

March 27, 2013

The Honorable Devin Nunes
Chairman
Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 201515

The Honorable Charles Rangel
Ranking Member
Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nunes and Ranking Member Rangel:

On behalf of the American Bar Association, I am pleased to submit this letter for the record of the hearing on “U.S.-India Trade Relations: Challenges and Opportunities.” We appreciate this opportunity to share with you the importance of global trade in legal services and the significant challenges currently faced by the U.S. legal profession in providing services in India. The ABA believes that addressing these challenges is one of the steps necessary to accomplish the goal of expanding the long-term trade and investment relationship between the U.S. and India.

With nearly 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. Our members include lawyers from practice settings of all sizes and types, and from every U.S. jurisdiction and many foreign countries. Through entities such as its Task Force on International Trade in Legal Services and the Section of International Law, the ABA monitors ongoing trade negotiations and other initiatives that impact trade in legal services; informs and educates ABA members and state regulators about legal services trade issues and their implications for the regulation and practice of law in the U.S. and abroad; and regularly communicates with Office of the U.S. Trade Representative (USTR) and the Department of Commerce regarding legal services issues.

The ABA has long supported a liberalized, rules-based system of international trade, both as a mechanism to advance the rule of law and as a means to enhance the ability of U.S. lawyers and law firms to effectively serve their clients through cross-border practice. The ongoing globalization of commercial activity by American individuals and businesses makes it imperative for U.S. lawyers to be able to provide advice and assistance to their clients wherever the clients need that assistance. In 2002, the ABA adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. In support of this policy, the ABA is actively working to enhance the ability of U.S. firms to establish offices overseas and to associate freely with foreign lawyers and law firms.

As you know, the U.S. is the largest exporter of services in the world, and the legal services sector is no exception. The U.S. legal profession is the preeminent player in the global marketplace, with annual exports of more than \$7 billion in legal services.¹ With imports averaging approximately \$1.7 billion, the U.S. enjoys a strong trade surplus in the legal services sector. More importantly, legal services are a “key input to international commerce: they facilitate trade and investment by increasing predictability and decreasing risk in business transactions.”² As a rapidly emerging economy and a leading destination for U.S. business and investment, India is a critical market for U.S. lawyers and law firms.

Unfortunately, India continues to be one of the most restrictive markets for U.S. lawyers and law firms. Under a ruling issued by the Bombay High Court in 2009, neither U.S. nor other foreign law firms may establish offices in India. While many U.S. firms maintain India practice groups, they must be managed out of their U.S. offices or offices in other countries, and they must confine their activity to travel to India on a temporary (fly-in/fly-out) basis to provide advice on the law of their home jurisdictions. Yet presently even this very minimal access by U.S. law firms to the Indian market is under threat.

Following the Bombay decision, a suit was filed against a number of U.S. and other foreign firms challenging the right to provide services relating to home country or international law on a temporary fly-in/fly-out basis. In February 2012, the Madras High Court issued a decision finding that there is no bar to foreign lawyers or law firms providing services on a fly-in/fly-out basis for the purpose of giving advice on home country or international law or to their participating in arbitration proceedings involving international commercial transactions. However, the Bar Council of India appealed the Madras ruling and the case is now pending before the Supreme Court of India. *A ruling by India’s Supreme Court prohibiting fly-in/fly-out access or participation in arbitration proceedings by foreign law firms in India would have serious consequences for the U.S. legal profession and would likely inhibit U.S. commercial transactions in India as well.*

Prohibiting American lawyers from visiting their India based clients to advise them on matters pertaining to U.S. law, even on a short-term basis, would adversely impact their ability to represent their clients and unnecessarily disadvantage U.S. law firms. Requiring officials of Indian companies to travel outside India to obtain advice concerning non-Indian law would significantly raise the transaction costs of Indian companies, creating an additional impediment to retaining the services of U.S. based law firms. In addition, prohibiting American lawyers from traveling with their U.S. clients to India to advise them on U.S.-related legal issues in connection with transactions, ventures, financings, international arbitrations, or the like being pursued with India-based companies will severely handicap the ability of U.S.-based companies in pursuing activities in India with India counter-parties – activities that will certainly benefit the Indian and U.S. economies and promote bilateral investment and trade.

¹ U.S. Department of Commerce Bureau of Economic Analysis, *Table G. Other Private Services Receipts*, available at http://www.bea.gov/scb/pdf/2012/10%20October/1012_international_services_tables.pdf [visited March 13, 2013].

² United States International Trade Commission, *2011 Annual Report on Trends in U.S. Services Trade*, Pub. 4243, at 7-1 (July 2011).

We would note that in the majority of U.S. jurisdictions, foreign-licensed lawyers, including those from India, may establish an office and provide legal services to clients located in or doing business in this country. The ABA's Model Rule for Licensing and Practice by Foreign Legal Consultants has been adopted by 32 U.S. jurisdictions (including the leading U.S. commercial states, such as New York, California, Florida and Illinois, as well as the District of Columbia). This regime allows lawyers from outside the U.S., upon certain conditions, to establish an office in the relevant state and advise clients, face-to-face or otherwise, on the law of the jurisdictions in which they are licensed without passing any examinations or undergoing any additional training. Indian lawyers also travel frequently to the U.S. on a fly-in/fly-out basis to advise American clients on issues arising out of Indian law. Given the increasing number of cross-border transactions involving India and the U.S. (for example, investments in and acquisitions of U.S. businesses by India-based multi-national companies), this practice is likely to become even more prevalent. *U.S. lawyers and law firms should be provided access in India comparable to that accorded lawyers from India by most jurisdictions here.*

In the short term, the ABA expects to file an amicus curiae brief urging the Supreme Court of India to affirm the Madras decision, which would maintain the status quo (under which lawyers from both countries can visit the other on a temporary basis to advise only on home country law) while the appropriate Indian authorities address the broader issue of permitting U.S. lawyers to have a more established role in India. Ultimately, we would hope that India, as an important U.S. ally and trading partner, will adopt rules and regulations that are consistent with the ABA's Foreign Legal Consultant Rule so that U.S. lawyers and law firms may open offices in India, just as Indian lawyers can in most jurisdictions in the U.S., without the risk of lawsuits and action by courts.

The ABA believes that allowing these activities is critical not only for the mutual benefit of legal practitioners and their clients in both countries, but also to foster the vital relationship between India and the United States and to promote the robust growth of trade and investments between our two countries.

We appreciate ongoing initiatives by the U.S. government to address legal services market barriers in a number of countries. And we are pleased to note that some progress toward liberalization has been made, including most recently in South Korea. However, serious barriers remain in countries, such as India, that are key U.S. trading partners; we urge continued efforts towards reducing or eliminating these market access restrictions around the world.

Thank you for the opportunity to share these comments.

Sincerely,



Thomas M. Susman