a branch office in Korea that is an FLCO under the FLCA. This phase, however, is conditioned upon the ratification of the treaty pending between both countries

The second phase is scheduled to begin within two years after the FTA becomes effective. With this, U.S. law firms will be permitted affiliate themselves with Korean law firms and will subsequently be allowed to take cases where both U.S. and Korean laws are involved.

The third and final stage is scheduled to begin within five years after the FTA becomes effective. Under certain requirements, U.S. law firms will be permitted to form partnerships with Korean law firms and, consequently, hire Korean lawyers.

Just like in Japan, the projected pay-off under this arrangement is the formation of *one-stop global law firms*:

> Despite these restrictions [limits on the liberalization], the act appears to be a significant step toward opening the legal services market in Korea. U.S. companies looking to conduct businesses in Korea may benefit enormously from the change. In the past, it was necessary for such companies to hire a Korean law firm because foreign attorneys were prohibited from executing legal documents on behalf of their clients in Korea. Now companies will have available to them fully integrated, one-stop international law firms that can meet the local needs as well as provide them with global know-how and resources. These changes could reduce the cost and inconvenience to both Korean and U.S. businesses in locating and retaining experienced U.S. counsel in Korea. **The availability of U.S. law**

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[58] Yookyung Moon, *Korea Passes Foreign Legal Consultant Act, Opening the Country's Legal Service Market to Law Firms in Foreign Countries that are Parties to Effective Free Trade Agreements with Korea (2009), available at* www.antitrustlawblog.com/2009/04/articles (last visited Jul. 17, 2009).

[59] *Id.*

> **firms in Korea may also provide U.S. companies with a certain comfort factor that could further facilitate Korea's long-sought foreign investment activity.**
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> Perhaps the greatest benefit to U.S. companies will be the caliber of legal services that will be available in Korea. There is currently a disproportionately small number of Korean lawyers who are experienced in sophisticated finance or corporate transactions.... **Opening of the legal services market means transfer of best practices and expertise of international law firms.** Competition will also catalyze the creation of larger law firms with a capacity to handle large-scale transactions. **With an open market, U.S. businesses can expect significant improvement in the overall quality of legal services in Korea.**[60] (emphasis supplied)

b. With Australia

On the one hand, there are the Australian law firms that eye Korea with significant interest as it is seen to be a relatively untapped market of an "increasingly sophisticated economy with an active export-oriented corporate sector, well established financial sector, strong infrastructure investment and well established business regulation and competition enforcement." For Australian corporations, on the other hand, it is the finance and insurance sectors that are of particular interest.[61]

As previously mentioned, Korea will undergo staged improvements for commercial association to the United States under their pending FTA. At the very minimum, Australia also seeks an FTA with Korea that provides the same opportunities with no later start date than that given to other trading partners.

iii. AUSTRALIA

Unlike Asian countries wherein liberalization were spurred primarily by direct pressure from countries such as the United States or indirect pressure from market forces, Australia has independently liberalized its legal services market. In 2001, Australia proposed a so-called *"limited licensing concept"*[62] defined as:

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[60] Rupp & Kim, *supra* note 51.

[61] ILSAC, *supra* note 40.

[62] The International Bar Association (IBA) definition is: regulation of foreign lawyers as practitioners of foreign law for the limited purpose of permitting them to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host bar. *See* World Trade Organization,

> [A] regulatory approach that permits foreign legal practitioners and foreign law firms to practise their home-country law, third-country law (where qualified), and international law in a host country, without having to satisfy the more burdensome requirements in relation to gaining a right to practice host-country law.[63]

Consistent with this stance, it adopted a limited licensing scheme consistent with the International Bar Association's Statement of General Principles of the Establishment and Regulation of Foreign Lawyers.[64] Through a simple registration process with a State or Territory professional body, foreign lawyers who are qualified and licensed to practice law in their home state may acquire a limited license to provide legal advisory services. This registration process involves:

- Establishing that the foreign lawyer is duly qualified and registered to engage in legal practice in one or more foreign countries and is not an Australian legal practitioner;
- Satisfying requirements as to probity and good professional standing; and
- A declaration to clients of whether they maintain professional indemnity insurance.[65]

Similar to the Japanese and Korean models, foreign lawyers and law firms have a right to practice foreign law and a right to enter into partnership or other forms of voluntary commercial association with other foreign legal practitioners or Australian legal practitioners, without limitation on the number and type of such associations. Fly-in, fly-out legal practice is permitted for an aggregate duration of 90 days within any twelve month period, without the requirement to register as a foreign lawyer.[66] Australian liberalization has gone as far as giving foreign lawyers the option of seeking admission as an Australian legal practitioner. And unlike the Philippines or Malaysia, Australia has no nationality or citizenship requirement for legal practitioners, no residency requirements, and no quantitative or geographic

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Communication from Australia: Negotiating Proposal for Legal Services Revision, S/CSS/W/67/Suppl.1/Rev.1, July 10, 2001.

[63] *Id.*

[64] International Bar Association, *Resolution on the General Principles for the Establishment and Regulation of Foreign Lawyers*, adopted by the Council of the IBA in Vienna on June 6, 1998 and called for the regulation of foreign lawyers as practitioners of foreign law for the limited purpose of permitting them to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host bar.

[65] ILSAC, *supra* note 40.

[66] *Id.*

limitations for admission or establishment of offices as it sees them as discriminatory trade-distorting barriers to the liberalization of trade in legal services.[67]

This shift to progressive liberalization has produced transparent regulation which substantially benefits Australian and foreign lawyers alike. These regulatory changes served as an impetus for competitiveness and innovation in the legal practice. Furthermore, the open market for foreign lawyers and law firms has expanded Australia's legal services sector and international trade in legal services. It also provided additional opportunities for Australian practitioners as they are now increasingly recruited in overseas jurisdictions, including by UK and US law firms, to work in those jurisdictions and Asia.[68]

IV. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The General Agreement on Trade in Services (GATS) is the first ever set of multilateral, legally enforceable rules covering international trade in services. It is one of the more than twenty trade agreements administered and enforced by the World Trade Organization (WTO). The GATS was established in 1994, at the conclusion of the "Uruguay Round" of the General Agreement on Tariffs and Trade (GATT) and was one of the trade agreements adopted for inclusion when the WTO was formed in 1995. The mandate of the GATS is the liberalization of trade in services and the gradual phasing out of government barriers to international competition in the services sector.

A. ON LEGAL SERVICES

The WTO's Services Sectoral Classification List[69] does not specifically define 'legal services'. The GATS, however, does define *services* as "including any service in any sector except services supplied in the exercise of governmental authority";[70] 'service supplied in the exercise of governmental authority' means "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."[71]

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[67] World Trade Organization, *supra* note 38.
[68] ILSAC, *supra* note 40.
[69] MTN.GNS/W/120 of Jul. 1991.
[70] General Agreement on Trade in Services (hereinafter "GATS") (1994), art. I(3)(b).
[71] GATS, Art. I(3)(c).

In its communication with the WTO, the United States suggested that "the classification should be understood to include the provision of legal advice or legal representation in such capacities as counselling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying."[72] Australia in its own communication sought to expand the definition of 'legal services'.[73] However, accepted or expanded definition or not, it is generally acknowledged that the WTO's definition of 'services' clearly subsumes legal services.[74]

The impetus for the WTO's General Agreement on Trade in Services (GATS), in particular for trade in legal services, has been articulated in this wise:

> In the past decades international trade in legal services has grown as a result of the internationalisation of the economy. Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdictions often comes from their corporate clients, who do business across borders and choose to rely on the services of professionals who are already familiar with the firm's business and can guarantee high quality services. **Some countries also favour international trade in legal services, as the establishment of foreign lawyers is seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment.** [75] (emphasis supplied)

Laurel Terry identifies seven (7) key GATS provisions that are of ultimate significance to the regulation of 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; (6) the market access; and (7) national treatment provisions.[76]

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[72] World Trade Organization, *supra* note 35.

[73] World Trade Organization, *Communication from Australia: Negotiating Proposal: Legal Services Classification*, S/CSS/W/67/Suppl.2, Mar. 11, 2002.

[74] *See* Dante Tinga, *From General Practice to Cross-Border Practice: The Changing Trends and Paradigms*, BENCHMARK ONLINE (May 2008); Roque, *supra* note 9.

[75] World Trade Organization, *supra* note 47.

[76] Laurel Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VANDERBILT J. OF INT'L L. 989 (2001).

1. Once a country signs the GATS there is a transparency undertaking which requires that all relevant measures regulating [legal] services be published or otherwise made publicly available. If there are any relevant changes as to government policies, regulations, or administrative guidelines which significantly affect trade in services covered by the specific commitments under the Agreement, then the country must correspondingly notify the WTO.

2. A signatory country is also subject to the most-favored nation (MFN) provision in the GATS. This provision requires each country to accord all WTO Member States the same treatment that it provides to any WTO Member State. This prohibits reciprocity provisions insofar as they are applied to foreign service providers. At the time the GATS was signed a WTO Member State was entitled to exempt legal services from the MFN. The Philippines, however, did not place legal services to the MFN exemption.

3. WTO Member States are subject to a domestic regulation provision which requires that regulatory measures – such as admission, licensing, and discipline measures – be administered in a manner that is reasonable, objective, and impartial. Furthermore, there is an undertaking that qualification requirements and technical standards will be based on transparent and objective criteria and will not be more burdensome than is actually necessary to ensure the quality of the service.

To be clear, the GATS by no means definitively regulates legal services or cross-border legal practice. It actually delegates to other institutions the obligation to develop a more detailed understanding of how the provisions of the GATS should apply to legal services. It is the WTO Council on Trade in Services – which is the entity responsible for administering the GATS – that is to establish the necessary bodies to create disciplines regarding domestic regulations to address qualification requirements, such as the bar admission process.[77]

4. Recognition requirements are most certainly relevant in the matter of deciding whether or not to recognize lawyers licensed in other jurisdictions. WTO Member States may independently decide to recognize the qualifications of foreign lawyers as valid or such recognition may be based upon an agreement or arrangement with the country concerned.[78] The

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[77] GATS, art. VI.
[78] GATS, art. VII.

standards upon which this recognition shall be based, however, is not provided in the GATS itself.[79] The GATS contemplates that recognition issues may also be handled through "Mutual Recognition Agreements" negotiated between GATS Member States in order to reach a common international standard and criteria for recognition as well as practice.

5. Article XIX of the GATS requires all WTO Member States to engage in "progressive liberalization" and requires additional negotiations within five years. This provision is the basis for the GATS 2000 negotiations.

The foregoing are general requirements that apply to all WTO Members. But if a country lists a category of services – in this case, legal services – on its Schedule of Specific Commitments, then future laws – and current laws not included in the Schedule – governing that service must comply with additional provisions in the GATS.

6. One such additional provision is the market access provision in Article XVI. The market access provision prohibits limitations on the number of service providers (e.g. quotas, numerical limitations, or monopolies, economic needs tests, requirements for certain types of legal entities, and maximum foreign shareholding limits). It entails that access to legal services cannot be provided in a manner less favorable than is set forth in the country's Schedule.

7. Another additional provision that applies once a service is scheduled is the national treatment provision in Article XVII. In effect, it acts as an equal protection clause for foreigners as compared to domestic service providers since it prohibits regulators from providing foreigners with treatment that is less favorable than the treatment it accords to its own services and service suppliers. Stated differently, foreign firms must be treated as favorably as domestic firms. Any measure which violates the national treatment obligation must be clearly inscribed in the Member's schedule of commitments.

Apart from these general provisions, under the GATS, there are four (4) modes of supply of a [legal] service for which specific commitments may be taken:[80]

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[79] Terry, *supra* note 76, at 1002.
[80] GATS, art. I(2).

Mode 1 is referred to as the "cross-border supply of services" wherein the service is supplied from the territory of one Member into the territory of another Member. This mode assumes particular relevance later on in the discussion on legal process outsourcing (LPO) wherein law firms in countries such as the United States may outsource contract reviews or preparation of legal documents to lawyers in the Philippines.

Mode 2 refers to "consumption abroad" or cross-border consumption of services in which the service is supplied in the territory of one Member to a service consumer coming from another Member. One example could be a foreign law firm providing service to a client overseas.

Mode 3 is the establishment of "commercial presence" which entails that the service is supplied by setting up a business or professional establishment, such as a subsidiary corporation or a branch or representative office, in the territory of one Member by a service supplier of another Member. This is one of the hallmarks of opening the legal market of a country as it facilitates foreign law firms opening a branch office in the territory of the host state. The opening of such branches may be classified as foreign investment as it will generate jobs for the local population.

Mode 4 pertains to the "movement of natural persons" which means human resource from one Member goes to the territory of another to provide services for short-term, non-immigrant, business-related purposes. Here, a law firm based in the United States can send a partner or associate to a branch office in the Philippines to manage its operations for a certain number of years, or perhaps even an associate from the Philippines is hired by a U.S. law firm to practice there for a few years – and when such Filipino lawyer returns, he/she is more experienced in transnational practice.

B. CHANGING PHILIPPINE POLICY PERSPECTIVE

The Philippine Senate, in ratifying the WTO pursued a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity as well as the promotion of industries which are competitive in both domestic and foreign markets.[81] Former President Fidel V. Ramos further saw in the WTO "the opening of new opportunities for the services sector and the attraction of more investments into the country."[82]

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[81] Tanada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997.
[82] *Id.* at 31-33.

As providently observed by Supreme Court Justice Dante Tinga, "the accession by the Philippines to the General Agreement on Trade in Services (GATS) as part of the Uruguay Round Agreement might very well be the gateway to the allowance of cross-border practice of law in the Philippines."[83] It must be noted, however, that the Philippines has not a Schedule of Specific Commitments for the practice of law under the GATS, nor has it submitted any proposal for negotiation relating to such cross-border practice or permissible multi-jurisdictional practice.

As can be gleaned from the earlier chapter on the admission requirements to practice law in the Philippines, the Philippines maintains a stance of *protectionism* with regard to the legal profession. During the deliberations of the Constitutional Commission (Con-Com) that drafted the present Philippine Constitution, the National Economy and Patrimony article was openly advocated as embodying a Filipino First Policy and this was extended to the practice of professions because it was thought that in principle, national patrimony and economy included the practice of professions.[84] However, in the explanation of the Con-Com's vote to adopt the article on National Economy and Patrimony, it was stated that "...the provisions strike a balance between national and foreign interests. The Article recognizes the need to invite foreign investment."[85] Thus, as remarked by Justice Sandoval-Gutierrez, "we must learn to interpret stodgy black-letter law within the context of pervasive political, social, and economic developments."[86]

In the case of *Tanada v. Angara*,[87] the Court clarified that the provisions of the Constitution that give life to a seeming "Filipino First Policy" is not a judicially enforceable right, but is a mere guideline for legislation. While indeed the sovereignty of the people stands behind all public functions, the Court also held in *Tanada* that sovereignty may voluntarily be submitted to limitations by international treaties if such would result in greater benefit to the people.

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[83] Tinga, *supra* note 74.

[84] Raul Pangalangan, *Law and Economic Choice in Philippine Constitutional Law*, *in* LAW, DEVELOPMENT AND SOCIO-ECONOMIC CHANGES IN ASIA 153 (2003).

[85] *Id.* at 151-52.

[86] Angelina Sandoval-Gutierrez, *Globalization in the 21st Century: A Jurist's Perspective*, 81 PHIL. L.J. 187, 190 (2006).

[87] The case arose from a petition filed by then Senators Wigberto Tanada and Anna Dominique Coseteng assailing the WTO Agreement for violating the mandate of the 1987 Constitution to "develop a self-reliant and independent national economy effectively controlled by Filipinos... (to) give preference to qualified Filipinos (and to) promote the preferential use of Filipino labor, domestic materials and locally produced goods."

Given the proposals for limited liberalization of legal practice by countries such as Australia and the United States, as viewed against the backdrop of globalization and the prospect of economic development, this Philippine protectionist policy can and must give way; as it has in the past.

The policy of *protectionism* has long been in existence in the Philippines but history shows that such policy has not always been effective. Prior to the 1980's, Philippine industries operated under an "imperfectly competitive structure characterized by unrealized scale economies and poor economic growth performance."[88] The adverse effects of such protectionist regime prompted the government to undertake trade and investment liberalization, deregulation, and privatization beginning the 1980's. The reforms were undertaken to improve efficiency and resource allocation, and attaining global competitiveness and sustained economic growth.[89]

The GATS is part of the WTO Agreement, a treaty which the Philippines ratified, thus it has the force of [statute] law in this jurisdiction. Should the Philippines opt to negotiate a Schedule of Specific Commitments regarding the liberalization of the legal profession with the WTO, such Schedule would also form part and parcel of the law of the land. As such, it serves as the exemption from the Constitutional provision that "the practice of all profession in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law."[90]

Apart from Executive policy and Legislative fiat, the Judiciary itself has to get involved in the matter of liberalizing the legal profession. As mentioned in the earlier chapter on admission, the power to admit applicants to the legal profession involves the exercise of judicial discretion, and it is the Supreme Court that is the sole authority that can promulgate rules of admission to the practice of law in the Philippines.[91] But well beyond mere promulgation of rules of admission, it may very well happen that should the Philippine government negotiate a Schedule of Specific Commitment for legal services, another *Tanada* may arise, and in such event, the Court must uphold this policy of liberalization.

To be clear, the prospect of opening the Philippine legal market is not one that is absolute in character. Indeed, the countries that have opened their legal markets did not pursue such absolutism. It is to open the legal

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[88] Austria, *supra* note 38.
[89] *Id.*
[90] CONST. art. XII, § 14(2).
[91] art. VIII, § 5(5); Phil. Lawyers Ass'n v. Agrava, G.R. No. 12426, 105 Phil. 173, Feb. 16, 1959.

market to an extent that will benefit the Filipino people. Such benefits shall be explained in the succeeding chapters.

V. SOME CONSIDERATIONS FOR LIBERALIZATION

A. COMPETITION WITH FILIPINO PRACTITIONERS

i. Size does not matter

One, if not the foremost, concern in opening the Philippine legal market is the protection of local lawyers – from solo practitioners to law firms. This presents the problem of striking a balance between increased liberalization of trade in legal services and the need to support local lawyers. A simple comparison of the ten (10) largest Philippine and U.S. law firms[92] would show the reason for this apprehension:

Philippines		United States	
Law Firm	**Firm Size**	**Law Firm**	**Firm Size**
Sycip Salazar Hernandez & Gatmaitan	133	Baker & McKenzie	3,246
Angara Abello Concepcion Regala & Cruz	110	Jones Day Reavis & Pogue	1,822
Romulo Mabanta Buenaventura Sayoc & Delos Angeles	75	Skadden Arps Slate Meagher & Flom	1,822
Villaraza Cruz Marcelo & Angangco	55	Latham & Watkins	1,627
Quisumbing Torres & Evangelista	52	White & Case	1,581
Picazo Buyco Tan & Fider	48	Sidley Austin Brown & Wood	1,511
Castillo Laman Tan Pantaleon & San Jose	44	Mayer Brown Rowe & Maw	1,351
Siguion Reyna Montecillo Ongsiako & Cruz	38	Holland & Knight	1,273
Quasha Ancheta Pena & Nolasco	31	Morgan Lewis & Bockius	1,098
Ponce Enrile Reyes & Manalastas	26	Shearman & Sterling	1,087

[92] Jonathan Pampolina & Juan Crisostomo Echiverri, *You, Me and the Firm: Tracing the Historical Development of Philippine Legal Practice from Solo Practice to Law Firms*, 81 PHIL. L.J. 879, 901 (2007).

This disparity in law firm size is attributable to the wide difference between the economic growth and capability of both countries as measurable by their respective gross domestic product (GDP).[93] Certainly the sheer size of a law firm has its advantages, as Michael Asimow points out:

> Bigness creates a fluid labor pool of lawyers to meet unpredictable staffing demands, such as complex, high-stakes litigation or a hostile takeover; smaller firms must hire contract lawyers or associate with other firms to meet such crises. Large size also permits synergies to occur between lawyers with different skills and client bases, so that the firm can market new services to existing clients.[94]

However, this apprehension that Philippine practitioners will be overwhelmed by the influx of foreign law firms must be appraised in light of the usual legal services actually provided by foreign legal practitioners. As explained by the International Legal Services Advisory Council (ILSAC):

> Commercial legal services are typically categorised as *producer* (or intermediate or trade-enabling) services provided in the form of advice to corporate clients and financial institutions. These producer legal services form the core in delivering the level of certainty and assurance required for commercial, trade and investment decisions...
>
> ...Foreign lawyers are, therefore, not interested in providing *consumer* legal services, which are typically final services such as those relating to family law, wills and personal injury. Nor are foreign legal practitioners usually interested in obtaining a right of audience to represent clients in the courts of host jurisdictions, other than a right to appear in international commercial arbitration. Foreign legal practitioners are predominantly [sic] concerned with providing legal advisory services that facilitate cross-border commercial, trade and investment activity of their corporate clients.[95]

In other words, lawyers supplying legal services abroad usually act as foreign legal consultants (FLC) of large corporate and financial institutions of a multi-national character. If we are to adopt the *limited licensing concept* proposed by Australia, these foreign lawyers will be limited to providing advice in international law, the law of their home country or in the law of

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[93] *Id.* at 900.

[94] Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1361 (2001); *cited in* Pampolina & Echiverri, *supra* note 92, at 906.

[95] ILSAC, *supra* note 40; World Trade Organization, *supra* note 62.

any third country for which they possess the required qualifications.[96] In other words, they shall not encroach into the primary fields of practice which are the source of bread and butter of local lawyers. They will not be involved in the practice of domestic law of the host state due to barriers of qualification requirements shaped along national lines.[97]

Furthermore, as Justice Tinga notes, this added competition could actually do some good to the profession as it may provide the impetus for the improvement or further competence of Filipino lawyers, who may have settled into professional complacency.[98]

ii. Legal Process Outsourcing

Apart from the provision of legal advice, legal process outsourcing (LPO) is a growing practice that is gaining popularity in the international market. Outsourcing is the sending of work traditionally handled inside a company or firm to an outside contractor for performance. Companies or firms resort to this practice as it provides convenience, cost-savings, and problem solving.[99]

It has been mentioned that there is a wide disparity between the economic growth and capability of the Philippines and the United States. If anything, this means that there is also a disparity between the costs of the talent pool between the two countries. Bluntly stated, quality legal practitioners come cheaper in the Philippines. To put things in perspective, lawyers in U.S. may charge from $50 to $1000 an hour, but in offshore locations – perhaps the Philippines – legal professionals charge an equivalent of just $20 to $100 an hour. It may very well be that the services of a seasoned lawyer in the Philippines cost cheaper than a lowly paralegal in the United States. These Philippine lawyers would then be expected to carry out legal and administrative tasks that would have been handled by these paralegals.

India is one case of a country with a booming LPO market. The reason for this is no different from the booming call center industry of either India or the Philippines: firms are looking for cheap but highly

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[96] N.B. if we are to adopt the proposals given by the United States to the WTO, foreign law practitioners will also be allowed to practice in other fields. *see* World Trade Organization, *supra note* 35.

[97] Trade Policy Division, Department of Commerce, Government of India, *A Consultation Paper on Legal Services Under GATS in preparation for the On-Going Services Negotiations at the WTO.*

[98] Tinga, *supra* note 74.

[99] Alison Kadzik, *Current Trend to Outsource Legal Work Abroad and Ethical Issues Related to such Practices*, 19 GEO. J. LEGAL ETHICS 731 (2006).

educated, English-speaking workers from developing countries. In terms of scale, the LPO industry could very well be the next "call center industry" in the Philippines, and the market must be captured before countries such as India dominate it.

Thus, as a matter of sound business practice today, law firms and legal departments worldwide take advantage of the low cost talent pool available in open legal markets through legal process outsourcing. With the current global recession which hit primarily the West, LPO becomes an even more attractive option. LPO can include:

(1) Intellectual property outsourcing (such as patent drafting);
(2) Litigation support;
(3) Contract management
(4) Paralegal support
(5) Legal document review
(6) Preparation of deposition summaries
(7) Litigation document management
(8) Legal research & analysis
(9) Legal auditing
(10) Contract drafting

The modes of supply under the GATS provide a framework on how this industry would be practiced in the legal profession.

As mentioned under Mode 1, legal services can be supplied from the territory of one Member into the territory of another Member. As a clear example, a law firm in the United States can send through fax or e-mail a contract which a Philippine lawyer or firm would review; and after such contract review, the Philippine lawyer or firm would then e-mail it back to the U.S. firm. However, this practice in fact could present significant problems in terms of confidentiality, conflict-of-interest, and supervision which will be discussed in the succeeding chapters. It is worth noting that in the *Birbrower* case, this practice of e-mailing or faxing legal opinions from one jurisdiction to another, given certain conditions, may be considered unauthorized practice of law under U.S. law.

A combination of Modes 3 and 4 could provide a more secure framework for LPO practice. Under Mode 3, foreign law firms may be able to set up branch offices in the Philippines and with these branches hire local lawyers to perform the outsourcing work. With Mode 4, foreign law firms can send a partner or associate to oversee the operations in this branch

office. This would provide better supervision of the quality of the work done, as well as the security of the information sent overseas.

B. CODE OF CONDUCT AND ETHICS

Certainly there is to be expected potential problem areas that may arise with respect to the increase in cross-border multi-jurisdictional practice. An especially crucial area is the applicable code of conduct to lawyers engaged in such practice. As most nations adopt their own codes of legal ethics and conduct, the problem of which code shall apply to the foreign practitioner – will it be that of the host state's or of the home state's? – inevitably arises. Indubitably, as cross-border practice becomes more prevalent worldwide, the need for the adoption of international agreements governing the code of conduct of lawyers in cross-border practice will become more pressing.[100] But undoubtedly, this problem already stares in the face many legal jurisdictions. As we consider the prospects of opening the Philippine legal market, these concerns may be addressed in the interim with the applicable rules as regards those who practice law in the Philippines.

The American Bar Association (ABA), in its Formal Opinion 88-356.32 identified the following areas of ethical concern that arises in the use of temporary lawyers, which applies to outsourced legal work:

(1) Avoiding conflicts of interest;
(2) Maintaining confidentiality of information relating to the representation of clients;
(3) Disclosing to clients the arrangement between the lawyer and the firm in some circumstances; and
(4) Maintaining professional independence of the lawyer performing the work, from the non-law company to which the fee is paid.[101]

i. Confidentiality

Certainly one of the major concerns for firms and departments that utilize LPO is that of security and the confidentiality of their client's data in the offshore branches. Just like other jurisdictions, the legal practitioners in the Philippines are expected to keep all client information confidential. As mandated by Canon 17 of the Code of Professional Responsibility: "a lawyer

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[100] Tinga, *supra* note 74.
[101] Kadzik, *supra* note 99.

owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed in him."

In our jurisdiction, there also exist other laws and rules of procedure that uphold the fiduciary relationship of lawyer and client. The Revised Penal Code imposes the penalty of *prision correccional* in its minimum period and/or a fine upon any attorney-at-law or solicitor for "any malicious breach of professional duty or of inexcusable negligence or ignorance, [which] shall prejudice his client, or reveal any of the secrets of the latter learned by him in his professional capacity."[102] The Rules of Admissibility of Evidence[103] also provide for the privilege of attorney-client confidentiality:

> Sec. 24. *Disqualification by reason of privileged communication.* – The following persons cannot testify as to matters learned in confidence in the following cases:
>
> x x x
>
> (b) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of, or with a view to, professional employment, nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of the client and his employer, concerning any fact the knowledge of which has been acquired in such capacity.

As well as the Rule on Attorneys and Admission to the Bar[104] which states that:

> Sec. 20. *Duties of attorneys.* – It is the duty of an attorney:
>
> x x x
>
> (e) To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client, and to accept no compensation in connection with his client's business except from him or with his knowledge and approval.

Thus while there are apprehensions that problems can arise because some cultures may not understand that revealing confidential client information about a matter handled by the foreign firm can result in an ethical violation, it is clear that Philippine legal practice and culture upholds this principle of confidentiality.[105]

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[102] REV. PEN. CODE, art. 209. *Betrayal of trust by an attorney or solicitor – Revelation of secrets.* The Revised Penal Code is Rep. Act No. 3815.

[103] RULES OF COURT, Rule 130.

[104] Rule 138.

[105] Kadzik, *supra* note 99.

ii. Conflict of Interest

At the very core of the codes of ethics is the fiduciary relationship between the lawyer and his client. This is expressed in Canon 15 of the Code of Professional Responsibility which provides that "a lawyer shall observe candor, fairness, and loyalty in all his dealings and transactions with his clients."[106] Corollarily, this entails that lawyers avoid probable[107] conflict of interest in their practice. There is conflict of interest when:

> ...there is an inconsistency in the interests of two or more opposing parties. The test is whether or not in behalf of one client, it is the lawyer's duty to fight for an issue or claim but it is his duty to oppose it for the other client. In short, if he argues for one client, this argument will be opposed by him when he argues for the other client...
>
> There is a representation of conflicting interests if the acceptance of the new retainer will require the attorney to do anything which will injuriously affect his first client in any matter in which he represents him and also whether he will be called upon in his new relation, to use against his first client any knowledge acquired through their connection.[108]

In terms of avoiding conflict of interest situations, one measure is to make certain that the outsourced lawyers are blocked from all other information relating to clients or transactions which are not part of the legal process outsourced to such lawyers. For purposes of future reference, it would also be prudent to maintain a record of all transactions outsourced and the local lawyer that worked on the same.

Generally, the possible practice of foreign firms of providing legal advice on laws of foreign jurisdictions or acquiring local lawyers to perform LPO would generate little conflict of interest situations. The problem arises when such local lawyers are no longer under the employ of these firms and move on to practice under some other firm or put up their own practice. The local lawyer's possession of certain information acquired from the LPO transactions would then be the subject of ethical questions. For even though such information pertained to a client overseas, it is still possible that such client has business and perhaps competitors here in the Philippines. And it is

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[106] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 15.

[107] *See* Nakpil v. Valdes, A.C. No. 2040, 286 SCRA 758, 773 Mar. 4, 1998. The court in this case held that "the test to determine whether there is a conflict of interest in the representation is *probability, not certainty of conflict.*"

[108] Abaqueta v. Florido, A.C. No. 5948, 395 SCRA 569, 574-75, Jan. 22, 2003.

possible that the local lawyer may find his way to represent these competitors or work for another foreign law firm branch that represents a competitor.

To assuage apprehensions with respect to conflict of interest situations regarding former clients, Court of Appeals Justice Hilarion Aquino narrates that there are two general principles applicable in our jurisdiction:[109]

> First, an attorney cannot represent one whose interest in the transaction is adverse to that of a former client, even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment.
>
> Second... Nothing then prohibits an attorney from accepting employment adverse to a former client if the matter has no relationship to confidential information acquired by reason of or in the course of his or her employment by the former client.[110]

Also, an additional measure, not new to foreign jurisdictions such as England and the United States, that can be utilized are the so-called "Chinese Walls".[111] With this system, the law firm ensures that its lawyers, representing conflicting interests, do not share files with each other and maintain a policy of non-disclosure to their colleagues. This measure however, is neither codified nor institutionalized in the Philippines, but can nonetheless be utilized.

iii. Competence & Supervision

The practice of outsourcing raises ethical issues pertaining to adequate supervision because it is indeed difficult for a supervising lawyer to maintain ample supervision over a lawyer working in another country. The ABA Ethics Committee in drafting Ethics Opinion 08-451 in fact considered this and noted that outsourcing lawyers may face challenges in

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[109] Canon 21 – A lawyer shall preserve the confidence and secrets of his client even after the attorney-client relationship is terminated.

[110] Hilarion Aquino, *Monograph on Conflicts of Interest in Legal and Judicial Ethics*, 81 PHIL. L.J. 193, 203 (2006).

[111] Leandro Angelo Aguirre, *From Courtroom to Boardroom: Evolving Conflict of Interest Rules to Govern the Corporate Practice of Law*, 81 Phil. L.J. 291, 314-15 (2006), *citing* La Salle National Bank v. Country of Lake, 703 F.2d 252 (7th Cir. 1983); *see also* Nancy Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm"*, 18 GEO. J. LEGAL ETHICS 521 (2005).

assuring competence and in overseeing the outsourced work, particularly when separated by thousands of miles.

As expressed earlier, this can be possibly addressed by a combination of the advantages of Mode 3 – branch office – and Mode 4 – supervising lawyer in the Philippines. These supervising lawyers would have the consequent obligation to make reasonable efforts to ensure that the lawyers in the branch office conforms not only to standards of competency in the performance of the work, but also to the rules of professional conduct, including those governing confidentiality of information relating to the representation of a client. In other words, the supervising lawyer has the task of overseeing the over-all operations of the branch office and consequently, shall bear full responsibility for the final product.

In terms of providing advice in international law, the law of their home country or in the law of a third country, it may be safely said that the foreign lawyers in the branch offices would be more competent in providing the same than their local counterparts.

The adoption of a *limited licensing concept* could address the rules of ethics that could apply to such foreign supervising lawyers. In the *multi-jurisdictional practice of law cases* of the United States, questions of ethics arise because the lawyer is not licensed to practice in the jurisdiction in which he provides legal services but is outside the territory in which he/she is allowed to practice. There is then confusion as to whose codes of ethics would apply. Through *limited licensing* under the aegis of the GATS, the lawyer then becomes "licensed" to practice in the host state and it can be further stipulated that a U.S. lawyer practicing in the Philippines is still subject to the codes of ethics of the state that supervising lawyer is licensed. The availment of Mode 3 can even be stretched to provide that U.S. ethics standards may be applied to the outsourced local lawyer while working in such branch, insofar as such rules are not in conflict with the Code of Professional Responsibility.

The present state of our Code of Professional responsibility, however, does not detail a law firm's responsibility for its partners or lawyers' [unethical] behavior nor does it provide any guidelines for supervision within such firms.[112] In this regard, it would be instructive to turn to the ABA's Model Rules of Professional Conduct in relation to law

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[112] Jose Concepcion, *Ethics and Excellence for Young Associates in Institutional Law Firms*, 81 PHIL. L.J. 221, 223 (2006).

firms and associates which, in one instance, was cited by the Philippine Supreme Court,[113] and thus may find application in our jurisdiction:

> Rule 5.1 *Responsibilities of Partners, Managers, and Supervisory Lawyers*
>
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Jose Concepcion, named partner of ACCRA Law Office, notes however, that existing jurisprudence[114] in our jurisdiction imposes upon law firm partners the standard of "adequate supervision" and "efficacious control" of the pleadings and documents submitted by their law firm, in contrast with the standard of "reasonable efforts" and "reasonable assurance" imposed by the ABA Rules.[115]

In addition, the Court in *Solatan v. Inocentes* laid down the applicability of the doctrine of *command responsibility* with respect to law firms thereby impressing upon partners and practitioners who stand in a supervisory capacity the consequent duty to "exert ordinary diligence in apprising themselves of the comings and goings of the cases handled by the persons over which they are exercising supervisory authority and in exerting

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[113] *See* Solatan v. Inocentes, A.C. No. 6504, 466 SCRA 1, 14 n.22, Aug. 9, 2005.

[114] *See* Rheem of the Phil., Inc. v. Ferrer, G.R. No. 22979, 20 SCRA 441, Jun. 26, 1967. The Court in this case held that "partners are duty bound to provide for efficacious control of court pleadings and other court papers that carry their names of the name of their law firm" and invited the attention of the partners "to the necessity of exercising adequate supervision and control of the pleadings and other documents submitted by their law firm to the courts of justice of this country."

[115] Concepcion, *supra* note 112, at 228.

necessary efforts to foreclose the occurrence of violations of the Code of Professional Responsibility by persons under their charge."[116]

In the absence of an agreed international standard of conduct which would be applicable to practitioners of multiple jurisdictions, these standards of ethical practice may find applicability; particularly when the Philippines opts to adopt the regime of a liberalized legal profession under the aegis of the GATS.

iv. The Code of Professional Responsibility

A code of legal ethics, more that being the embodiment of all the principles of morality and refinement that should govern the conduct of every member of the bar, has been characterized as the living spirit of the profession, which limits yet uplifts it as a livelihood.[117]

In the Philippines, the most general instrument for the regulation of the legal profession is the Code of Professional Responsibility (CPR). However, the provisions of this Code have been frequently criticized as antiquated and that it fails to constantly adapt to the ever shifting landscape of the legal profession.

An obvious reason as to why the present CPR is not responsive to the exigencies of the times is that it is not regularly updated to conform to the changing landscape of legal practice. After adopting Canons 1-32 of the ABA Canons of Professional Ethics in 1917,[118] the Philippine Bar updated it only in 1946 – nearly thirty years after – when the ABA again updated its current rules.[119] The subsequent initiative to update it came only in 1980 with the adoption of our own Code of Professional Responsibility which aimed to reflect the local customs, traditions, and practices of the bar and its members and to conform to new realities.[120] As can be observed, the time intervals in which our code of ethics and conduct are updated are simply too long to keep up with the times and address the fast-paced developments in the practice of law.

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[116] *Id*, at 230; Solatan, 466 SCRA at 14.

[117] RUBEN AGPALO, LEGAL ETHICS 2 (6TH ed.).

[118] *See* Presidential Commission on Good Gov't (hereinafter "PCGG") v. Sandiganbayan, G.R. No. 151809, 455 SCRA 526, 568, Apr. 12, 2005.

[119] AGPALO, *supra* note 8, at 2.

[120] *See* PCGG, 455 SCRA at 572.

The ABA has gone well beyond this predicament that faces the regulation of the legal profession in our jurisdiction. Between 1983 and 2002 alone, the House of Delegates of the ABA has amended their Model Rules of Professional Conduct and Comments on fourteen different occasions. To further their proactive stance, the ABA created the Commission on Evaluation of the Rules of Professional Conduct, otherwise known as the "Ethics 2000 Commission", in 1997. Its primary task is to comprehensively review the Model Rules and propose amendments, as they deem appropriate. Also, in 2000, the ABA created the Commission on Multi-Jurisdictional Practice to research, study, and report on the application of current ethics and bar admission rules to the multi-jurisdictional practice of law. The ABA Standing Committee on Ethics and Professional Responsibility also periodically issues ethics opinions for the guidance of lawyers, courts and the public interpreting and applying the ABA Model Rules of Professional Conduct to specific issues of legal practice and client-lawyer relationships.

Recently, the American Bar Association Committee issued Ethics Opinion 08-451[121] which details the ethics obligations of lawyers and firms that opt to outsource legal work. These rules address issues of competence, supervision, protection of confidential information, reasonable fees and unauthorized practice of law.

The opinion required that outsourcing lawyers should as a minimum:

(1) Conduct reference checks and background investigations of the legal service providers;
(2) Determine whether the legal education system in that country is similar to that of the U.S.;
(3) Determine whether professional regulatory systems incorporate equivalent core ethics principles and effective disciplinary enforcement systems;
(4) Determine whether the foreign legal system protects client confidentiality and provides effective remedies to the lawyer's client in case disputes arise;
(5) Obtain informed client consent before engaging outside assistance; and

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[121] American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 08-451: Lawyer's Obligations When Outsourcing Legal and Non-Legal Support Services*, Aug. 5, 2008.

(6) Regarding fees, the opinion says outsourcing lawyers may pass along to the client the costs of using the service provider, including a reasonable allocation of associated overhead expenses, but "no mark-up is permitted."

It's been almost thirty years since the present Code was updated. It would do well for the Philippine legal profession to once again consider these rules of the ABA in formulating an updated code of conduct in order to accommodate and effectively regulate an open Philippine legal market.

VI. CONCLUSION

Our Constitution does not pursue an isolationist policy nor does it contemplate economic seclusion.[122] The constitutional policy of a self-reliant and independent national economy in fact encourages that the realities of the constantly moving world trade be taken into account in formulating national policy for the benefit of the nation.[123] It is undeniable that there is a growing trend towards the liberalization of the practice of law. In an age of globalization and stiff economic competition, it would be provident that the Philippine legal market be not left behind in terms of competitiveness in the global market.

But before we can fully engage in opening our legal market, the code of ethics and conduct as embodied in the Code of Professional Responsibility would first have to undergo review and revision to bring cross-border multi-jurisdictional legal practice (as well as other relatively new facets of the practice of law *e.g.* law firms, non-litigation practices) under its purview. Like the ABA, the Philippine Bar must also assume a proactive stance so as to effectively address the possible problems in this promising field as they arise.

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[122] Tanada v. Angara, G.R. No. 118295, 272 SCRA 18, 59, May 2, 1997.

[123] Jorge Coquia, *The World Trade Organization (WTO) – Its Constitutional and International Validity*, 272 SCRA 83, 93, May 2, 1997.